Revista Jurídica Universidad Interamericana de Puerto Rico

Volumen LII agosto – mayo 2017-2018 Número 2

La *Revista Jurídica de la Universidad Interamericana de Puerto Rico*, fundada en 1964, se publica una (1) vez al año por estudiantes de la Facultad de Derecho.

MANUSCRITOS: La *Revista Jurídica* es un foro académico abierto a la libre discusión de temas jurídicos de interés general. Se invita al público a someter artículos, comentarios, reseñas y ensayos. Estos deben entregarse en manuscrito y en archivo digital. La Junta Editora de la *Revista Jurídica* evalúa todos los manuscritos que se reciben. La publicación de un artículo, de un comentario, de una reseña o de un ensayo no significa, necesariamente, que la Facultad de Derecho ni que la *Revista* compartan los puntos de vista que expone el autor.

CONFERENCIA NACIONAL DE REVISTAS JURÍDICAS: La *Revista Jurídica* es miembro de la *Conferencia Nacional de Revistas Jurídicas* (NCLR, por sus siglas en inglés). Durante el mes de marzo de 1994, la *Revista* fue la anfitriona de la Cuadragésima Conferencia Nacional de Revistas Jurídicas.

SUSCRIPCIONES: La suscripción anual de la *Revista Jurídica* tiene un costo de $45.00. Esta debe pagarse por adelantado. Solo se aceptarán suscripciones para volúmenes completos. Si la suscripción ha de descontinuarse, deberá notificarse con razonable anticipación o de lo contrario, esta se renovará automáticamente.

CITACIÓN: El texto y la citación de la *Revista Jurídica* se rigen por las reglas establecidas en *Bluebook* (Columbia Law Review Ass'n et al. eds., 20th ed., 2016).

TABLA DE CONTENIDO: Cada número tiene una tabla de contenido de los manuscritos publicados en este. Anualmente, se publica un índice general en el tercer número de cada volumen. Los índices generales de Revistas Jurídicas de Puerto Rico, correspondiente uno hasta el 1982 y el otro hasta 1998, están disponibles a un costo de $15.00 cada uno.

DERECHOS DE AUTOR: Los derechos de autor de los artículos publicados en la *Revista Jurídica* los retienen los autores. La *Revista Jurídica* se reserva el derecho de reproducir electrónicamente los artículos. Cada autor consiente a no publicar su artículo en ninguna otra Revista en Puerto Rico por espacio de dos (2) años a partir de que se llegue a un acuerdo de publicación en la *Revista Jurídica.*

Las oficinas de la *Revista Jurídica* están ubicadas en la Facultad de Derecho de la Universidad Interamericana de Puerto Rico. Cualquier comentario o sugerencia debe dirigirse a: *Revista Jurídica de la Universidad Interamericana de Puerto Rico*, Facultad de Derecho; P.O. Box 70351; San Juan, Puerto Rico 00936-8351. Además, puede comunicarse al (787) 751-1912, extensiones 2073 y 2078. Para más información, puede visitar nuestra página de Internet: www.derecho.inter.edu/ RevistaJuridica/default.htm.

Cítese esta *Revista* de la siguiente manera:
52 REV. JUR. UIPR ___ (2018).

The *Revista Jurídica de la Universidad Interamericana de Puerto Rico*, founded in 1964, is published by Law School students once (1) a year.

MANUSCRIPTS: *Revista Jurídica* is an academic forum open to the free discussion of law-related matters of public interest. Citizens are invited to submit articles, commentaries, reviews or essays. These must be submitted in both, manuscript and digital archive. The Editorial Board of the *Revista Jurídica* evaluates all manuscripts received. The publication of any article, commentary, review or essay does not necessarily mean that either the School of Law or the *Revista Jurídica* share the points of view expressed by the author.

NATIONAL CONFERENCE OF LAW REVIEWS: *Revista Jurídica* is a member of the National Conference of Law Reviews (NCLR). During March of 1994, *Revista Jurídica* was host to the Fortieth National Conference of Law Reviews.

SUBSCRIPTIONS: A one-year subscription with *Revista Jurídica de la Universidad de Interamericana de Puerto Rico* costs $45.00. Subscriptions must be paid in advance. Only subscriptions for an entire volume will be accepted. All subscriptions will be renewed automatically each year unless the subscriber timely terminates the subscription.

QUOTATIONS: Both the text and the quotations in *Revista Jurídica* follow the rules established in *The Bluebook* (Columbia Law Review Ass'n et al. eds., 20th ed., 2016).

TABLE OF CONTENTS: An index is published in the third number of each volume every year. The general indexes of Puerto Rican Law Reviews, one covering up to 1982 and the other covering up to 1998, are available at a cost of $15.00 each.

COPYRIGHT: The copyright of articles published in *Revista Jurídica* are retained by its authors. *Revista Jurídica* reserves the right to electronically reproduce the articles. Each author consents not to publish the article in any other legal periodical in Puerto Rico for a two-year term once an agreement has been reached to publish it in *Revista Jurídica*.

The office of *Revista Jurídica* is located at Interamerican University of Puerto Rico, School of Law. Any commentary or suggestion should be addressed to: *Revista Jurídica de la Universidad de Interamericana de Puerto Rico*, School of Law, P.O. Box 70351, San Juan, Puerto Rico 00936-8351. Anyone interested can contact *Revista Jurídica* by telephone calling (787) 751- 1912, extensions 2073 and 2078. For more information, you may visit our website: www.derecho. inter. edu/RevistaJuridica/default.htm.

Cite this journal as follows:
52 REV. JUR. UIPR ___ (2018).

Revista Jurídica
Universidad Interamericana
de Puerto Rico

Volumen LII | agosto - mayo 2017-2018 | Número 2

Miembro del *National Conference of Law Reviews* y del
Consejo Latinoamericano de Publicaciones Jurídicas Estudiantiles

Universidad Interamericana de Puerto Rico
Facultad de Derecho

Manuel J. Fernós López-Cepero..….Presidente de la Universidad Interamericana de Puerto Rico
Julio Fontanet Maldonado……..…….....Decano
Yanira Reyes Gil …….....Decana de Asuntos Académicos
Iris M. Camacho Meléndez.…….…….....……Decana de Estudiantes
Heriberto Soto López…….....……Decano de Administración
Rafael E. Rodríguez Rivera…….....Director, Clínica de Asistencia Legal
Héctor Rubén Sánchez Fernández…….....Director, Centro de Acceso a la Información
César A. Alvarado-Torres….……....……....Decano Asociado de Estudios Graduados,
Educación Jurídica Continua y Diplomados
Lin Collazo Carro.....….....Decana Asociada de Estudiantes Asuntos Internacionales
Luis E. Romero Nieves…..…….....……....Coordinador, Programa de Maestría

Facultad

Evelyn Benvenutti Toro, B.A., Universidad de Puerto Rico; J.D., LL.M., Pontificia Universidad Católica de Puerto Rico; Catedrática Asociada.

Gerardo J. Bosques Hernández, B.B.A., Universidad de Puerto Rico; J.D., Pontificia Universidad Católica de Puerto Rico; LMI., Universidad de Tulane; Catedrático Auxiliar.

Pedro J. Cabán Vales, B.A., J.D., Universidad de Puerto Rico; Doctorado, Universidad Complutense de Madrid; Catedrático Auxiliar.

Sylvia E. Cancio González, B.A., Colegio Universitario del Sagrado Corazón; J.D., Universidad Interamericana de Puerto Rico; M.C.I., Universidad de Tulane; Catedrática.

Andrés L. Córdova Phelps, B.A., Colegio *The Holy Cross*; M.A., Colegio de Boston; J.D., Universidad de Puerto Rico; Catedrático Asociado.

Juan F. Correa Luna, B.A., Universidad de Puerto Rico; J.D., Universidad Interamericana de Puerto Rico; Catedrático Auxiliar.

Jorge M. Farinacci Fernós, J.D., Universidad de Puerto Rico; LL.M. Harvard, S.J.D. Georgetown.

Manuel J. Fernós López-Cepero, B.B.A., J.D., Universidad de Puerto Rico; LL.M., Universidad de Nueva York; Diploma de Estudios Avanzados, Facultad de Derecho, Universidad Complutense; Catedrático.

María Dolores Fernós López–*Cepero*, B.A., J.D., Universidad de Puerto Rico; LL.M., Universidad de Columbia; Catedrática Honoraria.

Marta Figueroa Torres, B.B.A., J.D., Universidad de Puerto Rico; LL.M., Universidad de Harvard; Diploma de Estudios Avanzados, Facultad de Derecho, Universidad Complutense de Madrid; Doctorado, Universidad Complutense de Madrid; Catedrática.

Julio E. Fontanet Maldonado, B.A., Universidad Central de Florida; J.D., Universidad Interamericana de Puerto Rico; LL.M., Universidad de Chicago; Doctorado en Derecho, Universidad del País Vasco; Catedrático.

Margarita E. García Cárdenas, B.A., J.D., Universidad de Puerto Rico; Doctorado en Derecho, Universidad Complutense de Madrid, Catedrática.

Myrta Morales Cruz, B.A.*,* Universidad de Georgetown; J.D., Universidad de Puerto Rico; LL.M., Universidad de Harvard; M.A., Sociología Jurídica, Oñati.

Blanca Garí Pérez, B.A., M.A. Universidad de Puerto Rico; J.D., Universidad Interamericana de Puerto Rico; Catedrática Auxiliar.

Marilucy González Báez, B.B.A., Universidad de Puerto Rico; J.D., Universidad Interamericana de Puerto Rico; Catedrática Asociada.

Carlos I. Gorrín Peralta, B.A., Colegio *The Holy Cross*; J.D., Universidad de Puerto Rico; L.L.M., Universidad de Harvard; Catedrático.

Alberto Omar Jiménez, B.A.; J.D., Universidad de Puerto Rico; LL.M., Universidad de Harvard; Catedrático Asociado.

Antonio Negrón García, B.A., J.D., Universidad de Puerto Rico; Catedrático Distinguido.

Luis Mariano Negrón Portillo, B.A., M.A.P., J.D., Universidad de Puerto Rico; LL.M., Universidad de Yale; J.S.D. Universidad de Stanford; Catedrático.

Dora Neváres Muñiz, B.A., J.D., Universidad de Puerto Rico; M.A., PH. D., Universidad de Pennsylvania ; Catedrática.

Doel R. Quiñonez Nuñez, B.B.A., Universidad del Estado de Nueva York en Búfalo; J.D., Universidad de Puerto Rico; M.A., Universidad de Boston; Doctorado en Derecho, Universidad Complutense de Madrid; Catedrático.

Heriberto Quiñonez Echevarría, B.A., J.D., Universidad de Puerto Rico; LL.M., Pontificia Universidad Católica de Puerto Rico; Catedrático Asociado.

Carlos E. Ramos González, B.A., J.D., Universidad de Puerto Rico; Diploma Post Grado, Universidad de Estocolmo; LL.M., Universidad de California en Berkeley; Catedrático.

Yanira Reyes Gil, B.A., J.D., Universidad de Puerto Rico; PH. D., Universidad de Purdue; Catedrática Asociada.

Luis Rafael Rivera Rivera, B.A., M.P, J.D, Universidad de Puerto Rico; Doctorado en Derecho, Universidad Complutense de Madrid; Catedrático.

Jessica Rodríguez Martín, B.A., J.D, Universidad de Puerto Rico; Catedrática.

Luis H. Sánchez Caso, B.A., Universidad de Puerto Rico; J.D., Universidad Interamericana de Puerto Rico; LL.M., Universidad de Georgetown; Catedrático.

Héctor Ruben Sánchez Fernández, B.A., M.L.S., J.D., Universidad de Puerto Rico; M.A.R., Seminario Evangélico de Puerto Rico; Catedrático Auxiliar.

Enrique Vélez Rodríguez, B.A., Universidad de St. Louis; J.D., Universidad de Puerto Rico; M.A., Universidad de New York; Doctorado en Derecho, Universidad del País Vasco; Catedrático.

Esther Vicente Rivera, B.A., J.D., Universidad de Puerto Rico; LL.M, Escuela de Economía y Ciencias Políticas de Londres, Universidad de Londres; PH. D., Universidad de Londres; Catedrática.

Charles Zeno Santiago, B.B.A., Universidad de Puerto Rico; J.D., Universidad Interamericana de Puerto Rico, LL.M, Universidad de Harvard; Doctorado en Derecho, Universidad Complutense de Madrid; Catedrático.

Roberto Abesada Agüet, B.A., Universidad de Puerto Rico; J.D., Universidad Interamericana de Puerto Rico.

Diego H. Alcalá Laboy, B.S., Babson College; J.D., Universidad Interamericana de Puerto Rico; LL.M., American University.

César Alcover Acosta, B.A. en Ciencias Políticas, Universidad de Puerto Rico; J.D., Universidad Interamericana de Puerto Rico.

Leo M. Aldridge Kontos, B.A. en Ciencias Económicas, Literatura Hispana, Boston College; J.D., Universidad de Puerto Rico; LL.M., Temple University Law School.

Harry Anduze Montaño, B.A., J.D., Universidad de Puerto Rico.

Myrna E. Ayala Díaz, B.A., M.B.A., J.D., Universidad Interamericana de Puerto Rico; LL.M., Universidad de Vilanova; P.A.

Judith Berkan Barnett, B.A., Universidad de Yale; J.D., Universidad de Harvard.

Abelardo Bermúdez Torres, B.A., Universidad de Puerto Rico; J.D., Universidad Interamericana de Puerto Rico.

Osvaldo Burgos Pérez, B.A., J.D., M.A., Universidad de Puerto Rico.

Iris M. Camacho Meléndez, B.A., J.D., Universidad de Puerto Rico; Doctorado en Derecho, Universidad del País Vasco.

Ariel Caro Pérez, B.A., Universidad de Puerto Rico; J.D., Universidad Interamericana de Puerto Rico.

Juan B. Casillas Rodríguez, B.A., Universidad de Puerto Rico; J.D., Universidad Interamericana de Puerto Rico.

Alberto J. Castañer Padró, B.A. en Psicología, Universidad de Puerto Rico; J.D., Universidad Interamericana de Puerto Rico; LL.M, University of Tulane.

Lin Collazo Carro, B.A. en Psicología, J.D., Universidad Interamericana de Puerto Rico.

Carlos Concepción Castro, B.A., Universidad de Massachusetts; J.D., Universidad de Puerto Rico; M.A., Universidad de Nueva York.

Nelson Córdova Morales, B.S., Goldey Beacon College; J.D. Universidad Interamericana de Puerto Rico; LL.M., Concentración en Litigación, Temple University.

Wanda Cruz Ayala, B.A., Universidad de Puerto Rico; J.D., Universidad Interamericana de Puerto Rico.

José de la Cruz Feliciano, B.A., Universidad de Puerto Rico; J.D., Universidad Interamericana de Puerto Rico.

Julia A. Cruz Santana, B.A. en Relaciones Públicas, Purdue University; J.D., Universidad de Puerto Rico.

Julio De la Rosa Rivé, B.A., Universidad de Notre Dame; J.D., Universidad de Puerto Rico.

Manuel Del Valle Colón, B.A., Universidad de Princeton; J.D., Universidad de Yale; LL.M.,

Escuela de Economía y Ciencias Políticas de Londres, Universidad de Londres.

Yvonne Feliciano Acevedo, B.A., Universidad de Puerto Rico; J.D., Universidad Interamericana de Puerto Rico; LL.M., Pontificia Universidad Católica de Puerto Rico.

Félix Figueroa Cabán, B.A. en Ciencias Políticas y Filosofía; J.D. Universidad de Puerto

Rico.

Miguel Garay Aubán, Licenciatura en Derecho, Universidad Literaria de Valencia, España.

Emmalind García García, B.A., J.D., Universidad de Puerto Rico; LL.M., Universidad de Nueva York.

Víctor García San Inocencio, B.A., J.D. Universidad de Puerto Rico.

Gustavo Gelpí Abarca, B.A., Universidad de Brandies; J.D., Universidad de Suffolk.

Richard Graffam Rodríguez, B.S., Universidad de Michigan; J.D., Universidad de Connecticut.

Lorraine Juarbe Santos, B.A., Universidad de Puerto Rico; J.D., Universidad Interamericana de Puerto Rico; LL.M., Universidad Católica de Puerto Rico.

Erick V. Kolthoff Caraballo, B.A. en Administración de Empresas, J.D., Universidad de Puerto Rico; Maestría en Justicia Criminal, Universidad Interamericana de Puerto Rico.

Joseph Laws Del Valle, B.A., Universidad Interamericana de Puerto Rico; J.D., Universidad de Puerto Rico; LL.M., George Washington University.

Jocelyn López Vilanova, B.A., Universidad de Puerto Rico; M.A., J.D., Universidad Interamericana de Puerto Rico.

Virgilio Mainardi Peralta, B.A., Universidad de Puerto Rico; J.D., Universidad Interamericana de Puerto Rico; LL.M., Universidad de Nueva York.

Omar J. Marrero Díaz, B.A. Administración de Empresa, University of Dayton, Ohio; J.D. Universidad Interamericana de Puerto Rico; LL.M. en Derecho, New York University.

Annette Martínez Orabona, B.A., Licenciatura en Estudios Interdisciplinarios, Universidad de Puerto Rico; J.D., Universidad Interamericana Puerto Rico; LL.M., Derecho Internacional, Público y Derechos Humanos, Universidad de Tufts.

Rubén Medina Lugo, B.A. Contabilidad; B.A., J.D., Universidad de Puerto Rico; LL.M., Universidad de Pennsylvania.

Lilliam Miranda Rodríguez, B.A. en Ciencia, Universidad de Puerto Rico, Recinto de Mayagüez; J.D., Universidad Interamericana de Puerto Rico.

Hiram Morales Hernández, B.A., J.D., Universidad de Puerto Rico.

Edgardo L. Muñoz Maldonado, B.A., Universidad de Puerto Rico; J.D. Universidad de Puerto Rico.

Mildred E. Negrón Martínez, B.A. en Ciencias Sociales, J.D., Universidad de Puerto Rico, Recinto de Mayagüez.

Patricia Otón Olivieri, B.A., M.P.H.E. (R.C.M.), J.D., Universidad de Puerto Rico; LL.M., Universidad de Toronto.

Samuel R. Pamias Portalatin, B.A., M.A., Universidad de Puerto Rico; J.D. Universidad Interamericana de Puerto Rico.

Carlos Pérez Pérez, B.A. en Administración de Empresas, Universidad de Puerto Rico, Recinto de Río Piedras; J.D., Universidad Interamericana de Puerto Rico.

Jesús Peluyera Santiago, B.A., J.D., Universidad de Puerto Rico; M.A., Universidad Interamericana de Puerto Rico.

Héctor J. Pérez Rivera, B.A., Universidad de Puerto Rico; M.A., Universidad de Marquette; J.D., Pontificia Universidad Católica de Puerto Rico.

Carmen A. Pesante Martínez, B.A., J.D., Universidad de Puerto Rico.

José Quiñones López, B.A. en Ciencias Políticas, Universidad de Puerto Rico, Recinto de Mayagüez; J.D. Pontificia Universidad Católica de Puerto Rico.

Ricardo Ramos González, B.A., Universidad de Puerto Rico; J.D., Universidad Interamericana de Puerto Rico.

William Ramírez Hernández, B.A., Sociología y Música Universidad de Nueva York; M.A., Long Island University; J.D., Universidad de Puerto Rico.

Federico Rentas Rodríguez, B.A., Finanzas, Universidad de Puerto Rico; M.A. Washington State University; J.D., Universidad de Puerto Rico.

Edgardo Rivera García, B.A., M.A., J.D., Universidad de Puerto Rico.

Ana I. Rivera Lassen, B.A., J.D., Universidad de Puerto Rico.

Anabelle Rodríguez Rodríguez, B.A., Universidad de Puerto Rico; M.A., Universidad de Fordham; J.D., Universidad de Puerto Rico.

Vladimir Román Rosario, B.A. Universidad de Puerto Rico; J.D., Universidad Interamericana de Puerto Rico; Diploma en Estudios Avanzados, Universidad Complutense de Madrid.

Luis Enrique Romero Nieves, B.A. Universidad de Puerto Rico; J.D., Universidad Interamericana de Puerto Rico; LL.M., American University.

José R. Roque Velázquez, B.A., Universidad de Puerto Rico; J.D., LL.M., Universidad Interamericana de Puerto Rico.

Oscar J. Serrano, B.A., Universidad del Sagrado Corazón; J.D., Universidad de Puerto Rico.

Sigfrido Steidel Figueroa, B.A., J.D., Universidad de Puerto Rico.

Brian K. Tester Motycka, B.A., Universidad Oral Roberts; J.D., Universidad de Pepperdine.

José Juan Torres Rodríguez, B.A., Universidad de Puerto Rico; J.D., Universidad Interamericana de Puerto Rico.

Luis J. Torres Asencio, B.A., Universidad Interamericana de Puerto Rico; J.D., Universidad de Puerto Rico; LL.M., Universidad de Harvard.

Alejandro Torres Rivera, B.A., Universidad de Puerto Rico; J.D., Universidad Interamericana de Puerto Rico.

José J. Torres Rodríguez, B.A. Adm. de Empresas en Contabilidad, Universidad de Puerto Rico; J.D., Universidad Interamericana de Puerto Rico.

Aleida Varona Mendez, B.A., J.D., Universidad de Puerto Rico.

Fredrick Vega Lozada, B.B.A., Universidad de Puerto Rico; M.B.A., Universidad de Long Island; J.D., Universidad de Puerto Rico; LL.M., Universidad de Strathclyde.

Arlyn Vélez Cuebas, B.A. en Educación Física para Escuelas de Nivel Secundario, J.D., Universidad de Puerto Rico, Recinto de Río Piedras.

Félix Vélez Alejandro, B.A., Universidad Interamericana de Puerto Rico; M.A., Universidad de Puerto Rico; J.D., Pontificia Universidad Católica de Puerto Rico.

Juan Carlos Vélez Santana, B.A*.,* Universidad de Puerto Rico; J.D., LL.M., Universidad Interamericana de Puerto Rico;

Eric Alexander Vos, B.A. (Double Major), Clark University, MA; J.D., Temple University, PA; LL.M., Clark University, MA.

Revista Jurídica
Universidad Interamericana
de Puerto Rico

Volumen LII agosto - mayo 2017-2018 Número 2

TABLA DE CONTENIDO

LOOKING FOR THE CORRECT TOOL FOR THE JOB: METHODOLOGICAL MODELS OF CONSTITUTIONAL INTERPRETATION AND ADJUDICATION*

*Jorge M. Farinacci-Fernós***

I. Preliminary Issues

A. Introduction

This Article dives into issues of constitutional hermeneutics. This is especially crucial in the context of teleological constitutions, where the traditional interpretive models produce different results than what tends to happen in the framework system.[1] In the particular case of Puerto Rico, only recent has a formal conversation begun about models of constitutional interpretation, particularly as it relates to originalism.[2] Yet several crucial elements remain missing. First, *what exactly*

---

* This Article is based on a chapter of the author's S.J.D. Dissertation "*Original Explication and Post-Liberal Constitutionalism: The Role of Intent and History in the Judicial Enforcement of Teleological Constitutions*" (Georgetown University Law Center, 2017).

** B.A. and M.A. (Univ. of Puerto Rico); J.D. (University of Puerto Rico Law School); LL.M. (Harvard Law School); S.J.D. (Georgetown University Law Center). Assistant Professor of Law at the Interamerican University of Puerto Rico Law School.

[1] By teleological constitutions, I refer to those constitutions that adopt substantive provisions that impact the way society is built. By framework constitutions, I refer to those constitutions that merely adopt the structure of the state, basic political liberties and lay out the process for the adoption of substantive policy through ordinary political means.

[2] *Compare* Jorge M. Farinacci-Fernós, *Originalism in Puerto Rico: Original Explication and its Relation with Clear Text, Broad Purpose and Progressive Policy*, 85 Rev. Jur UPR 203 (2016) *with* Rafael Martínez Torres, *El Originalismo como método de interpretación constitucional y el principio de separación de poderes*, 49 Rev. Jur. UIPR 249 (2015).

are the different alternatives available. This is particularly true as to originalism since, as we are about to see, there is no such thing as *one* originalism but, instead, a broad family of originalist models that are quite different from each other. As such, it would be a mistake to simply bundle all of them as if they were a single formula. Second, that the *reasons* for choosing one model over another are crucial and should take into account different elements. And third, that, particularly in the Puerto Rican context, originalism is neither inherently conservative nor progressive; it depends on the specific constitution to which it is applied. Hopefully, this will allow the ongoing conversation to be clearer and more productive.

In this Article, I will dissect the current interpretive alternatives, see how they would interact with teleological systems (like Puerto Rico). In particular, I wish to focus on the U.S. debate about interpretative methodologies and analyze *how this debate translates to more modern constitutional systems around the world, possibly including U.S. state constitutions*. In other words, I wish to bridge seemingly parallel universes that appear to talk past each other. As we will see, it would seem that the U.S. debate, particularly as it pertains to *originalism*, is only applicable to that country's federal constitution, while the rest of the world chooses between purposivism and textualism. I disagree with that view. The challenge is, then, to adequately define the contours of the U.S. debate, shed off its context-specific content, and see how some of its tools work when applied to post-liberal teleological constitutions.

Constitutions, like any other legal instrument, are meant to be applied. As to this, two things require analysis. First, how these constitutions are *interpreted*. Second, how these constitutions are *judicially enforced*. This Article focuses on the former. Both are critical to discussing the real-life implementation of any constitutional system, particularly post-liberal teleological ones.

In modern constitutionalist systems the process of interpretation is mostly, though not exclusively, carried out by judicial bodies or similar entities. As such, identifying the adequate tools of interpretation is critical to the task of transferring constitutional text to action. Courts and scholars across the globe have tackled with the conceptual and practical tools needed for that process. As Jeffrey Goldsworthy observes, "[t]he time has come for a comparative study of the methods by which constitutions have been interpreted."[3]

Almost by definition, there are multiple models and tools of interpretation that can be used in constitutional adjudication. There is a wide variety as to *types of*

---

[3] JEFFREY GOLDSWORTHY, INTERPRETING CONSTITUTIONS: A COMPARATIVE STUDY 4 (Jeffrey Goldsworthy, ed., Oxford University Press 2006). Although "it does not follow that practices appropriate in one country are universally applicable…[i]nterpretation everywhere is guided by similar considerations, including the ordinary or technical legal meanings of words, evidence of their originally intended meaning or purpose, 'structural' or 'underlying' principles, judicial precedents, scholarly writings, comparative and international law, and contemporary understandings of justice and social utility." *Id.* at 3, 5.

constitutions and *models of interpretation*. We will focus mainly on the different existing alternatives as to methods of constitutional interpretation and application.

It is essential that we recognize, right from the start, the multiplicity of models of interpretation, while, at the same time, be on alert as to the different interactions *between* them. In other words, it will become apparent that these models of interpretation are *not* closed systems. Quite the contrary, they interact quite frequently with each other and they include many elements that overlap or are even common between them. Many particular tools, sources, concepts and approaches are shared by more than one system of interpretation. The end result is a wide variety of methodological approaches to constitutional adjudication. The key then is to better understand them in detail so we can eventually and adequately match each one with the different constitutional types, a task for which there is hardly a universal or automatic answer.

Some of the models of interpretation themselves have some conceptual relation to specific constitutional types. In other words, there are constitutional designs that are historically, or even conceptually, linked with forms of interpretation. However, this does not necessarily require either that they always be matched together or that they can't be applied to *other* constitutional types. The development of constitutional law need not be so linear or rigid. Instead of *a priori* matching up together method of interpretation with constitutional type, the challenge is to separate these matters and analyze them independently, without, of course, completely ignoring the conceptual similarities, associations or links. The purpose of this separate analysis is to allow for a selection process as to the adequate model of interpretation that is more *intentional and deliberate as to the choice made*. It should be *after* adequately analyzing the different characteristics of the constitutional design and the different alternatives as to methods of interpretation that we carry out the process of aligning type with method.

B. Fidelity, legitimacy and ideological connection

The search for a proper method of constitutional interpretation and application in reference to a particular legal system requires to *first* look at the constitutional type and *then* analyze the different methodological models available to see how the second would apply to the first. Among the different elements that must be taken into account when engaging in the process of matching model of interpretation with constitutional type are issues such as the nature of the constitutional design, its structure and history.[4]

The selection of a methodological model in any given legal system will depend on several factors, among which are: (1) constitutional *type*; (2) textual *structure*;

[4] *See* Jorge M. Farinacci-Fernós, *Post-Liberal Constitutionalism*, 54 TULSA L. REV. __ (2018, forthcoming).

and (3) authoritative *history*. In this Article I attempt to analyze the different methodological proposals with these three elements in mind. I have just commented on the connection between method and type, although I will expand on this when discussing each model of interpretation. The issue of textual clarity will be treated shortly when I dive into a general discussion about the role of text in constitutional adjudication. For its part, authoritative history has two components: (1) history itself and its different roles in adjudication, and (2) its status as authoritative.

From both a practical and theoretical standpoint, the actual *selection* of a particular model of constitutional interpretation is not a purely legalistic or mechanical decision: "We can determine the method to interpret the Constitution only if we are first clear about *why* the Constitution is authoritative."[5] Depending on the *why* we can identify the *how*. While some methods of interpretation were born out of particular constitutional designs, that process was not inherent, natural or inevitable. More to the point, that relation may actually change as a result of a shift in the political and legal culture of the corresponding community. A particular constitutional design may *start* out with a discrete method of interpretation and *end* up with another. It is a contingent relationship.

I believe that the issue of constitutional change is first and foremost, though not exclusively, *a matter of change in the adequate and accepted mode of interpretation*. It would seem that constitutional change, outside the avenue of formal amendment or replacement, results from a change in the *approach* to constitutional interpretation, than a change in the content of the interpretation itself. How that process is carried out is crucial for distinguishing between legitimate and illegitimate change.

As a result, the choice as to which method of interpretation to adopt and apply is a *constant subject of legal and political debate.*[6] The adequacy of a particular mode of interpretation will depend quite heavily on the prevailing social consensus as to the role of constitutional law, the role of the courts and the legitimacy of both the constitution itself and the adopted forms of interpretation and application. In particular, and as more relevant here, it will depend on the degree of *fidelity* of the political community with its constitutional structure and project. As such, greater fidelity to a particular constitutional regime may justify, allow or even require

---

[5] Michael W. McConnell, *Textualism and the Dead Hand of the Past*, 66 GEO. WASH. L. REV. 1127, 1128 (1998) (emphasis added). *See also* Christopher J. Peters, *What Lies Beneath: Interpretive Methodology, Constitutional Authority, and the Case of Originalism*, 2013 B.Y.U. L. REV. 1251, 1255 (2013) ("Interpretive methods presuppose accounts of constitutional authority."). *See also* Peter J. Smith, *How Different are Originalism and Non-Originalism?*, 62 HASTINGS L. J. 707, 714 (2011) ("[T]he question of the Constitution's meaning is distinct from the question whether we ought to follow the Constitution in the first place").

[6] Richard S. Kay, *Adherence to Original Intentions in Constitutional Adjudication: Three Objections and Responses*, 82 NW. U. L. REV. 226, 285 (1988) ("The choice of following or rejecting the original intentions is necessarily not a legal choice, but a moral and political one.").

selecting one model of interpretation over another.

On the other hand, when that fidelity erodes or fades away, a change in the approach to constitutional interpretation and application may ensue and still be considered legitimate. In fact, the issue of legitimacy as to a particular model of interpretation depends on the continued legitimacy of the constitutional project itself. One will determine, or at least greatly influence, the other. Legitimacy, or lack thereof, influences the issue of fidelity,[7] and fidelity requires a political connection and adherence with the constitutional project. As Andrew Coan suggests, "[t]he idea here is that the constitution emanates from the people and retains its legitimacy only to the extent that they continue to accept it as their own."[8] This applies both to the issue of the legitimacy of the constitution itself and of the adopted interpretive method.[9]

I believe that when we state that a particular method of interpretation is *the adequate* model for our constitutional structure, we are, in fact, making a statement as to our view of the constitutional project itself. In other words, while there are other legitimate factors and arguments to be made in selecting a model of interpretation, I strongly believe that it is first and foremost a *political* decision related to the level of fidelity and connection to the constitution itself, and our views as to its continued authority, role and legitimacy. When we choose a model, we state our level of connection with the original constitutional project.

A look at the heated scholarly debated in the United States, and the rest of the world for that matter, hints at more than methodological or purely result-driven disagreements. There seems to be a bitter clash over the level of connection with the original constitutional project which is, in the end, an *ideological* issue. In this Article, I will look at many factors that weigh in when choosing a particular method of constitutional interpretation. Among the most important is the level of continued political support, connection and fidelity with the constitutional project itself. Many of the authors researched for this Article hint at their level of fidelity, or understanding of it,[10] to their respective constitutional projects when arguing in favor of their chosen methodological approach.[11] This, is turn, for example, explains

---

[7] *See* Richard S. Kay, *Original Intent and Public Meaning in Constitutional Interpretation*, 103 NW. U. L. REV. 703, 716 (2009); Peters, *supra* note 5, at 1269.

[8] Andre B. Coan, *The Irrelevance of Writtenness in Constitutional Interpretation*, 158 U. PA. L. REV. 1025, 1059 (2010).

[9] *See, for example* Kay, *supra* note 7, at 706.

[10] KEITH E. WHITTINGTON, CONSTITUTIONAL INTERPRETATION: TEXTUAL MEANING, ORIGINAL INTENT, AND JUDICIAL REVIEW 3 (University Press of Kansas 1999).

[11] *See, for example* Bruce Ackerman, *The Living Constitution*, 120 HARV. L. REV. 1737, 1743 (2007); Lawrence B. Solum, *We Are All Originalists Now in* ROBERT W. BENNETT & LAWRENCE B. SOLUM, CONSTITUTIONAL ORIGINALISM 75 (Cornell University Press 2011); Michael C. Dorf, *The Undead Constitution*, 125 HARV. L. REV. 2011, 2015-16 (2012) ("The Constitution [of the United States] is

the different levels of legitimacy given to the original lawmakers.[12] The debate is sometimes overtly ideological.[13] In the case of the U.S., the result is a blurry and confusing conversation between proponents of the constitution as it *was* and the constitution as it *is*.[14]

This is related to the so-called dead-hand problem, which states that it is undemocratic, and therefore illegitimate, to require living human beings to be bound by a superior law generated by previous generations. Of course, as Michael McConnell persuasively points out, this is not limited to, for example, originalist claims; it affects the very notion of constitutionalism: "The first question any advocate of constitutionalism must answer is why Americans [or any other political community] of today should be bound by the decisions of people some 212 years ago."[15] His answer is quite relevant: "But in truth, the dead hand argument, if accepted, is fatal to *any* form of constitutionalism."[16] A similar point is made by Jamal Greene: "It is in the nature of a constitution to limit the will of a present majority."[17] This leads us back, one more time, to the issue of fidelity to a particular constitutional project and is linked with the constitutional-ordinary politics distinction.[18]

In reality, it is not the document itself that binds us: "It is, of course, no answer to the dead hand problem to point out that the constitution says it will govern the future, nor to prove that this was the Founders' intentions."[19] The answer to the dead hand problem, McConnell proposes, is *not to be found in constitutional law, but, instead, in political theory*.[20] He states that political theory "expresses principles of political morality and organization that *continue* to command our assent and agreement."[21] The success of a constitution rests on continued popular acceptance, if not of each

---

not law today simply because its provisions were adopted in 1789, 1791, 1868, and so forth. The Constitution is law today because it *continues to be accepted today*") (emphasis added); Donald L. Drakeman, *What's the Point of Originalism*, 37 HARV. J. L. & PUB. POL'Y 1123, 1125 (2014); Ethan J. Leib, *The Perpetual Anxiety of Living Constitutionalism*, 24 CONST. COMMENT. 353, 354 (2007) ("[I]t is only our constitution because it is suffused with and supported by contemporaneous assent"); Stephen R. Munzer & James W. Nickel, *Does the Constitution Mean What it Always Meant?*, 77 COLUM. L. REV. 1029, 1050 (1977) ("The current authoritativeness of original understandings depends in part on the strength of the framers' reasons for their choices and the application of those reasons today").

[12] *See* Coan, *supra* note 8, at 1038.

[13] Jamal Greene, *The Case for Original Intent*, 80 GEO. WASH. L. REV. 1683, 1687 (2012); Kay, *supra* note 6, at 228.

[14] *See* Jamal Greene, *Selling Originalism*, 97 GEO. L. J. 657, 668 (2009); Leib, *supra* note 11, at 354.

[15] McConnell, *supra* note 5.

[16] *Id.* at 1127 (emphasis added).

[17] Greene, *supra* note 14, at 664.

18 *See* Farinacci-Fernós, *supra* note 4.

[19] McConnell, *supra* note 5, at 1128.

[20] *Id*.

[21] *Id*. (emphasis added).

and every word contained in the document itself,[22] *of the constitutional project itself*. As Balkin explains, "[t]he democratic legitimacy of [a] Constitution depends on its acceptance by the current generation."[23] Fidelity is the main driving force when choosing a method of constitutional interpretation.

C. Options and analysis

As I previously stated, it would be a mistake to think of each model of constitutional interpretation currently used or proposed as wholly closed systems. They are not all take-it-or-leave-it models. On the contrary, the recent history of constitutional theory points to a constant and dynamic process of interaction, blurring of the lines, overlapping and even complementation between them. Only seldom do we find wholly incompatible models. Furthermore, there are multiple variables to be considered that, in turn, impact the selection of other features.

This Article will attempt to analyze the different models and methods of interpretation proposed by scholars or applied by courts in different countries around the world. In that sense, this is not an article about the history and development of a particular national experience. Actually, I believe that the insistence of some scholars to only focus on the proper method of interpretation and application as to *their* constitutional regime, muddies the waters as to the more *general* implications of their claims. In other words, it is sometimes difficult to distinguish between a general claim about constitutional adjudication and a specific claim as to the applicability of the claim to the particular national context.

This is definitely the case of the debate in the United States, where many of the claims about constitutional interpretation seem to be made *only* thinking of the U.S. constitutional structure, particularly as to the text of the federal Constitution. I wish to take advantage of that custom by analyzing U.S.-centered models of interpretation and discuss their possible applicability to constitutional types that are different from the federal Constitution. As such, I will partially focus on U.S.-centered models to analyze their implications for *other* constitutional systems. By focusing on the U.S. debate, two goals can be achieved: (1) to separate context-specific elements from more universal conceptual characteristics; and (2) to evaluate the possible use of the U.S. methodologies in alternative constitutional structures.

Our challenge here is to attempt to transcend this insularism and see the more general aspects of the different methodological proposals. Precisely, one of the goals of this article is to compare, analyze and force an interaction between the different dominant models currently used around the world, so as to offer different systems an

---

[22] In the case of rules, they "represent a far more powerful dead hand of the past [problem] than other parts of the Constitution." JACK BALKIN, LIVING ORIGINALISM 42 (Harvard University Press 2011). Put differently, they require a stronger connection between the past and the present.

opportunity to adequately judge the proposals and choose which one best fits them.[24] It would be a waste of intellectual energy to only focus the debate about methods of interpretation, *as a conceptual matter*, on a particular and unique context. Indeed, context is key, but mostly as to the question of *which model to adopt and apply*, not as to *which are* the models themselves. This distinction will be particularly necessary when analyzing the models discussed by U.S. scholars.

D. Interpretation and construction

At this point, it is necessary to distinguish between the process of interpretation and construction as it pertains to constitutional analysis. While the interpretation-construction distinction about to be addressed may not always be applicable or useful to all constitutional designs, it is a helpful tool that allows for greater precision as to the confection of an appropriate methodology.

According to its proponents, the exercise of constitutional interpretation is mostly text-based and is limited to identifying the semantic meaning and communicative content of the actual words that appear in the constitutional text.[25] In particular, what do the words actually mean from a semantic and communicative standpoint. Constitutional construction, on the other hand, is the process of giving legal content to those words.[26] While the proponents of the interpretation-construction distinction include *other* important elements relevant to that formulation, I will discuss those later on, since they carry great normative consequences. For now, I adopt the distinction for the purpose of distinguishing between textual meaning and legal effect through application.[27]

Of course, this distinction does not entail that there are wholly independent from each other. In fact, many of the normative claims made by the proponents of

---

[23] *Id.* at 41; Balkin adds "and the fact that it both reflects and accommodates the current generation's values." *Id*.

[24] *See* GOLDSWORTHY, *supra* note 3 ("There are many differences between the Constitution and constitutional tradition of the United States, and those of other countries, which have affected the interpretive practices of their courts"). Goldsworthy also notes that "[i]nterpretive methodologies and philosophies have largely been ignored even in texts devoted to comparative constitutional law." *Id*.

[25] *See* Jack Balkin, *The New Originalism and the Uses of History*, 82 FORDHAM L. REV. 641 fn. 3 (2013).

[26] Lawrence B. Solum, *The Interpretation-Construction Distinction*, 27 CONST. COMMENT. 95 (2010).

[27] Note of caution: for purposes of simplification, I will use the term interpretation as an all-encompassing term for the process of interpretation and construction. When using the term in its specific articulation as to the first part of the interpretation-construction formula, I will identify it as semantic interpretation. *See* Peters, *supra* note 5, at 1275 (Interpretation "is the process of determining whether and how the Constitution applies to an issue or dispute). *See also* András Jakab, *Judicial Reasoning in Constitutional Courts: A European Perspective*, 14 GERMAN L. J. 1215, 1219 (2013) ("Interpretation . . . means determining the content of a normative text").

this distinction are based, precisely, on the interaction between these steps. Among these are the Fixation Thesis, which states that the semantic meaning of words is fixed or settled at the moment they are adopted as part of the constitution, and the Contribution Thesis, which relates to the effect, if any, that semantic meaning has on the legal content of the text. But these proposals are not inherent nor necessary for the adoption of the interpretation-construction formula as a *methodological* tool.[28] While there are multiple legitimate views as to the correct relationship between semantic meaning and legal content or effect, it may be very useful to keep in mind this distinction when addressing the issue of constitutional methodology. From a purely methodological standpoint, I adopt the interpretation-construction distinction as descriptive of the different steps in the process of giving constitutional provisions meaning and effect. Later on I will analyze with greater detail the normative implications of this proposal, which is mostly associated with original public meaning originalism in the United States.

II. Methods of constitutional interpretation

A. Introduction

I will now turn to a description and critical analysis of the different main models of constitutional interpretation that are used by courts or discussed by legal scholars. As we saw, when carrying out this analysis, we must be aware of their interactions and correlations. As to each general approach, I will try to address several key topics such as their particular views on *text* and its meaning, the role of *purpose*, intent and potential applications, as well as its interaction with *history* and its view on acceptable sources and tools that can be used for either giving constitutional provisions communicative or legal content, or for putting them into effect through the process of adjudication. Text, purpose and history will be the principal areas that will be discussed when analyzing each interpretive model.

But, before diving in the particular features of the different models of interpretation currently used, we must take a general look at the issues of text, purpose and history. These are critical pieces in the current debates about methodology. Although I will return to text, purpose and history when discussing the specific models of interpretation in use today, I think it useful to start with a general view of each and address their more detailed features when discussing the different methodological models. This general analysis will supplement the particular discussion on how the different methodological models deal with these three critical issues.

---

[28] Greene, *supra* note 14, at 663 ("Identifying oneself as a semantic originalist *does not* commit one on the view that originalism is the appropriate method of constitutional interpretation.") (emphasis added).

i. Text

It is almost impossible to find a serious approach to constitutional interpretation in systems with written constitutional instruments that do not focus, at least initially, on text. As Michael Perry indicates, "[n]o conception of constitutional interpretation that excluded interpretation of the written text could be taken seriously."[29] From textualists to purposivists, the written form of the constitution requires giving the text a central role in the process of interpretation, development and application of constitutional provisions. As Lawrence Solum suggests, the only way to bind is through language,[30] and, in written constitutions, language becomes text. But the significance of text in constitutional adjudication will inevitable vary as we move along the different models. The role of text is a matter of degree.

Almost everyone agrees that constitutional interpretation starts with the text.[31] But there is varying disagreement on whether the inquiry ends there or, if it does not, how far should non-textual inquiries go. We will address this disagreement when analyzing each individual model. For now, the point is that text is unmistakably central to most, if not all, of the methods under review.

ii. Choice of words

When debating the issue of text, we must take into consideration the choice of words in a constitutional instrument.[32] There are important differences between legal rules, standards, and principles.[33] All of these have direct impact on the issue of interpretation and construction. As it pertains to constitutional interpretation and the selection of a methodological model, the choice of words has different and interlocking effects. In general, we must be aware that the decision to adopt particular words and not others has evident consequences in the process of interpretation. Words are chosen for a reason and we should try to account for that choice when interpreting them.[34]

---

[29] Michael J. Perry, *The Legitimacy of Particular Conceptions of Constitutional Interpretation*, 77 VA. L. REV. 669, 687 (1991).

[30] SOLUM, *supra* note 11.

[31] Ackerman, *supra* note 11, at 1738 (stating that U.S. constitutional law starts with the constitutional text); Sara Aranchick Solow & Barry Friedman, *How to Talk About the Constitution*, 25 YALE J. L. & HUMAN. 69, 74 (2013) ("We agree that constitutional interpretation cannot begin without attention to the document's text...."); Steven G. Calabresi & Livia Fine, *Two Cheers for Professor Balkin's Originalism*, 103 NW. U. L. REV. 663, 664 (2009) ("[C]onstitutional law begins with the text as a framework").

[32] BALKIN, *supra* note 22, at 6.

[33] Balkin, *supra* note 25, at 645. This also includes catalogues and discretions.

[34] *See* Dorf, *supra* note 11, at 2023-24; H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885, 905 (1985) ("The Constitution was ambiguous by design. . . ."); William H. Rehnquist, *The Notion of a Living Constitution*, 54 TEX. L. REV. 693, 694 (1976) ("The framers of the Constitution wisely spoke in general language").

First, there's the issue of semantic and communicative meaning. For example, the communicative content of a rule will yield more precise semantic definitions than in the case of a standard or principle. The very nature of the words typically used in rules, as opposed to standards and principles, allows for greater precision as to their communicative content. There is a reason we employ a particular set of words, and not others, when crafting a rule than when crafting a standard or principle. In that sense, we must respect the structural differences between these types of provisions when interpreting them. As Steven Calabresi and Livia Fine suggest, we should not turn standards into rules by way of interpretation,[35] or vice-versa.

As a result, the different models of constitutional interpretation must take into account these nuances in order to be more effective and precise. We do not interpret rules the same way we do standards and principles, even when searching for semantic or communicative content. It would seem that the words normally included in constitutional rules are more precise, specific and determinate as opposed to standards and principles.[36] Interpreters should never forget this important distinction, particularly in constitutional texts that employ *both* rigid and flexible worded provisions.[37] For example, more recent constitutions tend to have more rule-like provisions.

This is related to the proposal that sometimes lawmakers deliberately delegate the elaboration of content to future interpreters. They intentionally achieve this through the ambiguous articulation of certain constitutional provisions. Interpreters should be aware on when such delegation has occurred, so as to not confuse communicative under-determinacy with conscious delegation.[38]

Second, the different choices of words and the existence of a variety of legal norms with different roles and effects –rules, standards, principles, catalogues and discretions- have a direct impact as to the process of discovering a provision's *purpose*. As we will see, some models of constitutional interpretation give little or no

---

[35] Calabresi, *supra* note 31, at 672. *See also* Lawrence Rosenthal, *Originalism in Practice*, 87 IND. L. J. 1189, 1198 (2012).

[36] Robert W. Bennett, *Originalism and the Living American Constitution in* SOLUM, *supra* note 11, at 85. Another challenge in this respect is Dworkin's distinction between concepts and conceptions. According to this distinction, the use of a concept is an invitation to engage in "rational discussion and argument about what words used to convey some general idea mean." Munzer, *supra* note 11, at 1037. On the other hand, a conception is a "specific understanding or account of what the words one is using mean." *Id*. As such, many constitutional concepts are inherently contentious terms that everybody agrees with but for which there is a constant contest about its particular articulations, which take the forms of competing conceptions. Ascertaining the communicative content of these types of concepts is tricky at best.

[37] John Manning, *The Role of the Philadelphia Convention in Constitutional Adjudication*, 80 GEO. WASH. L. REV. 1753, 1783 (2012); SOLUM, *supra* note 11, at 155.

[38] *See* Joel Alicea & Donald L. Drakeman, *The Limits of New Originalism*, 15 U. PA. J. CONST. L. 1161, 1167 (2013); Balkin, *supra* note 25, at 646; BENNETT, *supra* note 11, at 173.

weight to the purpose behind particular constitutional provisions. Some textualists adopt this approach. But for now it is important to identify this phenomenon because it is one of the many by-products of the decision to adopt different kinds of words and provisions in constitutional instruments.

When we return to the interpretation-construction distinction, for example, we will see the role "purpose" *can* have in the process of constitutional construction when, such as in the case of standards and principles, the semantic content of particular constitutional provisions is under-determinate and is not enough to solve a specific legal question. Many models, for example, turn to purpose in order to give full legal effect and meaning to the corresponding constitutional provision. *But purpose can also be part of meaning itself*, and the choice of words may reveal that purpose. In other words, there could be situations when a particular choice of words reveals, even from a semantic point of view, that the text embodies purposes that must be taken into account both in the interpretation and construction stages. Introductory clauses are an example of this.

Finally, there's the issue of the effect of word-choice as to the adequate identification of a possible *principle* behind some of the provisions that are not, of course, principles themselves.[39] This is similar to the purposive angle we just discussed. It is natural, for example, for a constitutional rule to be the source, or even the result, of a particular constitutional principle that is embedded in the rule itself, instead of having separate articulation in another textual provision. In that sense, semantic interpretation should be aware that it is not only identifying communicative content from a purely linguistic perspective, but that it may *reveal* a broader legal, political or other type of principle that is both part of and separate from the actual semantic meaning of a particular word or set of words.

iii. Level of generality

The semantic and purposive analysis as to the meaning of words in the constitutional context, as well as the possible identification of principles derived from the text, leads us to the issue of what is the appropriate level of generality that should be given either to the communicative content of words, as well as to the principles they reflect and the purposes of their adoption.[40] The same thing goes for intent. Here I will only address the first manifestation of this issue: communicative content. As to purpose, intent, principles and scope, that will be addressed when discussing purpose in general.

Robert Bennett points out that "[t]his problem of choosing the level of generality may arise when one is faced with relatively precise enacted language…It is, however,

---

[39] BALKIN, *supra* note 22, at 3.

[40] *See* SOLUM, *supra* note 11, at 149 (commenting on the difference between the level of generality issue in the communicative interpretation and application stages).

general or vague constitutional language that has posed most insistently the level-of-generality problem."[41] That is, the level-of-generality problem not only exists as to identifying the ever elusive intent or purposes of the framers, but also when engaging in communicative interpretation.[42] This is particularly true when addressing legal provisions that are not bright-line rules. The general consensus appears to be that, at the very least, the communicative content arrived at by way of interpretation should be "stated at the level of generality found in the text."[43]

The interpretation-construction distinction helps in this regard. As to the semantic meaning of words, interpreters should be very conscious of the type and nature of the word or set of words they are interpreting. Semantic meaning may vary according to the *use* of these words, like in the case of rules, standards or principles. Conversely, different constitutional provisions require different approaches depending on the actual *choice* of words made when drafting it. As such, the appropriate level of generality will be the result of *both* an analysis as to communicative meaning and as to their role in the constitutional structure. Context is always necessary in the search for communicative content, and different legal norms require varying degrees of generality when searching for that communicative content.

Finally, András Jakob suggests that "the degree of generality of constitutional provisions is on average higher than that of statutory provisions, which again indicates a higher probability for creative –ie. non-literal- interpretation."[44] Modern constitutions tend to be articulated in clearer and more precise text than older ones. Yet, this does not mean that modern constitutions, particularly the teleological ones, are simply constitutionalized statutes. The combination of specific rules with broader standards and principles is an indication of this. As such, the level-of-generality issue will still be present even in the more precise constitutional texts.

iv. Communicative content

Another critical component of the interpretation-construction distinction is the issue of ambiguous, vague and under-determinate text. Ambiguity and vagueness both refer to a lack of clarity or certainty as to the meaning of the text.[45] Ambiguity occurs when a particular word or set of words are susceptible of more than one definition. That is, when a text has more than one sense.[46] In most cases, interpreters looking for the precise communicative content of a particular word or set of words

---

[41] BENNETT, *supra* note 11, at 108.

[42] *See* Mitchell N. Berman, *Originalism is Bunk*, 84 N.Y.U. L. REV. 1, 29 (2009).

[43] Rosenthal, *supra* note 35, at 1210. *See also* Smith, *supra* note 5, at 720.

[44] Jakab, *supra* note 27, at 1225.

[45] Solum, *supra* note 26, at 97.

[46] *Id*.

will be able to use context in order to resolve the ambiguity.[47] Vagueness, on the other hand, occurs when a particular word or set of words leaves doubt as to its precise extremities and it is normally difficult to resolve this problem through purely communicative interpretation.[48]

A common occurrence when dealing with vague text is that the content may be under-determinate, that is, it will not be enough by itself to adequately resolve a legal controversy. This leads us back to the issue of the difference between rules, standards and principles. Almost by definiti0n, the communicative content of rules will be enough to settle many legal controversies. By contrast, almost by definition, the communicative content of standards and principles makes it harder to give adequate legal content to a constitutional provision.

Proponents of the interpretation-construction distinction that adhere to original public meaning originalism hold that if a particular constitutional provision's communicative content is dispositive of a legal question, then no further inquiry will be necessary. This is related to the Contribution Thesis, which is a normative proposal that can be questioned or debated. I will address it later on in this Article when specifically analyzing original public meaning originalism. For now, I focus on the specific issue of the interaction between (1) rules, standards and principles, (2) word-choice, and (3) ambiguous and vague language. I believe these potential and varied interactions are relevant to the communicative and legal analysis under the interpretation-construction formula, independent of the *particular normative proposals* as to the relation between interpretation and construction.

Taking aside the normative claims about the different effects of determinate and under-determinate communicative content, the point is that, as relevant to the purely semantic issue, word-choice is also a deliberate act on the part of lawmakers which should be taken into account in the process of semantic interpretation. In other words, not only will interpretation identify the under-determinacy of language, but we should be aware that under-determinacy can, in turn, influence the final product of communicative interpretation. That is, to take the under-determinacy factor as *part* of the communicative analysis.

v. The role of text

As I stated previously, almost all models of constitutional interpretation give, at least, a central role for text in the process of adjudication. Others assign to it conclusive effect, particularly when its semantic content is ascertainable and determinate. That is the Contribution Thesis that will be analyzed in greater detail when discussing original public meaning originalism's approach to the interpretation-construction

---

[47] *Id*. at 102.

[48] *Id*. at 97.

distinction. On the other hand, other models limit the role of text to merely a starting point of interpretation. As a result, they will always look further, even if the apparent communicative content is enough to dispose of the legal question presented. But, since there is near universal agreement as to, at least, the *initial* role of text in constitutional interpretation and adjudication, when addressing how the particular methodological models view text, this premise will be taken as a given, and the analysis will focus on the specific role for text outside this common understanding.

B. Purpose

i. Purpose and purposivism

Constitutions are legal and political instruments which attempt to reach a particular goal.[49] To different degrees, almost all of the main methodological models account in some way for the concept of purpose, whether in ascertaining meaning or in the process of application.[50] According to Bennett, meaning is necessarily attached to purpose.[51] That is, that sometimes it is near impossible to make sense of particular constitutional clauses "without taking into consideration their purposes, especially with reference to fundamental constitutional ideas and values."[52] Some models actually allow purpose to limit the linguistic reach of text.[53]

For example, the goal of teleological interpretation in general is to ascribe purpose to constitutional provisions that both defines text and interacts with it as a separate element. Purpose comes in many forms and serves different ends. For instance, there is the purpose that drove lawmakers to adopt a particular legal provision; *why* they adopted certain text. This goes more to motivation and intent. But there is also the purpose of the provision itself: what was it adopted to *do*? Or even of the constitution as a whole: its over-arching purpose.[54] This distinction will become much clearer when comparing the objective and subjective teleological models. For now, the important thing is to be aware of the different manifestations of purpose. As such, when analyzing each methodological model, we will address each's view on the many manifestations of purpose.

---

[49] *See, for example* Yvonne Tew, *Originalism at Home and Abroad*, 52 COLUM. J. TRANSNAT'L L. 780, 802 (2014), as to the role of purpose in the creation of the Malaysian Constitution.

[50] *See*, SOLUM, 60*, supra* note 11, at 60.

[51] BENNETT, *supra* note 11, at 98, 103.

[52] Stephen M. Griffin, *Rebooting Originalism*, 2008 U. ILL. L. REV. 1185, 1214 (2008).

[53] *See* Kay, *supra* note 7, at 711.

[54] Stephen M. Feldman, *Constitutional Interpretation and History: New Originalism or Eclecticism?,* 28 B.Y.U. J. PUB. L. 283, 328 (2014).

ii. Level of generality, intent and scope

Finally, we return to the issue of level of generality, this time in the context of purpose and intent, as well as principle and the scope of constitutional provisions. As with communicative content in terms of semantic meaning, a particular constitutional provision's unstated purpose, the intent of its framers or the principle that underlies it will greatly vary depending on the level of generality with which we articulate it. This also has a direct effect on the scope and reach of a particular provision as to its legal effect.

When discussing the original intent model, I will attempt to distinguish between the concepts of intent and purpose.[55] For now, I treat them jointly. The articulation of a particular purpose or intent can, like with semantic meaning, be articulated on several levels of generality. Inherently, there is no correct answer here. It will all depend on the nature of the provision, the constitutional type, linguistic precision and the existence of authoritative sources of adoption history that shed light on this issue. But, interpreters face a stern challenge when attempting to articulate unstated purpose, particularly as to which level of generality to use. If no on-point empirical source exists, interpreters could consider using the same level of generality employed as to the communicative content of the particular provision.

This will also depend on the substantive nature of the provision at issue. The same thing applies to the task of articulating a provision's underlying principle.[56] As John Manning states in reference to the U.S. Constitution, "[t]he document itself does not contain merely broad statements of principle, but instead expresses policies at widely variant levels of generality."[57]

Finally, we turn to the issue of ascertaining the proper *scope* and *reach* of a particular constitutional provision. How we articulate that scope and reach is critical. Richard Kay's analysis of this issue is most helpful. In his discussion about the practical differences between original intent and original public meaning originalism as to specific results, Kay mentions the issue of scope. In particular, he stresses the decision interpreters must make in determining how broad or narrow to articulate a provision's scope and reach.[58] Some methodological models result in broader articulations of scope as compared to others.[59]

---

[55] *See* Alicea, *supra* note 38, at 1166; BENNETT, *supra* note 11, at 108; Thomas B. Colby & Peter J. Smith, *Living Originalism*, 59 DUKE L. J. 239, 292 (2009); Kay, *supra* note 7, at 721; Earl M. Malte, *The Failure of Attacks on Constitutional Originalism*, 4 CONST. COMMENT. 43, 47 (1987).

[56] Smith, *supra* note 5, at 709.

[57] Manning, *supra* note 37, at 1755. *See also* John O. McGinnis & Michael Rappaport, *Original Interpretive Principles as the Core of Originalism*, 24 CONST. COMMENT. 371, 378 (2008); Perry, *supra* note 29, at 679.

[58] Kay, *supra* note 7, at 713. *See also* Munzer, *supra* note 11, at 1050; Peters, *supra* note 5, at 1283.

[59] Manning, *supra* note 37, at 1776 ("To be sure, one aspect of the living constitutional tradition merely holds that judges should not read broadly or generally worded text narrowly . . ."). *See also*, Rosenthal, *supra* note 35, at 1189.

C. History

Constitutions are the product of particular historic moments and movements. Most constitutions that endure do so because of their ability to generate or maintain sufficient levels of social support and consensus. As with text and purpose, it is very difficult to ignore history in general when interpreting constitutions: "[A]ll plausible theories of constitutional interpretation make some appeal to understanding the Constitution in a historical context."[60] Yet, there is "no general agreement on the proper role either of history in general, or of the history of the constitution's framing and ratification in particular."[61] Of course, some models do, in fact, give little weight to history, such as textualism and, to some extent, the objective teleological approach. But there are multiple roles for history to play,[62] and, particularly in the context of many teleological constitutions that are the product of transcendental historical moments, actually do play important functions in the process of constitutional adjudication. History cannot be so simply ignored in constitutional adjudication. Some models see history as supplementary to text; others may see it as equal or even more authoritative.

i. Adoption history

When discussing the particular models of interpretation, we will see reference to history in a variety of ways. First, the history of constitutional adoption, that is, the process and context of the creation of the constitution itself: its prelude, gestation, birth and first steps.[63] We can identify this type of history as "adoption history."[64] In turn, this history can be narrow-focused, such as only analyzing the process of creation itself; or more broad-focused, such as taking into account the entire historical context of the relevant political community that adopted the constitutional text, including economic factors, social relations, cultural assumptions, and so on. As to the process of creation, many issues may be relevant in the process of adjudication: specific nature of the creation process, its democratic legitimacy, popular participation and involvement, and inclusion, to name a few. Adoption history also may be related to issues such as purpose, intent, accepted practices, expected applications, and

---

[60] Griffin, *supra* note 52, at 1193.

[61] Powell, *supra* note 34, at 885.

[62] *See* Colby, *supra* note 55, at 302-03.

[63] *See* Mary Sarah Bilder, *How Bad Were the Official Records of the Federal Convention?*, 80 GEO. WASH. L. REV. 1620, 1646 (2012); Kay, *supra* note 6, at 234.

[64] *See* Balkin, *supra* note 25, at 644. (While Balkin states that "[m]ost constitutional arguments in every day legal practice [in the United States] do not employ adoption history [that serves] as most as persuasive authority," it is difficult to deny history's role in constitutional research, particularly outside the United States).

so on. From simply seeing history as a temporal lens to identify contemporaneous communicative content to a substantive source of constitutional meaning and effect, adoption history can, and many times does, serve a distinct role from non-adoption events.[65] Finally, as Balkin points out, "[i]t is incorrect to call arguments from adoption history 'originalist'."[66] In other words, history, even adoption history, is not the exclusive domain of originalists; non-originalists, as well as other models of interpretation, also employ it. As Griffin explains, "I understand originalism as a specific approach to U.S. constitutional interpretation that is distinct from relying on appeals to history in general."[67]

ii. History in general

Second, there is history in general, which can relate to a wide variety of subjects: history of constitutional development after adoption, traditions, historical changes in the organization of society itself, as well as its political, economic and cultural transformations, and so on. Particularly relevant to constitutional interpretation are issues relating to historical grievances, social conflict and inequalities, internal cohesion, national identity, among others. This is particularly important in the context of teleological constitutions, especially those that are overtly ideological.[68] The history of the ideas that gave birth to a constitution may be relevant in general, but are particularly relevant in the teleological context. Constitutions that adopt ideas require a study into the history of those ideas.[69]

History can also be the source of constitutional legitimacy which in turns, influences the process of interpretation itself.[70] In that sense, history is not a discrete factor of interpretation, but an ever present source in the creation, development and application of legal norms that may well be critical to many constitutional systems. The stronger the link between the constitutional project and enduring social consensus, the greater the role of history may be in the process of interpretation and adjudication.

---

[65] *See* Vasan Kesavan & Michael Stokes Paulson, *The Interpretive Force of the Constitution's Secret Drafting History*, 91 GEO. L. J. 1113, 1181 (2003).

[66] Balkin, *supra* note 25, at 680.

[67] Griffin, *supra* note 52, at 1187.

[68] David Fontana, *Comparative Originalism*, 88 TEX. LAW. REV. 189, 197-98 (2010) ("[I]t should not be surprising that countries whose courts and commentators make originalist arguments tend to come from revolutionary constitutional traditions or are acting in revolutionary constitutional moments. The post-colonial constitutions of Africa and Latin America, for instance, foster many originalist arguments.").

[69] *See for example,* Varol, *infra* 118, at 1258, in reference to the history of secularism in Turkey.

[70] As Kesavan and Paulson explain in the U.S. context, the status of "the Philadelphia Convention debates as authoritative sources of guidance in constitutional interpretation as risen and fallen with the tides of relative popularity of the principal contending interpretive theories." Kesavan & Paulson, *supra* note 65, at 1124-25.

iii. Sources

Related to the issue of history is the matter of what are the appropriate sources that can be used in the process of constitutional interpretation.[71] This can pertain to both historical sources in general as well as legal sources in particular. When discussing the different methodological models, we will analyze their views on what are the adequate empirical sources, including historical materials, used in interpretation. This is both an empirical and a conceptual matter.[72] As to the former, it pertains to the likelihood that we can ascertain reliable and accurate information, be it communicative content, intent or other, from the available sources.[73] The latter is whether or to what degree, independent of that availability, these sources should play a role in constitutional adjudication. The U.S. debate on this issue can be confusing, because it is not always easy to distinguish empirical objections to conceptual ones as to the uses of history as an authoritative source of constitutional meaning.

iv. Historicism

A critical issue related to the different uses of history by the models of interpretation under analysis in this Article is the use of *historicisim*, that is, the different contextual elements that are normally taken into consideration in formal historiographic research and analysis in the process of searching for the meaning and content of constitutional provisions individually and for the constitution as a whole. As we will see, there is a variety of approaches as to this matter, where some methodologies attempt to use history without the historicism attached to it. We will also see that this is not a simple issue. Excluding the historical context from historical sources risks decontextualized readings and incomplete discovery. Including historical context defeats many of the stated purposes of some of the models of interpretation that want to avoid the problematic entanglements and subjective appreciations of historical processes. Original public meaning originalism is the main target of the history without historicism critique, and so it is there that we elaborate on this issue.

---

[71] *See Id*.

[72] *See* Robert G. Natelson, *The Founders' Hermeneutic: The Real Original Understanding of Original Intent*, 68 OH. ST. L. J. 1239, 1242 (2007).

[73] For example, a constant concern in U.S. constitutional adjudication is the availability, accuracy, authenticity and reliability of historical sources. *See* Bilder, *supra* note 63; Kesavan, *supra* note 65. The U.S. problem is exacerbated by the fact that the original U.S. Constitution was the product of secret deliberation. *See* Greene, *supra* note 13, at 1690.

D. Models

i. Introduction

I will now turn to the actual models of constitutional interpretation. It is not an exhaustive list. At the very least, as I stated previously, these are not closed systems, which would allow for an endless combination of custom-made methodologies that mix features from some or even all of the identified models. The following list is a summary of the more general models that have been the object of attention by courts and scholars.

When diving into each model, I will try to cover the following topics: the models' view about text, purpose and history, as well as other particular features it may have, including criticisms levelled against it, its development in time, its interactions, contradictions or similarities with other models of interpretation, and, finally, its interaction with the different constitutional types.[74]

Because of space limitations and its limited use worldwide, I have chosen to skip an analysis of "textualism" or "legalism".[75] Yet, I will make a few brief comments that will be relevant when diving into the more prevalent models.

As its name suggest, textualism is text-centered. This should not be confused with literalism. Textualist also carry out interpretation. But, text is the only relevant source. Obviously, textualism is not ignorant of the fact that *someone* approved the text and that there was a reason for doing so. It is also aware that text requires development through doctrine and the creation of a broader body of law. But, the search for those elements are constrained to text. Most of the issues normally related with textualism will be analyzed when discussing the objective teleological approach.

This is connected to the notion of *text as intent*.[76] As Kay explains, "[s]upport for the view that text alone creates legal rules might be drawn from the English practice of statutory interpretation. English judges in construing an Act of Parliament may *not* seek guidance from legislative debates or other legislative materials associated with its enactment."[77] But, Kay continues, "English courts have never suggested that the lawmaker's intent is not the critical object sough in statutory construction."[78] The point is that the *search* for that intent is done *through* the text. This is similar to the process of searching for purpose *through* text we will see in the objective teleological model of interpretation. There is also common ground with original public meaning originalists.

---

[74] *See* Farinacci-Fernós, *supra* note 4.
[75] *See* GOLDSWORTHY, *supra* note 3.
[76] *See* BENNETT, *supra* note 11, at 100.
[77] Kay, *supra* note 6, at 233 (emphasis added).
[78] *Id*.

While there is a debate to be had about the issue of intent expressed outside of textual enactment, there seems to be consensus that, at some very basic level, text is the direct result of intent.[79] This approach to intent is text-based, that is, "[i]t is not a theory of anyone's intent or intention."[80] As Kesavan and Paulson suggest as to what they dubbed originalist textualism, "[i]t is a theory of the meaning of words, phrases, and clauses of a legal text, in accordance with the text's own directive to treat the text as authoritative."[81]

1. U.S. originalist experience

a. Originalism in general and the different originalisms

As many scholars have pointed out, there is no one "originalism".[82] As Mitchel Berman puts it, what is originalism may vary, from meaning "too many things to near anything at all."[83] Moreover, many originalist models are actually contradictory. This is the result of the concept's continued development as a constitutional model.[84] As such, it would seem that there is no *one* actual originalist model of interpretation that can be compared to other methodologies. In fact, some believe it may be possible to be originalist as to some parts of the constitution but not as to others.[85] Others see in this multiplicity of articulations an admission of the result-oriented motivation of its proponents, as it applies in the U.S. context where it was created by a particular political movement.[86]

---

[79] Raoul Berger, *'Original Intention' in Historical Perspective*, 54 GEO. WASH. L. REV. 296, 304 (1986); Greene, *supra* note 14, at 664; Kay, *supra* note 6, at 273; Charles A. Lofgren, *The Original Understanding of Original Intent?*, 5 Const. Comment. 77, 79 (1988); Powell, *supra* note 34, at 895; Keith E. Whittington, *The New Originalism*, 2 GEO. J. L. & PUB. POL'Y 599, 610 (2004). That is why some challenge the practical difference of, for example, original intent in opposition to original meaning, because "meaning necessarily connotes intent." Dorf, *supra* note 11, at 2019. *See also* Colby, *supra* note 55, at 250.

[80] Kesavan, *supra* note 65, at 1132.

[81] *Id*.

[82] SOLUM, *supra* note 11, at 2; Laura Cisneros, *The Constitutional Interpretation/Construction Distinction: A Useful Fiction*, 27 CONST. COMMENT. 71, 72 (2010); Drakeman, *supra* note 11, 1124; Greene, *supra* note 14, at 661 ("[O]riginalism takes a variety of forms"); Smith, *supra* note 5, at 714 (Originalism is "far from a monolithic movement").

[83] Berman, *supra* note 42. For their part, Thomas B. Colby and Peter J. Smith argue that the current originalist family members are only unified by label. Colby, *supra* note 55, at 244.

[84] Greene, *supra* note 13, at 1683. ("Originalism has been running away from its past.").

[85] *See* Stephen L. Carter, *Originalism and the Bill of Rights*, 15 HARV. J. L. & PUB. POL'Y 141, 141-42 (1992).

[86] "One conclusion that could be drawn from this conceptual diversity and disagreement is that 'originalism' is not a constitutional theory at all, but rather is simply rhetorical code for a commitment to a series of particular judicial outcomes favored by political conservatives." Colby, *supra* note 55, at 262. These authors also find interesting the fact that originalism, with all its emphasis on settlement

In particular, as we will see, many of the features of some of the originalist models are actually quite similar to some of the more teleological approaches. But, because of the force originalism has acquired in the U.S. scholarly debate,[87] as well as the potentially revolutionary effects of its possible application outside of the United States constitutional experience, I think it would be productive to analyze the originalist models separately.

Producing a coherent list of models is therefore very difficult and disorienting. But since a list is, in the end, the most helpful way of carrying out the task of analyzing and comparing the different methodological models out there, I shall attempt to produce one.

The constant focus on originalism versus its apparent opposite, non-originalism, plus the continued and ever-expanding growth within the originalist family itself, creates a very confusing and murky situation as to the availability of different interpretative methods. This especially so when attempting to simultaneously analyze the teleological approaches to constitutional interpretation and compare them to the originalist and non-originalist variants in the U.S. context. There is no exact or even adequate point of reference. Some originalist models are more in-tuned with teleological approaches, while other originalist proposals are actually anathematic to teleological methodologies.

Originalism versus non-originalism is not the most adequate of labels for comparative purposes. As such, the following discussion as to (1) the originalist family, (2) the non-originalist family, and (3) the interaction between these two approaches, must be seen for what it is: an attempt to derive general normative proposals about method of interpretation from the current state of the U.S. debate. This problem will become clearer when addressing the non-U.S. centered models, which will mirror, to some degree, the analysis made as to the originalism versus non-originalism divide. Another factor that should be kept in mind is that most of the U.S. debate is *limited* to its own status as a liberal democratic framework constitutional system, while the teleological models seem to be more universal in their approach.

Since the early 1980's, "originalism" has been formally proposed as either an adequate, optimal or even the exclusively legitimate form of constitutional interpretation in (and, apparently, for) the United States federal constitution.[88] I

---

and fixed meaning, "is a jurisprudential theory undergoing its own endless evolution, with its own living constitution." *Id.* at 263.

[87] Dorf, *supra* note 11.

[88] Berman, *supra* note 42, discussing the different views of the proponents of originalism as to the strength that must be given to the originalist approach in the process of constitutional interpretation. He distinguishes between the "weak" forms of originalism that feel that, at the very least, originalism "ought not to be excluded from the interpretive endeavor", *Id.* at 10, from the "strong" articulations that believe that originalism should be "the sole interpretive target or touchstone" of such a project. *Id.*

will not attempt a restatement of the historical development of this methodological family. Others have done that quite well.[89] My interest here is to identify and discuss the *common* aspects of originalism, so as to then move on to analyze the *different* models derived from the general approach.[90]

b. What do all originalists have in common?

One of the common aspects of originalism is the so-called Fixation Thesis.[91] In essence, this view holds that the meaning of written text is the meaning "at the time of framing or ratification."[92] That is, that the meaning of the Constitution was fixed at the moment of adoption. As a result, courts are not empowered to modify or disregard that fixed meaning.[93] Limited discretion as to the determination of constitutional meaning is the result of fixation.[94] This states that meaning can be ascertained objectively.[95] It would appear that the very nature of a written constitution requires an adoption of some sort of fixation approach: "[W]riting, by its very nature, fixes the meaning of text at the moment it is written."[96] Of course, *what was fixed* is a matter of disagreement between originalists, and so I will tackle that issue later on. It seems that the lowest common denominator is original public meaning originalism's view as to *communicative content* in terms of *meaning*.

The Fixation Thesis leads us back to the issue about word choice. Some words, normally associated with standards, for example, are difficult, if not impossible to wholly fix as to their meaning.[97] While definitely not malleable in any direction, they are not entirely fixed. Fixation is not synonymous with unmovable linguistic precision.

Another commonly shared feature of originalism in general is the idea that the meaning of the text that was fixed by the process of adoption is either determinative

---

Berman also distinguishes between those who think originalism is the correct method of interpretation as an inescapable truth, which he dubs "hard" originalism, *Id.* at 2, and those that believe originalism is an appropriate or preferred mode of interpretation, which he dubs as "soft". *Id*. *See also* Griffin, *supra* note 52, at 1187.

[89] *See* Berman, *supra* note 42; Whittington, *supra* note 79.

[90] Berman, *supra* note 42, at 8.

[91] BENNETT, *supra* note 11, at vii. *See also* Munzer, *supra* note 11, at 1031.

[92] Peters, *supra* note 5, at 1259. *See also* John Harrison, *Forms of Originalism and the Study of History*, 26 HARV. J. L. & PUB. POL'Y 83, 89 (2003).

[93] Colby, *supra* note 55, at 264.

[94] Rosenthal, *supra* note 35, at 1186.

[95] Feldman, *supra* note 54, at 288.

[96] Coan, *supra* note 8, at 1028. Coan rejects that view. According to him, "writtenness" does not compel anything, especially as to method, except maybe some fidelity to text. *Id*. For a similar view see, also, Greene, *supra* note 14, at 665.

[97] Rosenthal, *supra* note 35, at 1217.

or nearly determinative in constitutional adjudication: "Originalism regards the discernable meaning of the Constitution as the time of its initial adoption as authoritative for purposes of constitutional interpretation in the present."[98] This is known as the Contribution Thesis.[99] As a result, courts "must be bound by the meaning of the words and phrases written down in the text."[100] Interpretive restraint is the result of these thesis. As Lawrence Rosenthal points out, this is key to originalism's use as a practical method of interpretation: "Thus, whatever its theoretical merits, originalism offers a workable and distinct approach to constitutional adjudication only if it provides a vehicle for utilizing the historically fixed meaning of constitutional text as a means of reducing the interpretive leeway claimed by non-originalist."[101]

Why Originalism? Several reasons and justifications have been given for why originalism is either an adequate, optimal or even required method of interpretation. Among the justifications given are the need to restrict the independent law-making power and discretion of courts in order to curtail their capability of imposing their personal views and will on a democratic community. Others have pointed at the very nature of the constitution as a written document, which requires, at least, some fidelity to the original communicative content of the adopted text.

c. Original intent

(1) Restraint and conservative results

Original-intent originalism in the United States was the first manifestation of the originalist family that sprang out of the debates about constitutional adjudication in the late 1970's and early 1980's. In its infancy, original intent was more a reaction than a theory of interpretation or adjudication. This fact is very relevant as to the *relationship* between methodological models and constitutional types.

The proponents of original intent in the United States were, apparently, more guided by result than by process. As such, they identified a model that would best suit their desired goals of producing particular, conservative results. They came up with original intent. Their purpose was two-fold: (1) to constrain the discretion of judges in developing constitutional law,[102] and (2) to re-direct the judicial power in a more conservative direction.[103]

---

[98] Whittington, *supra* note 79, at 599.

[99] SOLUM, *supra* note 11, at 18.

[100] Kesavan, *supra* note 65, at 1129.

[101] Rosenthal, *supra* note 35, at 1189.

[102] *Id*. at 1186; Whittington, *supra* note 79, at 602; Thomas B. Colby, *The Sacrifice of the New Originalism,* 99 GEO. L. J. 713, 714 (2011).

[103] As we saw, the restraint rationale is not exclusive to original intent originalists. But, it seems to be much more emphasized in this model. *See* Colby, *supra* note 55, at 262; Saul Cornell, *Meaning*

But how could original intent, or even originalism in general for that matter, do this? As we will see when we analyze the subjective teleological model of constitutional interpretation, original intent *is not inherently a constraining device in the full sense of the word nor does it always produce substantively conservative results*. Why?

First of all, it depends on what we mean by "constraining" or "restraining" courts. In the most basic sense, constraint means limiting the *choices* available to courts.[104] In other words, that not anything goes, that not everything is possible under a particular constitutional system.[105] By identifying binding sources and meaning, both semantic and legal, courts are constrained as to *where to go*.[106] This is done, for example, to ensure "that judges will invalidate democratically enacted law only when those laws conflict with the judgment" of the constitution-makers.[107] It is an attempt to take subjectivity out of judging, particularly to a judge's personal beliefs: "The goal of originalism has always been purity."[108] The argument goes that it is much better to be governed by the dead-hand of the past than by individual judges imposing their will.[109] This type of restraint applies equally to text or intent-based methods. In the end: "Constraining judges in a democracy is important."[110]

Yet, sometimes it seems like constraint takes another direction, which is closely associated to the second goal of the proponents of original intent in the United States. This second articulation of constraint means that the depth of judicial intervention into policy matters will be limited.[111] The first definition seems inherent to the original intent model. The second one is necessarily context-dependent.

A methodological model that limits discretion by forcing courts to adopt particular policy choices embedded in the constitutional text as identified by the authors' intent does seem to curtail the space left to courts to choose between different substantive outcomes. This relates to the first goal of original intent originalism and of originalism in general. Of course, this will depend on how ascertainable, authoritative and specific the intent is. This generates a zero-sum game where the greater

---

and Understanding in the History of Constitutional Ideals: the Intellectual History Alternative to Originalism, 82 FORDHAM L. REV. 721, 755 (2013); Jamal Greene, *How Constitutional Theory Matters*, 72 OHIO ST. L. J. 1183, 1183 (2011); Peters, *supra* note 5, at 1256.

[104] *See* SOLUM, *supra* note 11, at 151.

[105] *See* Greene, *supra* note 14, at 664.

[106] Balkin, *supra* note 25, at 646; SOLUM, *supra* note 11, at 4; Colby, *supra* note 55, at 264; Kay, *supra* note 6, at 226.

[107] Colby, *supra* note 55, at 276.

[108] Feldman, *supra* note 54, at 284.

[109] Greene, *supra* note 14, at 664; Harrison, *supra* note 92, at 83; Kay, *supra* note 6, at 289.

[110] BALKIN, *supra* note 22, at 19.

[111] Calabresi, *supra* note 31, at 698 ("The text of the Constitution, as it was originally understood, suggests a very modest and limited role for the federal Judiciary."). *See also* Colby, *supra* note 55, at 256, 289.

specificity of the intent, the narrower the room left for courts to navigate. Conversely, the greater the generality of the intent, the broader the room for judicial maneuver. The level of restraint, therefore, depends on the level of ascertainable intent.

The other definition of restraint is problematic. We are no longer talking about constraint as to *choice* but restraint as to the *depth* of the level of judicial activity and intervention. This will all depend on the actual substantive content of the authors' intent itself: "[T]he doctrine of restraint has not always been associated with originalism and is hardly an inevitable feature of it."[112] One could easily think of several manifestations of original intent that produces interventionist or empowered courts. For example, we could have a constitutional system where the framers intended courts to possess great latitude and discretion of constitutional law. In other words, that the original intent was not directed at the meaning of the provisions but at the process of judicial interpretation. Another example, which is closely associated with the post-liberal teleological model, would be if the original intent resulted in the need for aggressive judicial intervention into controversial or important policy matters. Post-liberal teleological constitutions that are the result of ideologically motivated framers who clearly intended the constitutional system to develop in, for example, a redistributive direction, require courts to intervene in policy matters. In that sense, the level of restraint original intent produces will depend on the substantive content of the intent itself, and it could go either way. The U.S. example is not universal.[113]

This, in turn, leads us to the second apparent effect of original intent: that it produces conservative results. This has been mentioned as one of the objections for its adoption.[114] Again, this is a context-specific scenario. In the case of the Constitution of the United States, because of its age, framework design and omission as to policy matters, as well as the historical limitations as to the political, social and economic views of its framers, an approach to constitutional adjudication based on the framers intent may normally yield substantively conservative results.[115] As John Harrison explains, "[t]he framers were in favor of limited government, federalism, and private property."[116] As such, an appeal to their original intentions

---

[112] Greene, *supra* note 14, at 678.

[113] Malte, *supra* note 55, at 45 ("[O]riginalists typically argue that aggressive judicial review is difficult to reconcile with the concept of democracy."). *See also*, McConnell, *supra* note 5, at 1136; Rehnquist, *supra* note 34, at 699; Luis Barroso, *The Americanization of Constitutional Law and its Paradoxes: Constitutional Theory and Constitutional Adjudication in the Contemporary World*, 16 ILSA J. INT'L & COMP. L. 579 fn. 2 (2010).

[114] Berman, *supra* note 42, at 2.

[115] BENNETT, *supra* note 11, at 82; Greene, *supra* note 103, at 1194. ("[O]riginalism cannot easily be appropriated to progressive constitutional arguments").

[116] Harrison, *supra* note 92, at 86 ("That sounded like a pretty good idea" to first generation originalists). *See also* Balkin, *supra* note 25, at 677.

would generate results consistent with those policy views. This is so because "[o]riginalism is backward-looking and thus, other things being equal, more likely to yield results that either preserve the status quo or will back the clock to an earlier status quo."[117] This will be the case, so long as the past is more conservative than the present, which is not inherently true: "[O]riginalism does not inevitably produce substantively conservative results."[118]

In the case of teleological constitutions, particularly those of a progressive or post-liberal bend, the result will be the opposite: an approach to constitutional adjudication based on the framers intent will normally yield substantively progressive results. As such, original intent is, by itself, *neutral* as to outcomes. It will all depend on the *actual content* of the original intent. As McGinnis and Rappaport suggest, "[o]riginalism is a method of legal interpretation, not a political or ideological stance."[119] Originalism *is* neutral as to results, but, as we already say, the decision to adopt originalism as a methodological tool *is not*.[120]

(2) The Notion of intent

Once we have shed off the incorrect notion about original intent based on a U.S. centered application, we are left with the actual methodological features of original intent.[121] But, before diving in to that aspect, one final introductory comment is warranted. As we will see, the adoption of an interpretive model based on the original intent of the framers of a constitution *seems to require the strongest fidelity to the actual content of the constitutional project*, or at the very least a strong recognition of the legitimacy and authority of the creators of the constitution. This happens, for example, when some question if the framers' intentions have become outdated, thus exacerbating the dead hand problem.[122]

This is especially true in the case of teleological constitutions, where the framers adopted, almost by definition, policy choices about important social, economic, political and cultural issues that may be divisive and, therefore, contested. Since

---

[117] Dorf, *supra* note 11, at 2045. *See also*, Keith Whittington, *Is Originalism Too Conservative?*, 34 Harv. J. L. & Pub. Pol'y 29 (2011).

[118] Ozan O. Varol, *The Origins and Limit of Originalism: A Comparative Study*, 44 VAND. J. TRANSNAT'L L. 1239, 1246 (2011).

[119] McGinnis, *supra* note 57, at 381.

[120] Rosenthal, *supra* note 35, at 1219 (referencing the so-called libertarian approach to originalism in the United States).

[121] Goldsworthy identifies the common issues that originalism must answer: (1) the extent on which evidence of original intention or purpose is treated as significant; (2) whose intent is authoritative; (3) the level of abstraction to articulate such intent, and (4) the limit imposed on the kinds of historical evidence that is admitted. GOLDSWORTHY, *supra* note 3, at 5.

[122] SOLUM, *supra* note 11, at 154.

adhering to original intent in this context requires many important issues to be decided by courts, not legislatures, taking into account the views of past, not present, democratic articulations, the original intent model creates a constant tension between the past and the present, between the constitutional law and ordinary politics, and between the different social forces of society, unless the constitution is able to create a social consensus around it.

Original intent seems identical to the subjective teleological model of constitutional interpretation. Yet, because the latter maybe somewhat narrower as to its object of inquiry, I treat them separately. While the subjective teleological model looks for the framers' intent *as to purpose* –both of the specific provisions as well as to the constitution as a whole–, the original intent model takes a broader view on the opinions held by the framers. Some proponents of original intent go as far as stating that the *private* or *unexpressed* intentions of the framers are relevant or even determinative. I don't think the subjective teleological model takes us that far. Original explication, as we will see, constitutes a middle ground, accepting a broad definition of intent that goes beyond mere purpose, but *only* as it was expressed during the process of constitutional creation. Yet, all these intent-based models would seem to agree that it is legitimate for the lawmakers to express their intent *outside* the adopted text.[123]

The issue of original expected applications also seems to be a wedge between the U.S. model of original intent and the subjective teleological model. In the case of original intent, it would seem that original expected applications, because they are the product of the original intention of the framers, *are part of intent* and, therefore, binding. In the case of the subjective teleological approach, expected applications are merely evidence that points to the *purpose* behind the framers' actions. Original intent, on the other hand, does seem interested in asking what the framers would have done in a particular situation. The subjective teleological model only asks *why* they adopted the text; original explication asks *what did they said about it*; and original intent goes further and hypothesizes on *what they thought about it and would do now*.[124] Intent, therefore, seems to be a very broad concept, at least generally, in original intent originalism in the United States.

(3) Text

Framework constitutions tend to be of a different textual structure than more teleological ones. One of the main reasons for this discrepancy is basically historical: older constitutions tend to be shorter and written in more general terms. Teleological constitutions tend to be more recent and more deliberate as to their choice of words

---

[123] Berger, *supra* note 79, at 304.

[124] *See* SOLUM, *supra* note 11, at 8.

and length. The shorter a constitution is, the less it has to say, not only narrowing the possible topics subject to constitutional consideration, but also limiting the textual sources that are so critical for adequate interpretation and construction. Precisely because of the lack of text, or textual clarity for that matter, many of the proponents of U.S. based original intent give so much emphasis to the framers' intent. Because they said so little by way of text, we must go beyond text and look at what they wanted to do but were either unable or unwilling to do by way of textual development, expansion or precision.

There are many ways to analyze the interaction between text and intent in the original intent model. First, that intent starts where text stops. Because of the emphasis on this point made by original public meaning originalists in the United States, I will elaborate on this notion when addressing that particular model of interpretation. Second, that intent shapes the text itself. That is, when interpreting text, we should not only look at its semantic meaning, but at its intended legal content as well. In particular, what legal effect did the framers attempt to produce by adopting particular words and provisions. Intent, therefore, drives text: "[T]o build a theory of historical meaning from Grice's idea of semantic meaning requires establishing what speakers in the Founding era typically intended when they uttered specific sentences. Sampling dictionaries, a favorite tactic of semantic originalists, will not suffice."[125] As Saul Cornell argues, original public meaning interpreters would still "need to engage in precisely the forms of historical inquiry that the theory was designed to obviate: reconstructing, weighing, and summoning the multiple and potentially conflicting intentions of Framers, ratifiers, and other relevant populations."[126] Finally, he states, "[o]nce one severs meaning from communicative intent, words can be read in almost any way that serves the ideological agenda of contemporary judges and lawyers."[127] In other words, the original intent model mixes intent and text, so as to limit and articulate the latter's meaning. Original intent is skeptical of under-determinate text and sees in intent the proper tool for smoothing it out. In that sense, the subjective intentions of the founders are "the most relevant evidence of meaning of constitutional provisions."[128] As a result, intent has two roles: (1) when text runs out, and (2) influencing the very meaning of text.[129]

Of course, as with most systems of interpretation, there is a minimum dosage of textualism: clear and specific rules basically speak for themselves. In the U.S. experience, this is normally shown by reference to the two-senator rule or the presidential age requirement. Other constitutional systems, particularly of the

---

[125] Cornell, *supra* note 103, at 734.

[126] *Id*.

[127] *Id*. at 742.

[128] Griffin, *supra* note 52, at 1188. This feature is shared with the subjective teleological approach.

[129] *See* Kay, *supra* note 6, at 232.

teleological family, have many more of these and of a wide range of policy topics. The end result is that, independent of method of interpretation, many of the policy-laden constitutional rules will be neatly applied without much need to identify intent, at least conceptually. But, in some systems, the sheer force of original intent will require to double-check even clear text to make sure it matches the original intent. This all depends, of course, on a model's approach to constitutional change, but that is another matter.

(4) Purpose

As we already saw, it seems like the original intent model does not limit the notion of intent to purpose. Intent encompasses much more than that. It includes purpose and reasons behind the drafting or adoption, but it also includes possible applications, intended communicative content and a more general view of the constitutional structure itself. In other words, original intent has space for the general worldviews and political beliefs of the framers of the constitution.

Many times, it seems that intent and purpose are seen as interchangeable terms.[130] But it looks like, in the end, intention is indeed broader and, in fact, encompasses purpose.[131] Therefore, a search for the framers' purposes is a manifestation of a more general original intent approach.

(5) History

Because original intent looks to the framers, by definition they look to the past. As such, law must dive into the historical field. This, in turn, requires a view of history in general and adoption history in particular. If, as Feldman put it, the goal of originalism has always been purity, then "[t]he key to attaining purity is history."[132]

The U.S. debate has centered on the *empirical* problem of ascertaining intent.[133] The temporal distance of the constitutional creation process makes research into intent a very problematic task. At best, it is educated guess-work.[134] This is exacerbated by the problem of *unexpressed* intent, which almost inherently requires guess-work on the part of interpreters and raises the legitimacy problem of giving authority to an unexpressed view. But other systems actually have an easier empirical situation which only leaves the *conceptual*, instead of the *empirical*, objection to original intent. Non-U.S. experiences serve as examples.

---

[130] *See* SOLUM, *supra* note 11, at 28.

[131] Kay, *supra* note 7, at 720.

[132] Feldman, *supra* note 54, at 284.

[133] SOLUM, *supra* note 11, at 8; Bilder, *supra* note 63; Kay, *supra* note 6, at 243; Kesavan, *supra* note 65, at 1159; Malte, *supra* note 55, at 50.

[134] SOLUM, *supra* note 11, at 21.

Intent can be found in a variety of sources, from the records of the constitution-making body, to even political publications and private correspondence, as long as it sheds light on what the framers thought. The uniting feature of these sources is that they are connected to the framers and the process of adoption. Griffin states that originalism "insists that only certain sorts of historical evidence, such as the understandings of constitutional meaning of the Philadelphia framers or ratifiers of the Constitution [in the U.S. case], are legitimate in constitutional interpretation."[135] But the key is if they actually reveal intent. Because of the connection between intent and constitutional creation, sources related to that process are, of course, given preferential treatment: "[T]he most direct way to determine what the Framers intended…is to look at the comments, suggestions, arguments, and other remarks that they made *while* drafting and approving the Constitution."[136] This is similar to the original explication model I will discuss a little later on. For his part, Kay identifies "legislative debates, committee reports, contemporary commentary, preliminary votes, earlier and subsequent statements of the participants, biographies, and other legislation" as appropriate sources. But, in the end, like with the search for communicative meaning, intent, broadly defined, can be found in many different places.

Other times, it seems that intent simply runs-out.[137] When this happens, original intent originalists must either speculate or abandon the purely originalist approach.[138] Another challenge to this model is the issue of contradictory evidence of intent, such as a dispute among the framers that was not definitely resolved one way or another.[139]

In the end, there are different uses for the information that can be retrieved from adoption history. Gregory Maggs suggests many interesting articulations, for example, in the context of direct adoption history: (1) reliance on arguments made in support of provisions ultimately included in the Constitution; (2) reliance on the rejection of arguments made against provision ultimately included; (3) reliance on negative inferences drawn from proposals rejected by the Convention; and (4) reliance on comparisons of different drafts versions of provisions ultimately included.[140]

---

[135] Griffin, *supra* note 52, at 187.

[136] Gregory E. Maggs, *A Concise Guide to the Records of the Federal Constitutional Convention of 1787 as Source of the Original Meaning of the U.S. Constitution*, 80 GEO. WASH. L. REV. 1707, 1730 (2012).

[137] BENNETT, *supra* note 11, at 94.

[138] Some simplify the problem by asking, *not* what the framers thought a provision meant, but if they would think the provision required a particular result in a specific case. *See* Kay, *supra* note 6, at 243.

[139] Alicea, *supra* note 38, at 1173.

[140] Maggs, *supra* note 136, at 1731-35.

(6) Problems

When original intent was first articulated in the United States, it became the object of heated debate and criticism. Some of the arguments were exclusively limited to the U.S. context. I see no need to expand on them here. Others have more conceptual consequences. For example, U.S. scholars have debated for decades whether the original intent model is actually compatible with the original intent of the framers. That is still a matter of empirical debate in the United States. As relevant here, the point is that it would seem to be relevant for any particular constitutional system that wishes to adopt an original intent approach to ask whether, as a matter of fact, the original intent of its framers allows for an original intent approach to constitutional meaning, particularly as to legal content. It would seem very odd indeed if a particular constitutional system adopted an original intent model that gives determinative effect to the intent of the framers when it was not their intent that such a model be adopted. So, from a conceptual point of view, it would seem like the first factual matter to determine when adopting an original intent model is to determine whether it is compatible with the actual original intent of the framers. While the fact that the original intent was to use original intent does not require doing so, it seems harder to justify using original intent when the original intent was to do otherwise.

Another example of the type of criticism leveled at the original intent model was the so-called collective intent problem. That is, that it is conceptually, and therefore empirically, impossible to determine a collective intent when dealing with a multi-member body. The scholarship in the United States has mostly adopted this objection.[141] According to Solum, meaning is not the sum of mental states.[142] Colby and Smith agree: "[I]t is nearly impossible to ascertain a single collective intent of a large group of individuals, each of whom may have had different intentions."[143]

I will not address this issue from a psychological perspective as to the possibility of group thinking or shared mental states. From a conceptual and methodological point of view, I think the possibility of collective intent is inherently linked to the issue of the legitimacy, authority and nature of the process of constitutional creation itself. Collective intent *in the context of the search for authoritative meaning when engaging in constitutional interpretation* depends on the shared notions of constitutional authority and legitimacy. Collective intent is not inherently an elusive concept. It depends on what we *mean* by collective intent, which is to say, arriving at the socially accepted definition of collective intent for the purposes of constitutional adjudication.

---

[141] SOLUM, *supra* note 11, at 8; Berman, *supra* note 42, at 2; Feldman, *supra* note 54, at 295; Greene, *supra* note 13, at 1687; Manning, *supra* note 37, at 1760.

[142] SOLUM, *supra* note 11, at 56.

[143] Colby, *supra* note 55, at 248.

In constitutions that are the product of high-energy democratic politics, popular mobilization and participation, social and historical transcendent moments, and are also public in nature, the concept of collective intent becomes less controversial. If the political community accepts, *as a political choice*, that a certain multi-member body is authorized and legitimized to act on behalf of the people, their *intent* is conceptually feasible, which is wholly separate from the empirical issue, which I already dealt with partially when analyzing the role of history in the original intent model. Collective intent becomes an accepted legal fiction.

According to Richard Kay, ascertaining collective intent in this context is not conceptually impossible.[144] According to him, "shared intention" can occur when it is "the product of mutual communication of individual intentions."[145] In fact, he states, "[w]ithout a core of identical meanings shared by all those agreeing, *the concept of decision by majority is meaningless*."[146] Kay persuasively argues that collective intent need not be discovered perfectly or be absolutely certain.[147] As it pertains to constitutional interpretation, an honest empirical search can lead to a *likely* conclusion about collective intent as it applies to a particular legal question.[148] Kay also argues that "intent can be attributed to a group without posing the idea of a group mind."[149] In the end, he suggests, "we should be able to accumulate enough identical intentions to compose an authoritative lawmaker."[150] As to possible sources for this endeavor, Kay suggests looking into "legislative debates, committee reports, contemporary commentary, preliminary votes, earlier and subsequent statements of the participants, biographies, and other legislation."[151] Kay's proposal is inherently connected to the original explication model.

d. Original explication model (briefly)

The controversy over the collective intent problem in the original intent model leads us to the original explication model.[152] Under this particular manifestation of the original intent proposal, the intent of the framers is formalized and particularized. By original explication we mean the process by which the framers themselves, during the process of constitutional creation, deliberate as a collective body and,

---

[144] Kay, *supra* note 6, at 242-52.

[145] Kay, *supra* note 7, at 707.

[146] *Id*. at 708 (emphasis added).

[147] Kay, *supra* note 6, at 244.

[148] *Id*.

[149] *Id*. at 245.

[150] *Id*. at 249 (emphasis suppressed).

[151] *Id*. at 251.

[152] This label was suggested by Lawrence Solum in our discussions about the particular original intent model used in Puerto Rico.

through the elaboration of official reports –by say, for example, an internal working committee- and by the interactions during the debates on the Convention floor, or some other form of formal and official record-keeping, actually elaborate, explain, develop, clarify and expand on the communicative and legal meaning of the adopted text.[153] In this situation, we search and use then "known intent of the legislator."[154] This is consistent with statutory interpretation that relies on a legislative committee's *official* report stating its findings and elaborations.[155]

As such, constitutional meaning is spread out between a shorter, cleaner formal text adopted in the written constitution, and an authoritative and official record of creation that supplements the intrinsic meaning of the text. In particular, this model focuses on the explications made in connection to the adopted text. In defending this type of approach, Richard Kay states: "[A]lthough I do refer to the actual subjective intentions of particular human beings, those intentions are relevant only insofar as they were directed to the content of the enacted rule."[156] In that sense, intent can actually re-direct text, especially when there is an obvious disconnect between expressed intent and adopted text. Interpreters can then correct that mistake.[157]

This model is particularly applicable to teleological constitutions. These constitutions emphasize the why over the what, or at least give it equal weight. Constitutional text rarely has the opportunity to effectively elaborate on its own purpose and meaning. But, because the why is so important –in that it was the driving force behind the adopted text-, the explications made by the framers as to their own understanding of the adopted words are crucial during the process of constitutional interpretation.

As we saw partially with the original intent model, original explication also requires that the political community recognize the authority and legitimacy of the constitutional creation process itself, and thus, the framers as the human components of that process. Original explication, like original intent more generally, requires the political community to accept as binding, not only the words adopted by the framers, but the expressed reasons for doing so. These reasons, in turn, are given by the framers during their deliberations in order to give greater depth to the text. In that sense, the main interpreters of the constitutional text are not judicial bodies. In this scenario, the framers themselves get the first bite at the apple in terms interpreting their own words.[158] As a result, courts are left with the task of (1) interpreting *those*

---

[153] Kay, *supra* note 6, at 724 (in reference to "statements made by enactors about what they meant by the language they were using.").

[154] *Id*. at 705.

[155] Manning, *supra* note 37, at 1765.

[156] Kay, *supra* note 6, at 710.

[157] *Id*. at 714.

[158] This is in contrast with Maggs comments that "some writers fall into the trap of thinking that, because a particular passage appears in the notes and records of the convention, the passage offers

interpretations, explications and elaborations, and (2) filling the gap when those explications are missing or are insufficient to settle a particular legal controversy. The collective-intent issue is meaningless here, because the political community has accepted its existence as a conceptual matter.

(1) Applications

Original intent, like originalism in general and the rest of the proposed models as well, is not inherent to any particular constitutional type. From a conceptual point of view, original intent can be applied to any constitutional type of whichever process of creation. But it would seem that the application of the original intent model would be either easier or more compelling in particular circumstances.

First, some sort of original intent approach seems warranted when the *process* of creation was a central aspect of the actual resulting constitutional text. This is linked to the discussion about popular participation during creation, as well as the public deliberation and social transcendence aspects. That is, the issue of legitimacy and authority. That is why it is easier to criticize, from a purely conceptual standpoint, the use of original intent approach in the U.S. context, where popular participation mas minimal, public deliberation non-existent (at least during the process of actual drafting), and there is considerable disconnect within the realities and mindsets of late eighteenth century life as compared to current ones. But, in societies where the constitutional process did incorporate these legitimizing and authority-conferring features, original intent seems more compelling. In the specific context of teleological constitutions that have these features of creation, that impulse seems even stronger, because the very nature of the constitutional text lends itself to explanation and expression of purpose and intent.

Second, original intent also seems to fit with teleological constitutional types, even those of a progressive, post-liberal or even radical nature. This is so because, as *teleological* constitutions, intent was the driving force behind its entire adoption. Of course, intent is a broader term than purpose, as the former includes the latter but also allows for other elements. For now, the point is that constitutions that carry with them substantive content, policy choices and ideological weight *can be* interpreted using the original intent model. Of course, it will not always be smooth sailing.

Again, originalism in general, and original intent in particular, requires a high level of fidelity, connection and agreement with the original constitutional project as it marches on. This can be tricky: the polarization that can occur because of the substantive policy choices of the constitution turns constitutional fidelity into an

---

proof about what the Constitution means." Maggs, *supra* note 136, at 1740. This is precisely what happens in the original explication model and is premised on the authority of the framers to explain their own words.

overt political choice. But, in systems where the substantive constitutional project has taken root and counts on continued social acceptance, original intent can actually enhance the adequate enforcement of the *substantive* content of the constitution, particularly when the result of high energy deliberations.

(2) Whose intent?

Again, this is an area where the U.S.-centric focus of original intent gets us into conceptual hot water. The historical experience in the United States where the constitutional process was divided up into varied instances of creation creates both a conceptual and empirical problem. I will deal here with the conceptual aspect of the object of intent using the U.S. example.

In the *particular* case of the U.S. Constitution, the process of creation produces problems of identifying the actual constitutional creators. Although the text speaks of "We the People", the process itself was multi-faceted. This is not necessarily the situation in other constitutional systems, including U.S. states. I will use the U.S. experience as an example and then turn to more general normative claims about the role of the framers in constitutional adjudication under the original intent framework. The fact that adoption was split between drafters and ratifiers, these in turn scattered among different state conventions, adds to the complication.[159]

First, we have the drafters, that is, the people who actually penned the text. In the U.S. case, the body that produced the *original* Constitution was the Constitutional Convention that met secretly in Philadelphia in 1787. This example creates a host of problems.

The first problem is legitimacy. The delegates to the Convention were not charged with drafting a new constitution. As such, they had little democratic mandate to create a new constitution, much less take positions as to the issues to be included in the constitutional text. Furthermore, the drafters did not have the power to actually adopt the constitution. In that sense, they can be seen more like a technical body that proposed a draft of the constitution for the consideration of the actual adopting body: the ratification conventions.[160]

The second problem is one of authority. The Convention not only *met* in secret, but its deliberations were officially kept secret from the public until decades after the adoption of the Constitution.[161] One of the sources of authority of teleological constitutions is the public and popular process of its creation. In the U.S. context, neither was present at the moment of redaction.

---

[159] *See* Colby, *supra* note 55, at 249; Kay, *supra* note 6, at 246.

[160] Lofgren, *supra* note 79, at 83.

[161] *See* Bilder, *supra* note 63; Greene, *supra* note 13, at 1690; Kesavan, *supra* note 65, at 1115.

When the notion of following the drafters' intent as the guiding force of constitutional interpretation was discarded in the United States, proponents of original intent turned to the ratifiers.[162] But, again, problems emerged.

The first problem was disconnection between drafting and ratifying. Although it would seem the ratifiers were the actual adopters of the constitution, the fact that they did not write the words creates a problem: they are adopting words created by others. This passive role makes intent seem less convincing.[163] The fact that they did not even know about the drafter's internal debates made the disconnection even greater.[164]

The second problem was really specific to the U.S. case: the multiplicity of the ratification conventions by individual states. As such, there is a particular type of collective intent problem different from the collective intent problem of multi-member entities. I already discussed the multi-member collective problem. Here I focus on the multi-entity collective intent problem. The existence of separate and disconnected bodies of ratifiers creates a conceptual problem that is difficult to overcome, unless one can empirically ascertain a shared mindset.[165] This explains why, in the United States, focus on the ratifiers had "limited endurance."[166]

Once we leave the context of the U.S. experience, however, I think a more interesting picture starts to emerge. In the context of more centralized, public and popularly-engaged processes of constitutional creation, the legitimacy and authority of original intent seems feasible. Original intent in this context will most likely be the intent of the delegates elected to a public and dynamic constitution-making body.

e. Original public meaning

(1) Development

In the U.S. context, the conceptual and empirical problems of original intent gave rise to a new development in originalist thinking. This is referred to as the shift from original intent to original public meaning.[167] This shift, aside from its

---

[162] BENNETT, *supra* note 11, at 90; Kesavan, *supra* note 65, at 1137. Robert Natelson believes that, in fact, the original intent of the framers was that interpreters would use the original understandings of the ratifiers as authoritative source. Natelson, *supra* note 72, at 1239, 1288.

[163] Although, it is worth noting that many of the drafters also served as ratifiers. Alicea, *supra* note 38, at 1211.

[164] Kesavan, *supra* note 65, at 1114; Manning, *supra* note 37, at 1765.

[165] Feldman, *supra* note 54, at 295; Lofgren, *supra* note 79, at 78.

[166] Maggs, *supra* note 136, at 1736.

[167] Drakeman, *supra* note 11, at 1124. There is heated debate on the degree of the practical effects of the shift. *See* Colby, *supra* note 55, at 252. Furthermore, many originalists did not join the shift. Greene, *supra* note 14, at 662.

particular contextual characteristics, is important to the issue of the actual desirability or viability of the latter model. Original public meaning is based on the notion that the authority of the constitution lies in its text more than in the reasons, motivations or views of its authors. Text is binding, the reasons for its adoption are not. While both look to the past, their uses of it are very different indeed. Ideally, meaning and intent coincide. But by insisting that intent be adequately textualized, original public meaning originalists, at least initially, are less intent-focused.

This approach is not purely textualist because it does have a conceptual justification: because of the particular nature of the constitutional creation process and of the constitution itself, intent is either impossible to ascertain or unjustifiable to use authoritatively. I propose that original public meaning originalism is premised on the notion that original intent is not justified as a binding form of constitutional interpretation in situations where the authors lack either legitimacy or authority as to the meaning and effects of the text they *adopted beyond the act of adoption itself*. That is why original pubic meaning, as distinct from original intent, has been more popular in the United States¸ *because it accounts for the secret, non-public, and democratically questionable nature of the creation process*. This conceptual problem applies neatly to the original Constitution. In the case of the Bill of Rights and the Reconstruction Amendments, I believe the scholarly objections are more premised on *empirical* grounds than on *conceptual* ones. In the end, to them text is the only authoritative creation of the framers. Curiously, it would seem that, although original intent and original public meaning are both part of the broader originalist family, they are conceptually different: the former is purposivist while the latter is textualist.

As a result, the current proposal of original public meaning is that, because the authors lacked political authority, it is the public –or people- that adopted the constitution. And because they were not active participants in the drafting and deliberation stages, the only source of constitutional meaning is the meaning *the public gave to the words offered to them by the drafters and adopted by the sovereign people*. Therefore, intent is irrelevant because the only authoritative source of constitutional law is the text.[168]

(2) Text: back to the interpretation-construction distinction

Original public meaning originalism states that the only binding effect generated by the constitutional text is its communicative content: what the words mean. The search for that meaning is the object of constitutional interpretation. Through the process of interpretation, courts look at the communicative content of the words of the constitution. This, in turn, leads us back to the Fixation Thesis. Because the point of a written constitution is to *settle* important matters of public concern, the meaning

---

[168] *See* Berman, *supra* note 42, at 60.

of the words of a constitution is the meaning they had when they were adopted. This is mostly a linguistic proposal, that is, fixation only applies to semantic meaning.[169] As Solum suggests, for original public meaning originalists, the Fixation Thesis is "not about constitutional doctrine."[170] According to him, "the rules of constitutional doctrine are not fixed."[171] The Fixation Thesis only includes semantic content and its "contextual enrichment."[172]

A good example for this sort of approach is the Domestic Violence provision in the United States Constitution. Those two words taken together have different semantic meanings when one compares late eighteenth century semantics with current linguistic understandings. Evidently, when a political community adopts a word or set of words that have, at that time, very specific and clear semantic meaning, their political act of settlement cannot be defeated by an eventual transformation in language that gives different communicative meaning to the same words. As it pertains to original public meaning originalism, the Fixation Thesis fits quite nicely, as it connects two important points: (1) that interpretation is limited to communicative content, and (2) that communicative content is fixed at the moment of adoption.

Additionally, proponents of this model argue that if the communicative content of the text is determinative to the legal question at hand, then it is also conclusive.[173] For example, in the case of a bright-line rule, "then the [judicial] decision follows directly."[174] Sometimes text and communicative content will be sufficient.[175] In that sense, original public originalists are more text centered than their original intent predecessors. This also distinguishes them from the objective teleological model which, although also text centered, *does not settle for a purely semantic interpretation that produces determinative results*.

Partially in recognition of the framework nature of the U.S. Constitution, original public meaning originalists that adopt the interpretation-construction distinction recognize that communicative interpretation, by itself, will not be determinative in many legal questions. This is closely related to the issue of rules, standards, principles, catalogues and discretions, as well as to the effect of the choice of words. Evidently, the greater the prevalence of clear text and specific rules, the greater the probability that pure communicative interpretation will resolve the matter. In that sense, U.S original public meaning originalists are conceptually textualists but, as

---

[169] Balkin, *supra* note 25, at 647.

[170] SOLUM, *supra* note 11, at 16.

[171] *Id.* at 67.

[172] Lawrence B. Solum, *Originalism and the Unwritten Constitution*, 2013 U. ILL. L. REV. 1935, 1941 (2013).

[173] Rosenthal, *supra* note 35, at 1243.

[174] SOLUM, *supra* note 11, at 23.

[175] Solum, *supra* note 172, at 1951.

a practical matter, will often find themselves concluding that interpretation alone will not suffice. Both the nature of the U.S. Constitution and its choice of words in terms of the articulation of its individual provisions, allows for this outcome. However, for constitutions that have clearer text and more legal rules embedded in the constitution, this approach will yield more textualist results.

When the communicative content of the text is vague or under-determinate, then the process of constitutional construction takes over.[176] This happens when communicative content "runs out."[177] As Solum puts it: "The original meaning of the Constitution goes only as far as linguistic meaning will take it."[178] This allows, as we will see shortly, for non-textual elements, such as intent, to make a reappearance, this time in the realm of constitutional construction.[179] In an old, liberal democratic framework constitution like the one in the U.S., "the meaning of the constitutional text is frequently, indeed systematically, under-determinate."[180] As Colby explains, "for many constitutional provisions, the original meaning of the Constitution is sufficiently open-ended as to be incapable of resolving most concrete cases."[181]

This leads us then to the so-called Contribution Thesis and the Constraint Principle, that is, the issue as to what is the correct degree of influence the communicative content should have on the process of giving the words legal content by way of constitutional construction. These approaches may vary somewhat.[182] It would seem that the mainstream view is that, at the very least, construction must be compatible with, and thus never contradict, the communicative content itself.[183] In other words, that construction fills the gaps by building upon communicative content. This also applies to situations "when there are two or more equally persuasive original public meanings."[184] Solum suggests two scenarios. In the first one, the communicative content of a constitutional provision will be precise or determinate enough so as to direct the result. In that case, doctrine will mirror semantic meaning.[185] In the second scenario, where the communicative content is not enough to solve the legal

---

[176] Rosenthal, *supra* note 35, at 1189.

[177] Cisneros, *supra* note 82, at 73.

[178] *Id.* at 26.

[179] Kay, *supra* note 6, at 232.

[180] Peters, *supra* note 5, at 1282.

[181] Colby, *supra* note 102, at 732,

[182] Lawrence Solum, *Faith and Fidelity: Originalism and the Possibility of Constitutional Redemption*, 91 TEX. L. REV. 147, 155 (2012) ("[T]he constraint principle is abstract because we have not specified what the constraining force should be.").

[183] Berman, *supra* note 42, at 32-33; Kesavan, *supra* note 65, at 1149; Solum, *supra* note 172, at 1951. *See also* Munzer, *supra* note 11, at 1052-53 as to the different views of the role of text in application.

[184] Alicea, *supra* note 38, at 1164.

[185] Solum, *supra* note 26, at 107.

question, "the semantic content of the text *constrains* but does not fully specify the legal content of constitutional doctrine."[186]

The interpretation-construction distinction still leaves many questions. Can we really separate purely communicative meaning from legal content in the context of a legal instrument such as a constitution?[187] How do we ascertain communicative content from an empirical point of view? What are the adequate sources for this endeavor? In which of the steps do we take into account, either as evidence or conclusive as to meaning, issues such as purpose, practices, expected applications, ideological motivations, intent, policy goals, and so on? Some have commented on the blurry line between interpretation and construction.[188] As Whittington suggests, "[t]he particular breakpoint between these two forms of elaboration, however, varies depending on the particular interpretive method adopted."[189] This is crucial if original public meaning is to be an effective model for teleological constitutions, particularly those that are *simultaneously* clear as to text but also give critical importance to non-textual elements such as purpose, values, goals, ideology and intent. There, the interpretation-construction may misfire, because it would generate many text-focused results that fail to take into account purposes which, as we saw, can actually have a greater role to play than text.

Finally, we have the issue of the different moments of constitutional adoption and amendment, which generates a whole set of new conceptual problems. Some of these problems are just a repetition of the previous ones. For example, in the case of the Bill of Rights and the Reconstruction Amendments, different entities participated in the process of drafting and adoption; in the U.S. constitutional experience, we refer to the federal Congress and the state legislatures that ratified the amendments. This may be less of an issue in other constitutional structures. But, there is another remaining issue: the effect of later text on previous text. Can an amendment change the original meaning of a previously enacted provision? One the one hand, one can argue that the new addition merely replicates the older one. But, one could also argue that the public meaning of the new text, *at its adoption*, may be different from the previous one, in which case the new text changes can have an effect on the older one or, at least, create different meanings to identical words.[190]

---

[186] *Id*. at 108 (emphasis added).

[187] *See* Mitchell N. Berman, *Constitutional Constructions and Constitutional Decision Rules: Thoughts on the Carving of Implementation Space*, 27 CONST. COMMENT. 39, 42-45 (2010). Berman analyzes Solum's articulation of the two-step interpretation-construction model and attempts to compare it with earlier three-step models that distinguished semantic content, legal content and application.

[188] Balkin, *supra* note 25, at 692.

[189] WHITTINGTON, *supra* note 10, at 12.

[190] *See* BENNETT, *supra* note 11, at 120; Greene, *supra* note 14, at 666.

(3) Purpose: the realm of construction

Because interpretation is mostly about communicative content, original public meaning originalists that embrace the interpretation-construction distinction relegate purpose to the process of constitutional construction.[191] In that sense, they seem to, at least temporarily, separate text from purpose. As Solum suggests, purpose and goals "are not in fact the mental states relevant to the linguistic meaning of a text."[192] This will be problematic when applying it to the teleological constitutional type. In situations where communicative content will be enough to resolve a particular legal question, text will have done all of the work, completely taking purpose of the equation. That could be a bridge too far for some constitutional types. It also may ignore important textually articulated purpose, such as introductory clauses.

When communicative content is insufficient for this task, then purpose re-emerges in the process of constitutional construction. The weight given to purpose at this stage will depend, hopefully, on the role purpose had *in the adoption of the constitutional provision at issue and of the constitution as a whole*. In other words, the more present a particular purpose was in the drafting of a particular constitutional provision, the greater the role it should have when giving it legal effect through the process of constitutional construction. It would seem that an historical inquiry can help in this regard by revealing what is the appropriate role for purpose in this endeavor.

Of course, purpose is not the only element to be considered in the so-called construction zone. As we saw, intent is a broader concept than purpose and both make an appearance in this space.[193] As Greene puts it, "[i]f we accept the interpretation-construction distinction, then there is no necessary incompatibility between an original meaning view and the use of original intent with constitutional construction."[194] Other factors weigh in as well. This is so because the construction zone is the place where legal effect is given to under-determinate communicative content. It is here, for example, that constitutional doctrine, tests and so on, are generated.[195] Because it is outside the realm of communicative interpretation, there is disagreement among originalists as to what exactly should go on within the construction zone.[196]

---

[191] Balkin, *supra* note 25, at 647.

[192] SOLUM, *supra* note 11, at 161.

[193] Greene, *supra* note 13, at 1685.

[194] *Id*. at 1705.

[195] *See* Balkin, *supra* note 25, at 646.

[196] SOLUM, *supra* note 11, at 26. As he states, "[o]riginalism itself does not have a theory of constitutional construction." *Id.* at 60. As to the different proposals, *see Id.* at 69.

(4) History: primary source of interpretation, important source of construction

Because of the Fixation Thesis and the shift from author intent to public meaning, original public meaning originalists look to history to find what the general public understood, from a semantic standpoint, the constitutional words to mean.[197] And because intent is no longer the primary focus of interpretation, all sources come into play as they are helpful in the process of ascertaining communicative meaning. Letters, dictionaries, pamphlets, and other non-adoption material are relevant.[198] This model "does not privilege any particular source over another."[199]

The role of adoption history sources is a little problematic though. From a purely conceptual point of view, in the interpreters' search for public meaning, adoption history sources are just as good as any other, including private correspondence by private citizens. From an empirical point of view, it does make sense to use adoption history sources more frequently than other types of materials, precisely because there is a higher degree of probability that the first sources will be more on-point or relevant to the words whose semantic meaning we are looking for.[200]

But that is not the whole picture. There is a problematic middle ground in practice. As some scholars have observed, the empirical component does not satisfactorily explain the overwhelming prevalence of adoption historic sources when other academics or courts engage in communicative interpretation. Some view it as playing a confirming role as to original meaning.[201] I will return to this topic when directly comparing the dominant originalist proposals of original intent and original public meaning. The point is that there appears to be a shift in theory but continuity in practice. One would think, for example, that if there is really no difference between the Records of the Constitutional Convention and private letters by a private citizen, there would be a balanced use of both, yet the sources like the former tend to dominate.

Where there does appear to be a consensus among original public meaning originalists is that the original expected applications of the framers *are not binding sources of meaning*.[202] As Balkin states, "[f]idelity to original meaning does not

---

[197] BALKIN, *supra* note 22, at 45.

[198] *See* Greene, *supra* note 14, at 690, making reference of the rising use of era dictionaries.

[199] Kesavan, *supra* note 65, at 1146. For example, here it makes no difference if the source is connected to Federalists or Anti-Federalists, because the search is for original public communicative meaning. *See also* Maggs, *supra* note 136, at 1738.

[200] Maggs, *supra* note 136, at 1739.

[201] Manning, *supra* note 37, at 1772.

[202] Berman, *supra* note 42, at 28 ("[L]eading originalists have unambiguously repudiated it for years"); Calabresi, *supra* note 31, at 669; Colby, *supra* note 55, at 254; Dorf, *supra* note 11, at 2013; Kay, *supra* note 7, at 710. Such consensus was not always the case, *see* Munzer, *supra* note 11, at 1030.

require fidelity to original expected applications."[203] For his part, Solum argues that "[e]xpectations and linguistic meaning are two different things."[204] At most, they are evidence of meaning that can aid both the interpretation and construction processes.[205] As Greene puts it, "[i]t is difficult to conceive of better evidence of the 'semantic intention' behind constitutional text than how that text was expected to be applied."[206]

The reason for this seemingly universal rejection by original public meaning orignialists to the binding force of original expected applications as descriptive of constitutional meaning is text-based: "It is entirely possible for a text to embody principles or general rules…[and] [t]he founders could be wrong about the application and operation of the principles that they intended to adopt."[207] This seems particularly true in the case of standards and principles, as opposed to rules.

Yet many have questioned original public meaning's fidelity to the principle of rejecting original expected application as determinative of original meaning. The line does seem to blur a bit when addressing the issue of contemporary practices, that is, of whether a particular practice incurred at the time of adoption is necessarily compatible with the constitutional text. Justice Antonin Scalia's approach to this issue is an example of this phenomenon. While claiming to have adopted original public meaning over original intent, and therefore rejecting original expected application, Scalia does seem to suggest that a practice contemporaneous with the founders is, almost by necessity, constitutional.[208] As Greene explains, "Justice Scalia's originalism does not allow constitutional interpretation to prohibit what was permitted at the time of the relevant clause's enactment."[209] This is so because it would be odd for the framers to adopt text that carried meaning which contradicted their contemporaneous practice. It's not that it's conceptually unfeasible for a person or group to adopt language that contradicts their own on-going practices. But it seems more reasonable to suggest that the meaning of the words *at that time* were such that permitted the contemporaneous practices. An example of this view is the position that the death penalty cannot be considered cruel and unusual punishment because, at the time the eighth amendment was adopted, the death penalty was legal

---

[203] Balkin, *supra* note 25, at 647.

[204] SOLUM, *supra* note 11, at 10.

[205] *Id.* at 11; Dorf, *supra* note 11, at 2014; Greene, *supra* note 13, at 1703 ("original expectations are relevant"); McGinnis, *supra* note 57, at 371 (original expected applications as "strong evidence of the original meaning") (in fact, the authors consider expected applications as the best evidence of meaning) *Id*. at 378.

[206] Greene, *supra* note 14, at 663.

[207] Whittington, *supra* note 79, at 610-11.

[208] *See Berman, supra* note 42, at 28; Rosenthal, *supra* note 35, at 1191. Dorf suggests that Justice Clarence Thomas is also a practitioner of this view. Dorf, *supra* note, at 2022.

[209] Greene, *supra* note 14, at 663.

and there is no indication that the text was adopted to put an end to that practice.

Now, there seems to be some daylight between an apparent *forward* looking expected application and a view that would allow *contemporaneous* practice to be compatible with the adopted text. But such daylight seems flimsy, because there is simply too much overlapping between the two. As such, it would appear that original public meaning originalists will have to extend their rejection of original expected applications to include contemporaneous practices.

There is also the issue of the use of history, not just as the source for communicative content, but as one of the tools used in the construction zone: "[C]onstruction, not interpretation, is the central case of constitutional argument and most historical argument occurs in the construction zone."[210]

Finally, we retake the issue mentioned in the introduction of this Article as to the relation between historical sources and other uses of history, and historicism. This is a two-way street: (1) recognizing the different historical conditions present at the time of adoption so that we may have a better understanding of historical sources; and (2) recognizing the practical impossibility of looking to the past without reference to the present. In other words, we do not look at the past neutrally.

More dynamic originalists like Jack Balkin seem to embrace at least some role of historicism in the process of constitutional interpretation.[211] Balkin also acknowledges that we read the framers from the present.[212] That is why Kay suggests that originalists must be active in "consciously suppressing our contemporary preconceptions and values."[213]

But this is a problematic subject in originalism. As Feldman observes, "[c]ontrary to originalist claims, historical research incurs contingencies and contexts."[214] He also notes the complex nature of historical research that sometimes seems to be lost on some originalist approaches: "[H]istorical thinking leads to complexity rather than to univocal and determinate factual nuggets."[215] He charges that "originalists disregard context, contingency and subtext" when carrying out historical research into constitutional meaning by way of even semantic interpretation.[216] When asking ourselves what the public understanding

---

[210] Balkin, *supra* note 25, at 650.

[211] *Id*. at 657.

[212] *Id*. at 712. In a similar fashion, Solum writes: "There is no neutral vantage point from which a text can be understood independently of any tradition or prejudice. Interpreters always read a text from a historically situated vantage point that consists of prejudgments constituted by tradition, a cumulative heritage of interpretations." Lawrence B. Solum, *Originalism as Transformative Politics*, 63 TUL. L. REV. 1599, 1606 (1989).

[213] Kay, *supra* note 6, at 252.

[214] Feldman, *supra* note 54, at 288.

[215] *Id*. at 298.

[216] *Id*. at 299. *See also* Rosenthal, *supra* note 35, at 1197.

was as to a particular word, set of words or constitutional provision, we must be aware of the *historical* nature of that public.[217]

Saul Cornell argues that the "relationship between originalism and history" is still an underdeveloped area.[218] This is picked up by Griffin, who echoes the concerns that originalists "depend on historical evidence without acknowledging the historical context of that evidence."[219] He continues: "For originalists having your cake and eating it too means using evidence from the eighteenth century selectively to decide cases in the present without taking into consideration relevant changes in context."[220] As a result of these problems, John Harrison objects to the demands that originalism places on the discipline of history.[221] Some, like Charles Lofgren, are much more dismissive. He states that historians wouldn't even use the concept of intent, choosing instead to employ concepts like expectations and understandings.[222] While this latter statement is more relevant to original intent than original public meaning, it reveals the scope of the tension between historical analysis and originalism in general. Finally, Cornell expresses the concern about the interaction between original public meaning originalism and historical sources: "New originalism has made it easier, not harder, for scholars and judges to manipulate evidence."[223]

f. Original intent and original public meaning: interaction and contradiction

Some scholars see so much daylight between these two models of interpretation that they question the very usefulness of the general originalist label. Others, curiously, see too little actual difference between both models, at least as to the results they tend to produce. This seems to be both an internal characteristic of originalism and a general trait among methodologies. Being simultaneously too similar and too dissimilar is not inherently contradictory. As we will, see, something like that occurs in the context of the teleological methodologies. This is part of my previous discussion about the interaction and partial interchangeability of some aspects of each methodological model. But, because of the central focus of originalism in general in the U.S. debate, it is worth analyzing briefly some aspects of the interaction between original intent and original public meaning.

---

[217] Feldman, *supra* note 54, at 302.

[218] Cornell, *supra* note 103, at 722.

[219] Griffin, *supra* note 52, at 1187.

[220] *Id*. at 1205.

[221] Harrison, *supra* note 92, at 83.

[222] Lofgren, *supra* note 79, at 78.

[223] Cornell, *supra* note 103, at 754.

(1) Similarities

There is continued skepticism about the shift from original intent to original public meaning: "Reasonable doubts have been raised as to whether the search for the public meaning of constitutional provisions is qualitatively different from searching for the intentions of the framers."[224] Kay explains it persuasively, stating that original intent and original public meaning "may, in theory, produce different results when particular constitutional language is applied to a particular set of facts."[225] But, he adds, "[i]n practice…the divergence will be very rare."[226] He points out that cases of divergence between the two will mostly be (1) the result of "some kind of mistake by the rule-makers,"[227] or, more significantly, (2) be measured as to the adequate *scope* of the words and provisions.[228] At some point, of course, there will be coincidence between the two models as to scope: "a core of coverage will be shared by public meaning and intentional meaning."[229] As Natelson concludes, "resorting first to the words is fully consistent with a search for subjective intent."[230]

The similarities between the two originalist models can be best appreciated when looking at the sources each looks to for ascertaining constitutional meaning: they are basically the same sources. While in theory original public meaning allows for a broader set of sources, many of which can have nothing to do with the framers themselves since the search has as its focus the publicly understood semantic meaning of words, "[i]t is not surprising, then that the practitioners of public meaning originalism tend to support particular interpretations *with essentially the same kind of evidence we have always associated with the search for the original intentions*."[231] In particular, Kay makes references to the common use of the Records of the Constitutional Convention and the ratifying conventions, drafting history, speeches by leading framers, committee reports, and so on.[232] As such, the same sources "might provide evidence of the original understanding of the ratifiers or the original objective meaning."[233] Because of this, some believe that "the New Originalism, like the Old, remains a stratagem for imposing politically conservative values in the guise of constitutional interpretation."[234]

---

[224] Griffin, *supra* note 52, at 1191.
[225] Kay, *supra* note 7, at 712.
[226] *Id*. Natelson proposes a case where this may have happened: the *ex post facto* prohibition. Natelson, *supra* note 72, at 1243-44.
[227] Kay, *supra* note 7, at 713.
[228] *Id*.
[229] *Id*.
[230] Natelson, *supra* note 72, at 1274.
[231] Kay, *supra* note 7, at 714 (emphasis added).
[232] *Id*.
[233] Maggs, *supra* note 136, at 1731.
[234] Peters, *supra* note 5, at 1264.

In fact, Kay argues that, because they share the same sources and normally reach the same results, *it is original intent that is vindicated by this fact* because, all things being equal between both models, original intent at least recognizes *why* we use those sources in the first place: "The central problem with the original public meaning view of constitutional interpretation is that it *severs* the connection between the Constitution's rules and the *authority* that makes us care about those rules in the first place."[235] On the contrary, the original meaning of the constitution is binding because of the *continued authority* of the *framers* themselves: "No constitution…can succeed if it is not regarded as the authentic command of a legislative lawmaker."[236] In the context of the United States, Kay argues, "the legitimating source of the Constitution is settled."[237] This is an example of continued fidelity to the constitutional project that most originalists in the United States still hold.

(2) Discrepancies

Even if in practice they may well produce similar results, there are conceptual differences between these two models. As Manning explains, the original public meaning approach "represents a different conception of the relationship between language and legislative supremacy."[238] Text is given more weight than intent. Also, "[t]he new originalism is less likely to emphasize a primary commitment to judicial restraint…The [new] justification for originalism is grounded more clearly and firmly in an argument about what judges are supposed to be *interpreting* and what that implies, *rather than* an argument on how best to *limit* judicial discretion."[239] It should be stressed that this shift is *U.S. specific*. In other settings, original intent can actually *empower* courts more while a more textual-approach may narrow their scope.

Another example of possible discrepancy is the view that original public meaning originalism "will generate more cases of constitutional indeterminacy that will the originalism or original intentions," and, as such, it "allows for multiple interpretation of constitutional provisions."[240] This would seem even more plausible in the case of teleological constitutions. In the end, "[g]iven modern originalism's origin as a response to the perceived excess of non-originalism, it is not surprising that many

---

[235] Kay, *supra* note 7, at 714 (emphasis added). John Manning takes not of this shift, noting that the change from original intent to original public meaning "represents a different conception of the relationship between language and legislative supremacy." Manning, *supra* note 37, at 1759.

[236] Kay, *supra* note 7, at 715.

[237] *Id*.

[238] Manning, *supra* note 37, at 1759.

[239] Whittington, *supra* note 79, at 608-609. *See also* Smith, *supra* note 5, at 713.

[240] Kay, *supra* note 7, at 719, 721.

originalists have resisted refinements to the theory that would tend to collapse the distinction between originalism and non-originalism."[241]

(3) Interaction

Some have looked for a middle ground. For example, Joel Alicea and Donald Drakeman suggest that we can use both original intent and original public meaning. They suggest using the former as the tie-breaker when the latter produces more than one seemingly plausible constitutional meaning.[242] Solum suggests that intent is still relevant as "evidence" of meaning.[243] This has led to some scholars to actually question the practical difference between original intent and original public meaning.[244] As Dorf points out, "meaning necessarily connotes intent."[245] What has happened is that intent has been nominally moved from the realm of interpretation to constitutional construction.[246] To some, this makes all the difference, since in the construction zone, originalism has no inherent role to play.

g. Original methods

Another originalist approach to constitutional interpretation is the so-called original methods originalism, which states that the constitutional text should be interpreted using the tools the framers themselves used in the process of constitutional interpretation, and thus would believe would be used by later interpreters. The main proponents of this approach are professors McGinnis and Rappaport.[247] This approach addresses the *empirical* problem cited earlier, that is, of whether the original intent of the framers was in fact, that original intent should be used in future interpretation. Conceptually, this approach is similar to the original intent model. This model asks what, as a matter of empirical fact, were the tools of interpretation used by the framers.[248] If such research reveals that original intent was

---

[241] Smith, *supra* note 5, at 710.

[242] Alicea, *supra* note 38, at 1169, 1208-10.

[243] SOLUM, *supra* note 11, at 10. Griffin has a similar view, stating that the subjective intentions of the founders are "the most *relevant* evidence of the meaning of constitutional provisions." (Emphasis added) Griffin, *supra* note 52, at 1188.

[244] *See, for example* Coan, *supra* note 8, at fn. 9; Colby, *supra* note 55, at 250.

[245] Dorf, *supra* note 11, at 2019. For his part, Greene believes that "original intent not only matters but it mattes more than original meaning." Greene, *supra* note 13, at 1685.

[246] Greene, *The Case for Original Intent, supra* note 13, at 1705 ("If we accept the interpretation-construction distinction, then there is no necessary incompatibility between an original-meaning view and the use of original intent with constitutional construction.").

[247] *See* McGinnis, *supra* note 57.

[248] For example, as to the U.S. case, some have suggested that the original intent was that interpreters looked at the original understandings of the ratifiers. Natelson, *supra* note 72, at 1239.

the preferred approach, then original intent should be used. This shares with the pure original intent model its adherence to the authority of the framers as the source for constitutional methodology. Here, the preliminary question is what was the original intent of the framers as to methodology. The answer will identify the foregoing method to be employed.

2. U.S. Non-originalism

a. Introduction

As a U.S. phenomenon, originalism was born in opposition to a particular practice of judicial adjudication. It would seem, then, that originalism is the counterview of another model of constitutional interpretation. It doesn't seem to be that simple. First, it would appear that the thing originalism was reacting to was, like originalism itself, not a thing at all, but a multiplicity of different methodological approaches and tools. Second, there is, also like originalism, contradictory approaches within this other model of interpretation. The waters keep getting murkier. Balkin asks: "Is our Constitution a living document that adapts to changing circumstances, or must we interpret it according to its original meaning?"[249] He answers: "[T]he choice is false."[250]

For many years, the methodological approach to which originalism was opposed was dubbed living constitutionalism. That label has come to disuse for various reasons, ranging from the pejorative connotations associated to it, to its incorrect description of what was actually going on. Partially because of the ascendancy of originalism, and also because of the inherent lack of conceptual unity within that family of models, it is better to characterize this alternative as *non-originalism*.

But even that label can be problematic. First, because what remains of general originalism, that is, the common elements shared by all who still adhere to that approach of constitutional interpretation, is so skeletal, that non-originalism can become as meaningless as originalism *per se*. Second, there are some variants of originalism that actually have much in common with supposedly non-originalist positions. In fact, there are important aspects of constitutional interpretation where some originalist models are actually closer to non-originalist proposals than to other originalist articulations. If true, it would certainly diminish the usefulness of the originalism-nonoriginalism distinction.

---

[249] BALKIN, *supra* note 22, at 3.

[250] *Id*.

b. Non-Originalism in general

Some call this approach "ordinary constitutional interpretation."[251] Simply put, non-originalism combines several and diverse tools of interpretation, such as history, text, structure, doctrine, ethos, prudence, intent, precedent, and so on,[252] without necessarily giving particular importance to any specific one. Balkin believes this is how lawyers actually do constitutional argumentation.[253] This is reminiscent of the so-called common law method.[254]

Non-originalism's identity stems from its approach to history and its interaction with text. Berman suggests that non-originalism "is the thesis that facts that occur after ratification or amendment can property bear –constitutively, not just evidentiary- on how courts should interpret the constitution (even when the original meaning is sufficiently clear)."[255] This does *not* entail a rejection of original meaning: "Not a single self-defining non-originalist of whom I am aware argues that original meaning has no bearing on proper judicial constitutional interpretation."[256] But it does reject the view that original meaning is the only and authoritative source of constitutional meaning. In other words, non-originalism *includes* originalist sources of interpretation, and just allots them different degrees of authority. In that sense, non-originalists are not anti-textualists nor anti-original meaning, in all its variants. But, because they do not give conclusive status to the original meaning of the text when its communicative content is sufficiently clear, it still proves a bridge too far for even the less extreme originalists.[257]

The common link of non-originalism is its eclectic nature. Stephen Feldman suggests that, in fact, eclecticism was the prevalent method of interpretation at the time of constitutional adoption in the United States.[258] It has also allowed important landmark decisions in U.S. constitutional law.[259]

---

[251] Solow, *supra* note 31, at 69. *See also* Griffin, *supra* note 52, at 1185. He characterizes non-originalism as "traditional or conventional constitutional interpretation, which features a variety of forms, modes or methods." He also identifies as a "pluralistic" approach to constitutional interpretation. *Id*. at 1194.

[252] *See, for example* Solow, *supra* note 31, at 76-78.

[253] Balkin, *supra* note 25, at 658.

[254] *See* Coan, *supra* note 8, at 1063; Ackerman, *supra* note 11, at 1801; DAVID STRAUSS, THE LIVING CONSTITUTION 3 (Oxford University Press, New York 2010).

[255] Berman, *supra* note 42, at 24.

[256] *Id*. at 24-25.

[257] *See* Solum, *supra* note 172, at 1952 (referencing "freestanding" or "unbound" constitutional interpretation).

[258] Feldman, *supra* note 54, at 289 ("[E]arly Americans used multiple interpretive approaches –hence, eclecticism-…").

[259] Greene, *supra* note 14, at 677-687 (in reference to *Home Building & Loan Ass'n v. Blaisdell*, 290 U.S. 398 (1934)).

(1) Text

As a result, non-originalists still maintain some connection to the constitutional text itself, even if they reject an exclusive original meaning view. As Coan explains, non-originalists still reference the written constitutional text as (1) a focal point for legal coordination, (2) a flexible framework for common law elaboration, (3) a locus of normative discourse in a flourishing constitutional culture, and (4) one of many legitimate ingredients in a pluralistic practice of constitutional adjudication.[260] As to the use of text as a focal point for coordination, this is particularly true in the context of *legal rules*.[261] As such, it would seem non-orginalists would be more textualist if the constitution were more rule-like, which brings us back to the choice of words issue.

But, leaving aside bright-line rules that are difficult to ignore, non-originalism is skeptical of text-centered models: "[A]ll by itself the text is meaningless."[262] Text, therefore, is one tool out of many, and one which must constantly be contextualized and supplemented. According to Peter Smith, most non-originalists "treat the original meaning as the *starting point* for any interpretive inquiry, but are willing to look elsewhere –to history, precedent, structure, and policy, among others- to construct constitutional meaning when text is vague or indeterminate."[263]

Of the different models under consideration, non-originalism is probably the most tilted towards change. Of course, it is not the *exclusive* mechanism of constitutional change or development though interpretative practice. For example, some originalist or teleological approaches may produce change, *depending, precisely, on the content of the particular constitution and its history*. But, while the view on change of originalism and purposivism will depend on the constitutional content, non-originalism seems to have change as an inherent feature.[264] We will see this again shortly when discussing the common law method of constitutional interpretation as well as the notion of living constitutionalism. In all instances, non-originalist tools, while they do not require or compel change, make it easier as a conceptual and methodological matter.

But, like originalism, there is no *one* non-originalism. In fact, because of its eclectic nature and its use of different tools of interpretation, non-originalism can go in a variety of directions, from more textualist non-originalism to a more purposive approach.[265] It will all depend on the particular mode of non-originalism that is adopted and the internal emphasis made between the available tools and sources.

---

[260] Coan, *supra* note 8, at 1074.

[261] *Id*. at 1049.

[262] Bennett 84, *supra* note 11.

[263] Smith, *supra* note 5, at 709-10.

[264] *See* Munzer, *supra* note 11.

[265] Perry, *supra* note 29, at 686.

(2) Purpose and history

Because no one source of meaning is wholly determinative, all the ordinary tools of interpretation are used and the degree of their role will vary. Purpose and history are among these tools. Yet, "[s]ome nonoriginalists and living constitutionalists may shy away from invoking adoption history because they fear that this will be seen as an implicit confession that conservative originalism is the only correct theory of interpretation."[266] At the same time, non-originalists "also care about the historically situation meaning of the text."[267] In the end, though, "[c]onsulting history as a *guide*, however, stops far short of originalism's insistence that historically fixed meanings of constitutional text control constitutional adjudication."[268]

c. The "Living Constitutionalism" approach

According to its critics, this model once ruled supreme, which resulted in the creation of originalism as its challenger.[269] According to its supposed practitioners, it really never existed.[270] In any case, it seems to be more dead than alive: "[L]iving constitutionalism has suffered its own intellectual and rhetorical collapse."[271] The notion of the constitution as a living organism that evolves over time has become much narrower. While it is true that, "[a]t first blush, it seems certain that a 'living' Constitution is better than what must be its counterpart, a 'dead' Constitution[,]"[272] the apparent *anything goes* application of it proved too much for some people.

Progressive originalists like Jack Balkin have attempted to give new life to the living constitutionalist brand by, curiously enough, associating it with originalist approaches to interpretation.[273] According to Balkin, the living constitution lives again within the construction zone.[274] If so, then living constitutionalism is still

---

[266] Balkin, *supra* note 25, at 718.

[267] Manning, *supra* note 37, at 1757.

[268] Rosenthal, *supra* note 35, at 1244.

[269] Colby, *supra* note 55, at 262-63 ("Originalism might be better understood by reference to its arch-nemesis, living constitutionalism."). Of course, living constitutionalism was not always seen as in opposition to notions of the framers' intent. *See* Munzer, *supra* note 11, at 1046 (in which they link the "living tree that grows" analogy with "natural and gradual development that was *anticipated by the framers*.") (emphasis added).

[270] Balkin, *supra* note 25, at 646. ("[I]t is not a distinct theory of interpretation that gives advice to judges or that judges might consciously follow"). *See also* Dorf, *supra* note 11, at 2011. According to Stephen Griffin, living constitutionalism was more a "label" than anything else; it was "too hazy to serve as meaningful guides to interpretation." Griffin, *supra* note 52, at 1209.

[271] Solow, *supra* note 31, at 71.

[272] Rehnquist, *supra* note 34, at 693.

[273] Leib, *supra* note 11, at 354.

[274] Balkin, *supra* note 25, at 646. *See also* SOLUM, *supra* note 11, at 67.

alive, but secondary and subordinate to the original communicative content of the constitutional text. I have been *originalized*. Stephen Griffin suggests that what is left of the living constitutionalist label is a "general perspective on the role of history and society in determining constitutional meaning."[275]

Before its death and reanimation in originalist terms, "living constitutionalism core animating anxiety is that the Constitution (and most especially its original meaning) may not be binding."[276] As such, Leib states that "[l]iving constitutionalism is more than a pedestrian desire for flexibility and adoption, an excuse nominally liberal results."[277] As a side note, it should be said that, like with originalism, there is nothing substantively inherent about living constitutionalism as to progressive or conservative judicial results. Original intent may be progressive and living constitutionalist tools can be applied to achieve reactionary results. It all depends to which constitutional system it is applied. Once we shed-off the incorrect notions about the inherent substantive nature of living constitutionalism, we can concentrate on its actual methodological proposals.

Leib suggests that living constitutionalists "simply do not privilege history (of ratification) in constitutional interpretation."[278] Of course, this does not mean that adoption history is irrelevant to constitutional adjudication, its just not determinative. Adoption history is merely a part "of the motley constellation that is constitutional interpretation."[279]

Living constitutionalists "are plagued by anxiety about the dead hand of the past –and think we need to update and affirm the document's underlying principles if it is to be binding on anyone living today."[280] This requires us to analyze the issue of fidelity to the constitutional project. Living constitutionalism may have been seen as a progressive methodology because of a shared view that the U.S. Constitution, because of its age and exclusive focus on structure and political rights (that is, because it is an old liberal democratic framework constitution that reflected the views of a more conservative era), had either become conservative or, at least, insufficient to meet the demands of the social realities of modern times. If that were so, then applying an originalist methodology would, as a practical matter, yield conservative results, because either the original intent, purposes, explications or even just the communicative content of the Constitution would either require conservative results or not allow progressive ones. As Peter Smith suggests, "non-originalism has long been animated by the concern that the Constitution…risks losing legitimacy today if

---

[275] Griffin, *supra* note 52, at 1209.

[276] Leib, *supra* note 11, at 354.

[277] *Id*. at 354-55.

[278] *Id*. at 358.

[279] *Id*.

[280] *Id*. at 359.

it cannot be read to embody modern, rather than anachronistic, values."[281] Adopting living constitutionalism, then is a political choice, not as to results necessarily, but as to the Constitution itself.

Of course, as I've stated repeatedly, this is context-specific: it is how originalism applies *as to the Constitution of the United States*. The opposite would be true in more progressive or socially-oriented constitutional structures. But, independent of actual substantive content, the point remains the same: originalism requires a greater fidelity to the original constitutional project than the living constitutionalist approach. When the old consensus breaks, living constitutionalism may find it easier to fill the void.

As developed in the United States, so-called living constitutionalism has been associated with an approach to interpretation that focuses on the constitution as a "high-minded statement of principles."[282] This is why some associate living constitutionalism with purposivist interpretation. For example, Stephen Gardbaum writes that the U.S. version of purposivism is living constitutionalism.[283] But, we already saw that some original intent approaches may actually lead to a purposivist method of interpretation. At the same time, a living constitutionalist approach may defeat original purpose. Justice Stevens dissent in *Heller* actually mixed *purposivism with originalism.*

As Manning states, living constitutionalism "presupposes that the constitution necessarily reflects broad articulations of principle and that interpreters should read it in that spirit."[284] But that is not inherent in the notion of a living constitution *per se*. Change, evolution and development, all features of a living organism, need not be intrinsically connected to high principles or progressive values. The U.S. experience with progressive living constitutionalism is not necessarily true worldwide. For example, Rosenthal states that living constitutionalist "make the more limited claim that *contemporary understandings* are of use in interpreting the broadest, most open-ended provisions in the Constitution."[285] First, it appears that living constitutionalism lives and dies on the existence of vague and content-less provisions, which are more likely to be found in older constitutions. Second, "contemporary understandings" may actually be more regressive and conservative than previous ones.

In the end, from a comparative perspective and as it pertains to constitutional theory as a general normative matter, and not a particular U.S.-centered issue, the originalism versus non-originalism dichotomy is not very helpful.[286]

---

[281] Smith, *supra* note 5, at 714.

[282] Manning, *supra* note 37, at 1755. *See also*, Solum, *supra* note 182, at 164.

[283] Stephen Gardbaum, *The Myth and The Reality of American Constitutional Exceptionalism*, 107 MICH. L. REV. 391, 411 (2008).

[284] Manning, *supra* note 37, at 1773.

[285] Rosenthal, *supra* note 35, at 1189 (emphasis added).

[286] *See* Smith, *supra* note 5.

(3) Teleological models

a. A General approach to the teleological model and the role of purpose

The teleological approach is not in opposition to either the originalist or non-originalist models that are currently debated in the United States. Nor does it have sufficiently adequate counterparts, although, as we are about to see, there could be, *in particular constitutional systems*, a correlation between original intent and the subjective teleological model on the one hand, and of some versions of non-originalism, or even original public meaning originalism, and the objective teleological approach. Intent can refer either, or simultaneously, to the objective purpose of a text or the subjective intent of its authors.[287]

We should be careful not to jump to simplistic conclusions. For example, some scholars believe that countries have rejected the originalist model because they have adopted a teleological approach to constitutional adjudication.[288] Others appear to believe that purposivism is outside the scope of originalism.[289] Sometimes purposivism is seen as synonymous with the so-called living constitutionalism approach.[290] I disagree. For one thing, purposivism can actually be more compatible with an originalist approach in some cases; there is no inherent link between living constitutionalism and a formal purposivist approach.

As such, it would be better to start our analysis of both teleological models with an introductory discussion of the teleological approach in general. Outside the United States, the general teleological approach is seen as one of the dominant

---

[287] Natelson, *supra* note 72, at 1255.

[288] *See* Coan, *supra* note 8, at 1067-68 (noting that "the limited comparative literature on constitutional interpretation suggests that [the originalist approach] is not the case…If anything the contrary is true… The comparative literature is too limited to make any confident claims about interpretive practices predominating among all countries with written constitutions."). The problem here is that (1) there is an emerging comparative literature that does suggest that some forms of originalism are, in fact, practiced by other constitutional systems –many of which, curiously, produce progressive instead of conservative results-; and, more importantly (2) that in many instances the actual originalist model *requires* teleological interpretation. Such can happen when the original intent is purposivist-looking or when we combine originalist methodology with teleological constitutional types. *See also* Ackerman, *supra* note 11, at fn. 202 ("This is not to say that the Germans, or other leading constitutional courts, have embraced anything like the mechanical jurisprudence of Justice Black or Justice Scalia. To the contrary, teleological interpretation is the dominant technique"). This statement may ring true as it pertains to more *text*-based originalist models, but would be problematic when mixing original intent with teleological constitutional types.

[289] SOLUM, *supra* note 11, at 150. Again, this could ring true if taking as a given that originalism as an interpretive tool only applies to communicative content. Such would not be the case for more intent based originalist models.

[290] Sujit Choudhry, *Living Originalism in India? 'Our Law' and Comparative Constitutional Law*, 25 YALE J. L. & HUMAN. 1, 18 (2013).

models of constitutional interpretation.[291] As Donald Kommers explains, "[t]he aim of this approach is to discover, and then put into effect, the end or 'telos' of the Constitution."[292] As we are about to see, there are two ways to go about this and it is the distinguishing factor between the two teleological models: the objective model which focuses on text and *what* it was designed to do, and the subjective model which focuses on the authors and *why* they adopted the text.

The teleological models are premised on the notion that constitutional provisions are meant to do something and that, almost inherently, text can, or even should, only take us so far. Like Robert Bennett states, law is a purposive enterprise.[293]

But, instead of what happens when you adopt the interpretation-construction distinction, *they do not separate text from its purpose*. In general, the teleological method argues that constitutional adjudication must "draw on [the] values and purposes written into the constitutional text by its Framers."[294] In simpler terms, it is a purposivist approach to interpretation. We already discussed the role of purpose in the previous models: in the non-originalist models, purpose was *one* of many factors; in the original public meaning model, purpose comes after communicative meaning; in the original intent model, intent includes much more than purpose and is connected to the text. But now, in the teleological approach, purpose is the *main* source of meaning and effect. In fact, purpose may even trump the ordinary linguistic meaning of the text, which rarely happens in the U.S. models, albeit arguably some original intent approaches may actually require it.[295] Finally, it should be noted that this general model allows for greater use of structural and systematic arguments, including social, political and legal contexts.[296]

As we are about to see, the particular articulations of the general teleological model differ on *how* to ascertain purpose: the *objective* model and the *subjective* approach.

b. Objective teleological model

In this model, purpose is to be ascertained objectively. This does *not* refer to either the objective *meaning* of *words* or to the *subjective* purposes of the makers,

---

[291] Jamal Greene, *On the Origins on Originalism*, 88 TEX. L. REV. 1, 5 (2009).

[292] GOLDSWORTHY, *supra* note 3, at 200. Building on the notion that teleological interpretation is different from U.S. originalism, Kommers stresses that the teleological model, which seeks "interpretive guidance from the history and spirit of the constitution as a whole…[is] not to be confused with historical intent." *Id*. I'm not so sure.

[293] BENNETT, *supra* note 11, at 178.

[294] Coan, *supra* note 8, at 1068.

[295] *See* Solum, *supra* note 26, at 118 (identifying the open question as to whether there is any case where construction can or should override linguistic meaning).

[296] *See* Jakab, *supra* note 27, at 1233.

but to an objective analysis of the *purposes of the text*.[297] The purpose of the words (object) of the constitution are the primary focus, instead of the purposes motivating the framers (subject). According to András Jakab, the concept of *objective* "simply refers to the origin of the purpose: we establish it on the bases of an object…not on the basis of a subject."[298] The text is the object while the author is the subject.

(1) Text as purpose and purpose from text

The objective teleological model derives purpose from the text itself. In that sense, it is textualist and purposivist at the same time. First, its main source of interpretation is the text itself, which makes it somewhat textualist in its approach. But, it does not stop at the semantic meaning of the text, which distinguishes it from the more common textualist approaches. In an interesting twist to the interpretation-construction distinction, the objective teleological model derives purpose *from the text* which, in turn, *influences how that text is interpreted and applied*. In that sense, it modifies the interpretation-construction distinction of original public meaning originalism so that the initial step of communicative interpretation *takes into account purpose when carrying out that interpretation*. This is very similar to the view of text as intent we saw earlier.[299] In this scenario, the core proposal is to simultaneously see text *as* purpose and to identify purpose *from* text.

Also, because text-derived purpose is the driving force of constitutional meaning, an ascertained general purpose of a text can override the specific intention of its authors.[300] This is because when a legislative body, like a constitutional convention, adopts a particular provision, the body is voting on the proposed *words* and not on "what anybody said about it."[301] In that sense, the text-centered approach carried out by the objective teleological model "is not necessarily inconsistent with the position that the intentions of the lawmaker are the proper objet of interpretation, *just a different way of searching for their intentions*."[302] As such, there is a conceptual objection to the use of legislative history, keeping in mind that rejection of this type of source "does not necessarily entail a rejection of the authority of the original intentions."[303] Purposes are still relevant, in fact determinative, but the *source* of that purpose is the *text*. But, the force of purpose is such that it can influence the

---

[297] Colby, *supra* note 55, at 252 (commenting on the shift from subjective to objective analysis in originalism). This refers to the shift between intent and semantic meaning. Here, we are referring to an objective analysis of purpose, not just semantic content.

[298] Jakab, *supra* note 27, at 1241-42.

[299] *See* Powell, *supra* note 34, at 895 (in reference to using text as a source of intent).

[300] Bennett 130, *supra* note 11.

[301] *Id.* at 90.

[302] Kay, *supra* note 6, at 274 (emphasis added).

[303] *Id*.

semantic meaning of the words, either to contract or expand it, or even to contradict it: "[This thesis] presupposes that there is some inherent purpose of the text beyond what is written in it, and that this purpose can be followed even against the text."[304] This phenomenon takes place in both framework and teleological constitutional systems. But, it would appear that there is a stronger case for this model in the latter in relation to the former. In summary, this is a textually-focused, purposivist approach to interpretation.

(2) History

As a text-based model, the objective teleological approach gives less weight, if any at all, to historical sources. Unlike textualists or original public meaning originalists, the objective teleological model does not treat words as disassociated from their purpose. But, like textualists and unlike public meaning originalists, this approach is more resistant to engaging in historical inquiry. Purpose is key to giving meaning to text, but that purpose stems from the text itself, not other extra-textual sources. As Balkin states, "the purpose of a constitutional provision, like the purpose of a statute, need not be the same as the intentions of the persons who drafted or adopted it."[305]

As a result, there is a lot of *court driven* purposivist interpretation, which directly clashes with the traditional originalist position which wishes to eliminate a court's ability to decide for itself the meaning of constitutional text. Because purpose will be ascertained from text, not history or intent, the court plays a central role in this regard. In scenarios such as these, there would seem to be some correlation between this model and the so-called living constitutionalist approach. As Gardbaum explains that "[t]he purposive or teleological approach to constitutional interpretation is, roughly speaking, an approach that looks to the *present* goals, values, aims, and functions that the constitutional text is *designed to achieve*."[306] Although he makes reference to the teleological model, in general terms, his description fits in with the objective model, while it would be inaccurate as to the subjective version. Finally, Jakab explains the different methods of identifying purpose under this model: "[O]bjective purpose can be inferred directly from the text…or indirectly on the basis of it, like the presumable intention of an assured abstract author."[307]

Yet, a modification of this model could be made to make it more compatible, for example, with original public meaning originalism by way of the interpretation-construction distinction. This could be achieved by substituting *court*-centered

---

[304] Jakab, *supra* note 27, at 122.

[305] Balkin, *supra* note 25, at 663.

[306] Gardbaum, *supra* note 283, at 410 (emphasis added).

[307] *Id*. at 1241.

purposive interpretation of the text to a *historical*-centered inquiry as to what was the shared communicative understanding of the text *as to its purpose*. Because it focuses on purpose as opposed to only communicative content, it is still teleological. And because it identifies that purpose through the historically-based communicative content of the text, it is still objective.

(3) Uses

Writing about the Anglo-American experience, Natelson states that "[s]ometimes the courts did speak and act as if they were constructing an *objective* statutory 'intent' rather than following the legislator's *subjective* intent."[308] This was done when there was "no available evidence of subjective intent other than the words of the enactment and other legal materials" or "where the court knew the legislator's *general* intent, but there was no specific intent because a subsequent state of facts had not been foreseen."[309] According to Natelson, this narrows the gap between the two teleological models.[310] Finally, Powell states that "[a]t common law, then, the 'intent' of the maker of a legal document and the 'intent' of the document itself *are one and the same*."[311]

Many objections have been raised against this model. András Jakab mentions some of them: (1) the same text can have several, even contradictory, purposes; (2) the empirical problem of determining the *best* result; (3) it does not account for intention-less text; and (4) that there are no abstract authors, but real ones.[312]

c. Subjective teleological model

Here, purpose is also the driving force, but the main source of purpose is not the object (words) but the subject (author).[313] It is very similar to the original intent models, given the proximity of intent and purpose. As such, it is very important that we distinguish between the two teleological models (objective and subjective), because failing to do so may be problematic. For example, Gardbaum writes that, in the United States, "the greater emphasis is on historical understandings of the text, particularly on original intent" *in opposition to* "the relatively rarity and questionable legitimacy of employing a 'teleological' or purposive mode of interpretation that is

---

[308] Natelson, *supra* note 72, at 1286 (emphasis added).

[309] *Id*. (emphasis added).

[310] *Id*.

[311] Powell, *supra* note 34, at 895 (emphasis added).

[312] Jakab, *supra* note 27, at 1245.

[313] Here the subjectivity does not refer to the court, but to the constitution-maker. *See Id*. at 1246 (making reference to "the actual purpose or intention of the constitution maker.").

common in many other countries.[314] First, this may be true if by the teleological model he refers to the *objective* teleological approach that some Western European countries use.[315] But, in the case of the *subjective* teleological approach, it may be very similar to the original intent model. Second, as we will see in Part II, *applying original intent methods to teleological constitutions may actually require purposivist analysis*. Garbaum writes that "[i]t is obviously a curious fact that constitutional courts elsewhere, when interpreting the provisions of relatively recent constitutions –including some written in the last decade- should generally eschew an interpretive method (ie, originalism) so heavily relied upon by a court interpreting a 219-year-old- document."[316]

(1) Text

The subjective teleological model does not ignore text, particularly when it is clear and specific enough to require direct application, like in the case of legal rules. But here text is not always the primary source of constitutional meaning, particularly in the process of adjudication and the assignment of legal content to constitutional provisions. Text is to be interpreted *through* the expressed purposes of the framers. In that regard, it is very similar to the original explication approach discussed earlier. The principal difference between them, is that the subjective teleological model focuses primarily on *purpose*, while the original explication approach takes a broader look and treats the *general expressions* of the founders, as included in the formal record, as binding in themselves, independent of purpose. But, in both cases, text is merely the instrument of the framers' design, be it their purposes and goals, or a more general approach to intent. Furthermore, and unlike some originalists, here purpose can actually trump text.

(2) Purpose

As with the objective teleological approach, the subjective model gives central importance to purpose in the process of giving legal effect the constitution. But the

---

[314] Gardbaum, *supra* note 283, at 396. He repeats his proposal later on, writing that in the United States there is a "greater use and importance of history –in particular, original intent and/or understanding- and the lesser use and legitimacy of the 'purposive' or 'teleological' method of reasoning that is common, and often dominant, elsewhere." *Id*. at 410.

[315] *See also* Greene, *supra* note 291, at 33 ("But the substantive differences between Canadian and American rights jurisprudence are minor compared to the *methodological* and *rhetorical* gulf separating the two Supreme Courts") (emphasis added). The apparent world-wide gulf is much narrower. It seems like, some scholars equate the teleological model with its objective articulation. *See* Jakab, *supra* note 27, at 1227.

[316] Gardbaum, *supra* note 283, at 410.

source of that purpose is different. Instead of deriving purpose from the object of the text, purpose is derived from the authors of the text. As we saw, this is very similar to the original intent model, particularly the original explication articulation. This similarity reaches its high water mark in the context of teleological constitutions that, in turn, were the product of a high-level democratic process that included a heavily engaged public and different forms of popular participation and that generated a strong social consensus in favor of the legitimacy and authority of the constitutional project and the process of its creation.

The subjective teleological approach is similar to the original intent model. Both focus on the actions of the authorized lawmaker and the *process* and *reasons* that generated the final text. They are both intentionalists in this regard.[317] But here purpose reigns more supreme than original intent, particularly as to its relation with text. According to Jakab, this model has two main articulations of purpose: (1) what the constitution-maker *intended* at the particular historical moment; and (2) what the constitutional maker *would* say today, among the altered historical circumstances."[318] This is reminiscent of the discussion about original intent and original expected applications we saw earlier.

(3) History

Because purpose is not objectively derived from the text, which could be done in a more abstract, court-driven fashion, the subjective teleological model gives greater weight to history, particularly adoption history. Like with original intent, the subjective teleological model looks to the framers for meaning and that search is historic in nature. Also like its counterpart in the originalist family, this model is related to the "authority of the lawmaker."[319] Here fidelity to the constitutional project is strongest. Using the subjective purposes of the framers is not "because one thinks that the constitution-maker knows better than anyone else how to interpret the provision, but simply because it is her interpretation."[320] This model believes that "normally the constitution-maker has stronger legitimacy, being closer to the source of sovereignty, than those interpreting or applying it."[321]

Unlike many originalists in the United States, it appears that the subjective teleological model *does* take history with its corresponding historicism. In that sense, history is contextualized and given independent force, with its corresponding

---

[317] Berman, *supra* note 42, at 39.

[318] Jakab, *supra* note 27, at 1246.

[319] Kay, *supra* note 6, at 233.

[320] Jakab, *supra* note 27, at 1246 (internal quotes omitted) (emphasis omitted).

[321] *Id*.

[322] Rosenthal, *supra* note 35, at 1191.

emphasis on economic factors, social conflicts and collective aspirations. As such, not only are the framers' purposes determinative as to the meaning of text, but that purpose is understood as being influenced by the social forces and historical context present at the moment of adoption.

(4) Uses

It is worth noting that there have been scholars that have linked this teleological model with U.S. originalism, making reference to the "purposivist brand of originalism, in which textual meaning is based on the original intentions underlying the constitutional text."[322] This would seem to link this model with original intent. In Part II we take a broader look at how this has occurred in other constitutional types, even if the term *originalism* is never used.[323]

Some objections to this model are familiar. For example, situations where the framer purposively left an issue open for future development: "The constitution-maker may even have intended to leave a question open."[324] Another example is the objection to the almost impossible task of empirically ascertaining an excepted application under changed circumstances.[325] But these don't seem to challenge the basic premise of the model; they just identify some spots where it will not be sufficient to get the entire job done. For example, in the delegation scenario, there the subjective intent was to, precisely, leave the issue open. In such a case, a court will not be able to use the subjective model all the way, and will have to use an alternative approach, *precisely in order to comply with the original purpose*. As to the second example, a court may well distinguish the original *purpose* as expressed by the framers and the original *applications* of those purposes. The teleological approach would seem to favor the former over the latter. But even if original applications were actually binding, a court is still empowered to determine if the original factual assumptions changed. If not, of course, then courts should read the expected application as part of the purpose, and simply enforce it. This is similar to the original explication model.

Other objections are less methodological and related more to fidelity to the constitutional *project*. For example, Jakab writes that "[t]he legislature speaks through the written text, not her assured intention."[326] As a result, "[t]he Constitutional Court…is bound by the text of the Constitution only, it cannot consider the assured intent of those drafting the Constitution…when seeking to find firm ground for the legitimacy of a decision."[327] The problem with this assertion is that is takes as a

---

[323] Varol, *supra* note 118, at 1263.

[324] Jakab, *supra* note 27, at 1247.

[325] *Id*.

[326] *Id*. at 1248.

[327] *Id*.

given that referring to the subjective intent of the framers *reduces* legitimacy. But, as it applies to certain teleological constitutions that are the result of a constitutional process that still gives the original framers authority, this recourse can actually *add* legitimacy.[328] Jakab proposes that we "reformulate, if possible, the subjective teleological arguments into objective teleological arguments."[329] This is reminiscent of the shift from original intent to original meaning. But here, the proposed shift is plainly grounded on the *conceptual* position that it is more *legitimate* to refer to text than to intentions. That, of course, *will necessarily depend on the continued level of fidelity, authority and legitimacy of the framers themselves*.

III. Conclusion

In this Article, we analyzed the main methods of interpretation used in modern constitutional systems. In particular, we focused on issues such as their view of text, purpose and history. But, we also saw that methods are not inherently substantive nor do they directly create results; they are merely the procedural element of constitutional adjudication. Constitutional types provide the substantive content. The key then, is to analyze how these models interact with the constitutional types.

---

[328] Compare with Michel Rosenfeld's analysis that "[a] closer look at the reasons for the importance of originalism in the United States, and the practical implications of the theoretical controversy over originalism, reveals that the main concern is *not* with the democratic legitimacy of judicially enforced constitutional constraints…[but it] arises…from a concern over the democratic legitimacy of subjecting majoritarian laws to constitutional review." (emphasis added) Michel Rosenfeld, *Constitutional Adjudication in Europe and the United States: Paradoxes and Contrasts*, 2 INT'L J. CONST. LAW 1, 38 (2004). This is due, he claims, to the relative lower degree of veneration that European constitutions have when comparted to the U.S. text.

[329] Jakab, *supra* note 27, at 1249. It would seem that Jakab is referring to constitutional systems where the constitution is not as venerated as in the U.S. *Id*. at 1274. But constitutional veneration is not an exclusive U.S. feature.

GREENING CONSTITUTIONS: A CASE FOR JUDICIAL ENFORCEMENT OF CONSTITUTIONAL RIGHTS TO ENVIRONMENTAL PROTECTION

*Luis José Torres Asencio**

I. Introduction

Environmental protection concerns have joined the catalogue of domestic constitutional rights all over the world. As of recent counts, over 145 countries have included environmental protection provisions in their new constitutions or have amended existing ones to include them.[1] While some of these provisions have been drafted to be judicially unenforceable,[2] be it by specifically stating so or by classifying them as 'aspirational' or directive principles of State

* Adjunct Professor, Inter American University of Puerto Rico Faculty of Law. B.A., Inter American University of Puerto Rico; J.D., University of Puerto Rico School of Law; LL.M., Harvard Law School. An original version of this paper was prepared as the written work requirement for completion of the author's LL.M. degree, under the supervision of Professor Mark V. Tushnet. I would like to thank professors Tushnet, Richard J. Lazarus and Frank Michelman for giving me their time, as well as their thoughtful comments and insight, in several conversations pertaining to various topics discussed in this paper, as well as professors and colleagues Jane Bestor, Jason Anthony Robison, Joan Solanes Mullor, Myrta Morales Cruz, Pedro Juan Cabán Vales, Verónica González Rodríguez and Héctor Sueiro Álvarez for their invaluable comments in the drafting of this article. Any errors and oversights, of course, are my own.

[1] David R. Boyd, The Environmental Rights Revolution: A Global Study of Constitutions, Human Rights, and the Environment 47 (2012). *See also* James R. May, *Constituting Fundamental Environmental Rights Worldwide*, 23 Pace Envtl. L. Rev. 113, 129-33, 146-82 (2006).

[2] Boyd, *supra* note 1, at 53-57 (identifying ninety-two constitutions with substantive environmental rights).

policy,[3] the highest courts in more than a dozen countries have interpreted their respective constitutional environmental rights to be enforceable.[4] In fact, some courts have enforced environmental protection rights, even though they are not explicitly recognized in their constitutions,[5] or they are drafted as unenforceable directive principles.[6]

What about the United States? During the period of creation of modern environmental protection law during the latter parts of the 1960s and the early 1970s, several proposals for a federal constitutional amendment to recognize a right to a healthful environment were presented before Congress.[7] When these failed,

---

[3] Randall S. Abate, *Climate Change, the United States, and the Impacts of Arctic Melting: A Case Study in the Need for Enforceable International Environmental Human Rights*, 26A STAN. ENVTL. L.J. 3, 26 (2007); May, *supra* note 1, at 136. Spain's Constitution, for instance, includes a right to a healthy environment, but another provision states that such a right is not self-executing. RAÚL CANOSA USERA, CONSTITUCIÓN Y MEDIO AMBIENTE (2000); DEMETRIO LOPERENA ROTA, EL DERECHO AL MEDIO AMBIENTE ADECUADO (1st reprint, 1998); MAR AGUILERA VAQUÉS, EL DESARROLLO SOSTENIBLE Y LA CONSTITUCIÓN ESPAÑOLA (2000).

[4] *See, e.g.*, Alberto Ricardo Dalla Via, *Derecho ambiental en Argentina: La reforma constitucional de 1994 y el Medio Ambiente*, *in* DERECHO COMPARADO DEL MEDIO AMBIENTE Y DE LOS ESPACIOS NATURALES PROTEGIDOS 285 (Gerardo Ruiz-Rico Ruiz coord., 2000) (Argentina); Merideth D. Delos Santos, *Is There a Right to a Healthful Environment?*, *in* SOCIAL JUSTICE AND HUMAN RIGHTS IN THE PHILIPPINES 384 (Alberto T. Muyot ed., 2003) (Philippines); José Antonio Ramírez Arrayás, *Derecho ambiental en Chile: Principales elementos de la institucionalidad e interpretación jurisdiccional de la evolución ambiental*, *in* DERECHO COMPARADO DEL MEDIO AMBIENTE Y DE LOS ESPACIOS NATURALES PROTEGIDOS, *supra* note 4, at 201 (Chile); JULIO CÉSAR RODAS MONSALVE, FUNDAMENTOS CONSTITUCIONALES DEL DERECHO AMBIENTAL COLOMBIANO 31-107 (1995) (Colombia); ÁLVARO SAGOT RODRÍGUEZ, LOS PRINCIPIOS DEL DERECHO AMBIENTAL EN LAS RESOLUCIONES DE LA SALA CONSTITUCIONAL (2000) (Costa Rica).

[5] Clíona Kimber, *Public Environmental Law in Ireland*, *in* PUBLIC ENVIRONMENTAL LAW IN THE EUROPEAN UNION AND THE UNITED STATES: A COMPARATIVE ANALYSIS 247, 250 (René J.G.H. Seerden, Michiel A. Heldeweg, Kurt R. Deketelaere, eds., 2002) (Ireland); Martin Lau, *Islam and Judicial Activism: Public Interest Litigation and Environmental Protection in the Islamic Republic of Pakistan*, *in* HUMAN RIGHTS APPROACHES TO ENVIRONMENTAL PROTECTION 285 (Alan E. Boyle & Michael R. Anderson eds., 1998) (Pakistan); Massimiliano Montini, *Public Environmental Law in Italy*, *in* PUBLIC ENVIRONMENTAL LAW IN THE EUROPEAN UNION AND THE UNITED STATES: A COMPARATIVE ANALYSIS, *supra* note 5, at 283-84 (Italy).

[6] VASANTHI NIMUSHAKAVI, CONSTITUTIONAL POLICY AND ENVIRONMENTAL JURISPRUDENCE IN INDIA 67-157 (2006); P LEELAKRISHNAN, ENVIRONMENTAL LAW IN INDIA 193-226 (2nd ed. 2005); BIJAY SINGH SIJAPATI, ENVIRONMENTAL PROTECTION LAW AND JUSTICE (WITH SPECIAL REFERENCE TO INDIA & NEPAL) 37-46 (2003); Deepa Badrinarayana, *The Emerging Constitutional Challenge of Climate Change: India in Perspective*, 19 FORDHAM ENVTL. L. REV. 1, 17-27 (2009); Kelly D. Alley, *Legal Activism and River Pollution in India*, 21 GEO. INT'L ENVTL. L. REV. 796-97 (2009); D.M. Dharmadhikari, *Development and implementation of environmental law in India*, *in* JUDGES AND THE RULE OF LAW: CREATING THE LINKS: ENVIRONMENT, HUMAN RIGHTS AND POVERTY 23 (Thomas Greiber ed., 2006); Michael R. Anderson, *Individual Rights to Environmental Protection in India*, *in* HUMAN RIGHTS APPROACHES TO ENVIRONMENTAL PROTECTION, *supra* note 5, at 199.

[7] H.R.J. Res. 1205, 91st Cong. (1970); S.J. Res. 169, 91st Cong. (1970); H.R.J. Res. 1321, 90th Cong. (1968); H.R.J. Res. 954, 90th Cong. (1967). Proposals for amendments were again presented at other moments in the 1970s and 1980s, and are still regularly presented before the House of Representatives.

environmental groups invited federal courts to acknowledge the existence of such a right under the Fifth, Ninth and Fourteenth Amendments, with equally unsuccessful results.[8]

H.R.J. Res. 33, 111th Cong. (2009); H.R.J. Res. 33, 110th Cong. (2007); H.R.J. Res. 33, 109th Cong. (2005); H.R.J. Res. 33, 108th Cong. (2003); H.R.J. Res. 33, 107th Cong. (2001); H.R.J. Res. 519, 102nd Cong. (1992). For a discussion many of these, and additional efforts, *see* Rebecca M. Bratspies, *The Intersection of International Human Rights and Domestic Environmental Regulation*, 38 GA. J. INT'L & COMP. L. 649, 659 (2010); Ernst Brandl & Hartwin Bungert, *Constitutional Entrenchment of Environmental Protection: A Comparative Analysis of Experiences Abroad*, 16 HARV. ENVTL. L. REV. 1, 14-15 (1992); Richard O. Brooks, *A Constitutional Right to a Healthy Environment*, 16 VT. L. REV. 1063, 1063-64 (1991-1992) (hereinafter, Brooks, *A Constitutional Right*); Lynton K. Caldwell, *The Case for an Amendment to the Constitution of the United States for Protection of the Environment*, 1 DUKE ENVTL. L. & POL'Y F. 1, 2 (1991); Carole L. Gallagher, *The Movement to Create an Environmental Bill of Rights: From Earth Day, 1970 to the Present*, 9 FORDHAM ENVTL. L.J. 107, 120-22 (1997); Daveed Gartenstein-Ross, *An Analysis of the Rights-Based Justification for Federal Intervention in Environmental Regulation*, 14 DUKE ENVTL. L. & POL'Y F. 185, 191 (2003); Dan L. Gildor, *Preserving the Priceless: A Constitutional Amendment to Empower Congress to Preserve, Protect, and Promote the Environment*, 32 ECOLOGY L.Q. 821, 823 (2005); Barry E. Hill, Steve Wolfson & Nicholas Targ, *Human Rights and the Environment: A Synopsis and Some Predictions*, 16 GEO. INT'L ENVTL. L. REV. 359, 389-90 (2004); John L. Horwich, *Montana's Constitutional Environmental Quality Provisions: Self-Execution or Self-Delusion?*, 57 MONT. L. REV. 323, 330 (1996); Bruce Ledewitz, *Establishing a Federal Constitutional Right to a Healthy Environment in US and in our Posterity*, 68 MISS. L.J. 565, 611-13 (1998); Neil A.F. Popovic, *Pursuing Environmental Justice with International Human Rights and State Constitutions*, 15 STAN. ENVTL. L.J. 338, 346-47 (1996); J.B. Ruhl, *An Environmental Rights Amendment: Good Message, Bad Idea*, 11 NAT. RESOURCES & ENV'T. 46, 46-47 (1996-1997) (hereinafter Ruhl, *An Environmental Rights Amendment*); J.B. Ruhl, *The Metrics of Constitutional Amendments: And Why Proposed Environmental Quality Amendments Don't Measure Up*, 74 NOTRE DAME L. REV. 245, 247-50 (1999) (hereinafter Ruhl, *The Metrics of Constitutional Amendments*); Joseph L. Sax, *The Search for Environmental Rights*, 6 J. LAND USE & ENVTL. L. 93, 93 n.3 (1990); Rodger Schlickeisen, *Protecting Biodiversity for Future Generations: An Argument for a Constitutional Amendment*, 8 TUL. ENVTL. L.J. 181, 183 (1994); Barton Thompson, Jr., *Constitutionalizing the Environment: The History and Future of Montana's Environmental Provisions*, 64 MONT. L. REV. 157, 157-58 (2003); Mary Ellen Cusack, Comment, *Judicial Interpretation of State Constitutional Rights to a Healthful Environment*, 20 B.C. ENVTL. AFF. L. REV. 173, 175-76 (1993); Robert McLaren, Comment, *Environmental Protection Based on State Constitutional Law: A Call for Reinterpretation*, 12 U. HAW. L. REV. 123, 124-25 (1990).

[8] Stop H-3 Ass'n v. Dole, 870 F.2d 1419, 1429-30 (9th Cir. 1989); Ely v. Velde, 451 F.2d 1130, 1139 (4th Cir. 1971); *In Re* Agent Orange, 475 F. Supp. 928, 934 (E.D.N.Y. 1979); Fed. Employees for Non-Smokers' Rights v. United States, 446 F. Supp. 181, 183-85 (D.D.C. 1978); Hawthorne Envtl. Preservation Ass'n v. Coleman, 417 F. Supp. 1091, 1095 (N.D. Ga. 1976), *aff'd* 551 F.2d 1055 (5th Cir. 1977); Pinkney v. Ohio Envtl. Protection Agency, 375 F. Supp. 305, 309-11 (N.D. Ohio 1974); Hagedorn v. Union Carbide Corp., 363 F. Supp. 1061, 1064-65 (N.D. W. Va. 1973); Tanner v. Armco Steel Corp., 340 F. Supp. 532, 534-38 (S.D. Tex. 1972); Environmental Defense Fund v. Corps of Engineers, 325 F. Supp. 728, 738-39 (E.D. Ark. 1971). For discussions of the arguments presented, and the court pronouncements in these cases, *see* Brandl & Bungert, *supra* note 7, at 21-23; Brooks, *A Constitutional Right*, *supra* note 7, at 1068-70; Janelle P. Eurick, *The Constitutional Right to a Healthy Environment: Enforcing Environmental Protection Through State and Federal Constitutions*, 11 INT'L. LEGAL PERSP. 185, 211-14 (2001); Gallagher, *supra* note 7, at 109-19; Gartenstein-Ross, *supra* note 7, at 191 n.27, 193-98; Hill, Wolfson & Targ, *supra* note 7, at 390-91; Horwich, *supra* note 7, at 330; Ledewitz, *supra* note 7, at 608-11; Barton H. Thompson, Jr., *Environmental Policy and State*

Parallel to and sometimes even predating these efforts, most state and territorial constitutions have been amended or drafted to include environmental protection clauses or provisions. In fact, forty-five states now have some type of constitutional environmental provision,[9] ranging from clauses that recognize abstract, substantive rights to a clean or healthy environment; 'public trust' provisions; resource specific environmental protection sections; and 'directive principles' clauses that expound some type of affirmative governmental policy or duty for the protection of the environment; and many others.[10] Yet, while success has been achieved in writing these provisions into state constitutions, efforts to have courts enforce them have not yielded the same results. Most state courts have declined invitations to interpret their respective constitutional environmental protection provisions so as to create judicially cognizable claims or as to limit public or private actions that affect the environment.[11] Even many state courts that have acknowledged the possibility of

Constitutions: The Potential Role of Substantive Guidance, 27 RUTGERS L.J. 863, 919 (1996); Cusack, *supra* note 7, at 176-79; McLaren, *supra* note 7, at 125; Oliver A. Pollard, III, Note, *A Promise Unfulfilled: Environmental Provisions in State Constitutions and the Self-Execution Question*, 5 VA. J. NAT. RESOURCES L. 351, 352-53 (1986).

[9] ALA. CONST. art. I, § 24, amend. 543; ALASKA CONST. art. VIII; ARIZ. CONST. art. XVII; ARK. CONST. amends. 35, 75; CAL. CONST. arts. I, § 25, X, XA, XB; COLO. CONST. arts. XVI, XVIII, §§ 2, 12b, XXVII; FLA. CONST. arts. II, § 7, X, § 16; GA. CONST. art. III, § VI ¶ II(a)(1); HAW. CONST. arts. IX, § 8, XI; IDAHO CONST. arts. VIII, § 3A, XV; ILL. CONST. art. XI, §§ 1-2; IOWA CONST. arts. I, § 24, VII, § 9; KAN. CONST. arts. XI, § 9, XV, § 9; LA. CONST. arts. VII, IX; ME. CONST. arts. I, § 1, IX, § 23; MASS. CONST. arts. XLI, § 143, XLIX, § 179; MICH. CONST. arts. IV, § 52, IX, § 35-36, X, § 5; MINN. CONST. arts. X, § 2, XI, § 10-11, 14; MISS. CONST. art. IV, § 81; MO. CONST. arts. III, § 37(b), IV, §§ 40(a), 47; MONT. CONST. arts. II, § 3, IX, §§ 1-4, X, §§ 2, 4, 11; NEB. CONST. arts. III, § 20, VIII, § 2, XV, § 4; NEV. CONST. art. X, § 1; N.H. CONST. part. II, art. V; N.J. CONST. arts. VIII, §§ 1-2, 5; N.M. CONST. arts. XVI, §§ 1-3, XX, § 21; N.Y. CONST. arts. I, § 7, XIV; N.C. CONST. arts. V, § 9, XIV, § 5; N.D. CONST. arts. X, XI, § 3; OHIO CONST. arts. II, § 36, VIII, § 20; OKLA. CONST. art. X, § 39; OR. CONST. arts. XI-D-XI-E, XI-H-XI-I, XV, § 4; PA. CONST. arts. I, § 27, VIII, §§ 15-16; R.I. CONST. art. I, § 17; S.C. CONST. art. XII, § 1; S.D. CONST. arts. XIII, § 14, XXI, §§ 6-7; TENN. CONST. art. XI, §§ 8, 13; TEX. CONST. arts. XVI, § 59, XVII, § 1; UTAH CONST. arts. XVII, § 1, art. XVIII, § 1; VT. CONST. ch. II, § 67; VA CONST. art. XI, §§ 1-3; WASH. CONST. arts. VIII, § 10, XV, § 1-3, XVII, § 1-2, XXI, § 1; W. VA. CONST. art. VI, § 53; WIS. CONST. arts. VIII, §§ 1, 10, IX, §§ 1-3; WYO. CONST. arts. I, § 31, VIII, §§ 1-5, XIII, § 5. *See, e.g.*, *Environmental and Natural Resources Provisions in State Constitutions*, 22 J. LAND RESOURCES & ENVTL. L. 73, 74 (2002) ("Most state constitutions contain provisions expressly addressing natural resources and the environment. In total, our research has uncovered 207 state constitutional provisions relating to natural resources and the environment in 46 state constitutions."). Although that article counts forty-six states as having constitutional provisions, it only cites clauses from forty-four states, and it does not include Georgia's constitutional provision, an express grant of power to the Legislative Branch (General Assembly) to restrict land uses "in order to protect and preserve the natural resources, environment, and vital areas of [the] state." GA. CONST. art. III, § VI, ¶ II(a)(1).

[10] *Environmental and Natural Resources Provisions in State Constitutions*, *supra* note 9, at 74-75 (identifying nineteen different substantive areas covered by state environmental constitutional provisions and eleven different types of clauses).

[11] *See* City of Elgin v. County of Cook, 660 N.E.2d 875 (Ill. 1996); Robb v. Shockoe Slip Foundation, 324 S.E.2d 674 (Va. 1985); Payne v. Kassab, 361 A.2d 263, 272 (Pa. 1976); Commonwealth v. National Gettysburg Battlefield Tower, 311 A.2d 588, 593 (Pa. 1973).

enforcement, like Louisiana, have established highly deferential standards of review and thus, have yet to find violations to their provisions.[12]

This article focuses on the debates about providing judicial enforcement for constitutional environmental protection provisions in the United States.[13] While some scholars and environmental activists continue to advocate for the constitutionalization and judicial enforcement of environmental protection rights,[14]

---

[12] *See* Save Ourselves v. Louisiana Environmental Control Commission, 452 So.2d 1152 (La. 1984).

There are, however, some exceptions. For instance, the Montana Supreme Court has held that the state's constitutional environmental protection rights provisions not only are enforceable, but also that state or private actions that implicate those rights are subject to strict scrutiny analysis. Montana Envtl. Info. Ctr. v. Dep't of Envtl. Quality, 988 P.2d 1236, 1246 (Mont. 1999); Cape-France Enterprises v. Estate of Peed, 29 P.3d 1011, 1016-17 (Mont. 2001). *But see* Lohmeier v. Gallatin County, 135 P.3d 775, 778 (Mont. 2006); N. Plains Res. Council, Inc. v. Mont. Bd. of Land Comm'rs, 288 P.3d 169, 174-75 (Mont. 2012). Pennsylvania and Alaska are two other state jurisdictions which have given their respective constitutional provisions new life as enforceable constitutional commitments. See Robinson Twp., Washington Cty. v. Com., 83 A.3d 901 (Pa. 2013) (holding that Article 1, section 27 of the Pennsylvania Constitution is self-executing); Sullivan v. Resisting Envtl. Destruction on Indigenous Lands (REDOIL), 311 P.3d 625, 637 (Alaska 2013) (holding that the State has a constitutional duty to take a hard look at a project's cumulative environmental impacts).

As I will discuss, I believe that these cases serve as examples of how courts can shift from weak to strong judicial enforcement of certain rights, as they gain experience and confidence adjudicating constitutional claims that implicate those rights. *See* MARK TUSHNET, WEAK COURTS, STRONG RIGHTS: JUDICIAL REVIEW AND SOCIAL WELFARE RIGHTS IN COMPARATIVE CONSTITUTIONAL LAW 263-64 (2008) (arguing that "weak-form review can be replaced by strong-form review when enough experience has accumulated to give us–judges, legislators, and the people alike–confidence that giving the judges the final word will not interfere with our ability to govern ourselves in any significant way").

[13] While this article is dedicated to the debates related to judicial enforcement of existing constitutional environmental rights in state constitutions, some of the discussions are also relevant for the debates about constitutionalizing and enforcing environmental protection rights at the federal level.

A related consideration deals with whether a political case can be made for the constitutionalization of environmental protection rights in liberal constitutional democracies. While this is an interesting and important issue, *see, e.g.,* DEMOCRACY AND GREEN POLITICAL THOUGHT: SUSTAINABILITY, RIGHTS AND CITIZENSHIP (Brian Doherty & Marius de Geus eds., 1996); TIM HAYWARD, CONSTITUTIONAL ENVIRONMENTAL RIGHTS (2005) (hereinafter HAYWARD, CONSTITUTIONAL ENVIRONMENTAL RIGHTS); JOHN HANCOCK, ENVIRONMENTAL HUMAN RIGHTS: POWER, ETHICS, AND LAW (2003); GRAHAM SMITH, DELIBERATIVE DEMOCRACY AND THE ENVIRONMENT (2003), I do not address it in this paper. Rather, for the purposes of the paper, I assume that a strong case can be made for inclusion of environmental protection rights as part of the catalogue of 'fundamental rights,' and focus instead on the objections to judicial enforcement of said rights.

[14] Brooks, *A Constitutional Right*, *supra* note 7; Richard O. Brooks, *A New Agenda for Modern Environmental Law*, 6 J. ENVTL. L. & LITIG. 1, 16-18 (1991) (hereinafter Brooks, *A New Agenda*); Caldwell, *supra* note 7; Robert Kundis Craig, *Should there be a Constitutional Right to a Clean/Healthy Environment?*, 34 ENVTL L. REP. 11013 (Dec. 2004); Eurick, *supra* note 8; Eric T. Freyfogle, *Essay on the Bill of Rights: Should we Green the Bill?*, 1992 U. ILL. L. REV. 159 (1992); Gallagher, *supra* note 7; Gildor, *supra* note 7; Ledewitz, *supra* note 7; Sax, *supra* note 7; Schlickeisen, *supra* note 7; John C. Tucker, *Constitutional Codification of an Environmental Ethic*, 52 FLA. L. REV. 299 (2000); John A. Chiappinelli, Comment, *The Right to a Clean and Safe Environment: A Case for a Constitutional Amendment Recognizing Public Rights in Common Resources*, 40 BUFF. L. REV. 567 (1992); McLaren, *supra* note 7.

little emphasis has been placed in addressing the objections brought forward by courts and other legal academics. These objections, which I lay out and discuss in the following section, range from claims about ambiguity and technicality of these rights, their classification as positive, collective, and third generation rights, as well as with concerns about democracy and the institutional capacity of courts to entertain these types of claims.[15] After extensive discussion of all of these topics, I argue that, while some of these objections are significant, they only serve to limit the extent to which these rights can be enforced in a liberal constitutional setting.

Some final clarifications are necessary. A good deal of discussion on environmental rights deals with whether their content should be anthropocentric, and thus be limited to 'human' rights, or whether they should be extended to all living organisms in the planet,[16] or even those, human or others, that might come to existence in the future.[17] Although I do not wish to underestimate the importance of these debates, I intend to focus here on the anthropocentric component of environmental

---

[15] *See, e.g.,* CASS R. SUNSTEIN, THE SECOND BILL OF RIGHTS: THE LAST GREAT SPEECH OF FRANKLIN DELANO ROOSEVELT AND AMERICA'S UNFINISHED PURSUIT OF FREEDOM (2004) (hereinafter SUNSTEIN, THE SECOND BILL OF RIGHTS); CASS R. SUNSTEIN, DESIGNING DEMOCRACY: WHAT CONSTITUTIONS DO 234 (2001) (hereinafter SUNSTEIN, DESIGNING DEMOCRACY); CASS R. SUNSTEIN, THE PARTIAL CONSTITUTION (1993) (hereinafter SUNSTEIN, THE PARTIAL CONSTITUTION); David M. Beatty, *The Last Generation: When Rights Lose Their Meaning*, *in* HUMAN RIGHTS AND JUDICIAL REVIEW: A COMPARATIVE PERSPECTIVE 321 (David M. Beatty ed., 1994); Frank B. Cross, *The Error of Positive Rights*, 48 UCLA L. REV. 857 (2001); Dennis M. Davis, *The Case Against the Inclusion of Socio-Economic Rights in a Bill of Rights Except as Directive Principles*, 8 S. AFR. J. HUM. RTS. 475 (1992) (hereinafter Davis, *Directive Principles*); Jose L. Fernández, *State Constitutions, Environmental Rights Provisions, and the Doctrine of Self-Execution: A Political Question?*, 17 HARV. ENVT'L. L. REV. 333 (1993); Daniel Reeder, *Federalism Does Well Enough Now: Why Federalism Provides Sufficient Protection for the Environment, and no Other Model is Needed*, 18 PENN ST. ENVTL. L. REV. 293 (2010); Ruhl, *An Environmental Rights Amendment*, *supra* note 7, at 47-49; Ruhl, *The Metrics of Constitutional Amendments*, *supra* note 7; Cass R. Sunstein, *Against Positive Rights*, *in* WESTERN RIGHTS? POST-COMMUNIST APPLICATION 225 (András Sajó ed., 1996) (hereinafter Sunstein, *Against Positive Rights*); Cass R. Sunstein, *Why Does the American Constitution Lack Social and Economic Guarantees?*, 56 SYR. L. REV. 1 (2005) (hereinafter Sunstein, *Why Does the American Constitution*); A. Dan Tarlock, *Is There a There There in Environmental Law?*, 19 J. LAND USE & ENVTL. L. 213, 225-26 (2004).

[16] HAYWARD, CONSTITUTIONAL ENVIRONMENTAL RIGHTS, *supra* note 13, at 32-36; Tim Hayward, *Constitutional Environmental Rights: A Case for Political Analysis*, *in* MORAL AND POLITICAL REASONING IN ENVIRONMENTAL PRACTICE 109, 111 (Andrew Light & Avner de-Shalit eds., 2003) (hereinafter, Hayward, *A Case for Political Analysis*); James A. Nash, *The Case for Biotic Rights*, 18 YALE J. INT'L L. 235 (1993); SMITH, *supra* note 13, at 107; Joshua J. Bruckerhoff, Note, *Giving Nature Constitutional Protection: A Less Anthropocentric Interpretation of Environmental Rights*, 86 TEX. L. REV. 615 (2008). *But see* Ledewitz, *supra* note 7, at 586 ("The right to a healthy environment is one of clear human welfare-not a right in nature itself.").

[17] EDITH BROWN WEISS, IN FAIRNESS TO FUTURE GENERATIONS: INTERNATIONAL LAW, COMMON PATRIMONY, AND INTERGENERATIONAL EQUITY (1988). Schlickeisen, *supra* note 7, at 190-97. *See also* Oposa v. Factoran, 224 SCRA 792 (July 29, 1993) (Phil.). *But see* Trevor R. Updegraff, *Morals on Stilts: Assessing the Value of Intergenerational Environmental Ethics*, 20 COLO. J. INT'L ENVTL. L. & POL'Y 367 (2009).

protection rights.[18] Additionally, while some of the cases and constitutional provisions cited here address the questions about whether the rights are enforceable against private parties, I only focus here on judicial enforcement or constitutional rights to environmental protection against governmental entities.

Finally, some of these sources I discuss here deal with the constitutionalization of social and economic rights, a category that sometimes is said to exclude environmental protection rights.[19] I will criticize the reliance on these classifications to distinguish among different rights in this article, but suffice it to say that here no scholar that is opposed to the constitutionalization of socioeconomic rights feels different about environmental protection rights, and their arguments in opposition to the former seem equally extensive to the latter. Given that the literature on constitutionalization and judicial enforcement of environmental protection rights is not as developed as the one for socioeconomic rights, I believe that my discussion of these sources will enrich the debates for this topic.

II. Objections to judicial enforcement of environmental protection rights

Professor Jeanne M. Woods argues that "[s]ocio-economic rights pose a significant conceptual challenge to the liberal construct, in which rights are deemed individual entitlements that are antagonistic to and super[s]ede the common good, thus mandating a limited-government paradigm."[20] Indeed, similar statements can

---

[18] Like Graham Smith, I believe that "[t]he first step . . . for the project of constitutional environmentalism must surely be to ensure the entrenchment of *human* environmental rights." SMITH, *supra* note 13, at 107. *See also* HAYWARD, CONSTITUTIONAL ENVIRONMENTAL RIGHTS, *supra* note 13, at 35-36; Hayward, *A Case for Political Analysis*, *supra* note 16, at 111 (advocating for the constitutionalization of anthropocentric rights, because he believes those are "more likely to be enhanced than hindered by certain entrenched rights," and that once they are established, "practical jurisprudence and wider social norms will develop progressively to support more ambitious aims.").

[19] *See* MERCEDES FRANCO DEL POZO, EL DERECHO HUMANO A UN MEDIO AMBIENTE ADECUADO 11-16 (2000) (discussing the emergence of the third generation cultural and environmental rights discourse, tied to the concept of 'solidarity,' as opposed to first and second generation rights, which are linked to freedom and equality, respectively); Dinah Shelton, *Human Rights, Environmental Rights, and the Right to Environment*, 28 STAN. J. INT'L L. 103, 122-25 (1991) (describing, but criticizing these distinctions). *But see* Sunstein, *Against Positive Rights*, *supra* note 15, at 226-27 (including environmental rights within the category of socioeconomic rights); Jeanne M. Woods, *Emerging Paradigms of Protection for "Second-Generation" Human Rights*, *in* PROGRESSIVE LAWYERING, GLOBALIZATION AND MARKETS: RETHINKING IDEOLOGY AND STRATEGY 267, 286-87 (Clare Dalton ed., 2007) (hereinafter Woods, *Emerging Paradigms of Protection*) (discussing examples of judicial enforcement of environmental rights within her discussions about the justiciability of socioeconomic rights).

[20] Woods, *Emerging Paradigms of Protection*, *supra* note 19, at 267. *See also* Jeanne M. Woods, *Justiciable Social Rights as a Critique of the Liberal Paradigm*, 38 TEX. INT'L L.J. 763 (2003) (hereinafter Woods, *Justiciable Social Rights*).

be and have been said about environmental protection rights,[21] given that their implementation might require measures that could also be seen as counter to the 'limited-government paradigm.'

This awkward fit between socio economic rights and environmental rights, on one hand, and liberal theories of democracy, on the other, has led some scholars to argue that these 'rights' are not on equal footing, in terms of normative scope and enforceability, with traditional civil and political rights and, thus, they should not receive the same constitutional treatment, if they are to receive any at all. Others bring forth theoretical concerns about democracy, constitutionalism, and adjudication as forceful claims against constitutionalizing or, at the very least, judicially enforcing these rights.

In this section, I will discuss most of these objections to judicially enforcing constitutional environmental protection rights. First, I will address claims related to the classification of these rights as second or third-generation, positive and collective rights, as opposed to the traditionally enforceable first-generation, negative, individual categories of rights. After that, I will examine arguments related to the difficulties of defining the content of environmental protection rights, given their scientific and abstract nature. Finally, I will evaluate the concerns about the impact that judicial enforcement of environmental protection rights would have on notions of democracy, judicial review, and the proper role of courts and constitutional adjudication in the United States.

A. Objections based on the classification of environmental protection rights

i. Generational classification of human rights

It is common to see scholarly attempts at classifying existing and developing rights, whether it serves political, historical, practical, or even juridical purposes. One of the most prevalent of these exercises involves classifying rights among 'generations', which are defined by historical and theoretical characteristics.[22] According to this view, there are currently three generations of rights. The first generation is comprised of civil and political rights, like freedom of speech, freedom of religion and privacy, which "define a sphere of personal liberties into which the

---

[21] *See* Robyn Eckersley, *Greening Liberal Democracy: The Rights Discourse Revisited*, *in* DEMOCRACY AND GREEN POLITICAL THOUGHT: SUSTAINABILITY, RIGHTS AND CITIZENSHIP, *supra* note 13, at 212. In fact, Woods discusses examples of judicial enforcement of environmental protection rights as part of her piece on enforcement of 'second generation' social and economic rights. Woods, *Emerging Paradigms of Protection*, *supra* note 19, at 286-87.

[22] Prudence E. Taylor, *From Environmental to Ecological Human Rights: A New Dynamic in International Law?*, 10 GEO. INT'L ENVTL. L. REV. 309, 317 (1998); FRANCO DEL POZO, *supra* note 19, at 11-16; Shelton, *supra* note 19, at 122.

government cannot enter."[23] Freedom and liberty from government intrusion are the core principles that define this generation of rights.[24] Thus, these rights are couched as individual, negative rights, because they prohibit government conduct that intrudes onto these liberties. According to this classification, these rights do not require the State to perform any action in order to protect them.[25] The prevailing view is that the United States' Constitution only protects these types of negative rights, and not those belonging to the second and third generations.[26]

The second generation is composed of social and economic rights, like rights to housing, health, education and social security.[27] Contrary to first generation rights, these rights are positive in nature, because they require governments to implement affirmative measures in order to achieve their 'realization.'[28] They also have a redistributive component, given that they are particularly targeted at improving the standard of living of the poorest sectors of society.[29] Thus, it is said that the concept of equality constitutes the theoretical basis for these rights.[30]

Finally, the third generation of rights generally includes cultural and environmental rights, like language rights and rights to self-determination, rights to development, the right to peace, and environmental protection rights.[31] These rights "may both be invoked against the State and demanded of it; but above all (and herein lies their essential characteristic) they can be realized only through the concerted efforts of

---

[23] Shelton, *supra* note 19, at 122. *See also* Taylor, *supra* note 22, at 317-18.

[24] FRANCO DEL POZO, *supra* note 19, at 16; Taylor, *supra* note 22, at 318.

[25] Cross, *supra* note 15, at 864 (distinguishing positive and negative rights). As a commenter on the subject has described it:

> The Constitution does not merely delineate the government's political powers and limitations; it also declares the government's ethical obligation not to interfere with its citizens' rights. From a deontological standpoint, this duty extends only to government actions: Government inaction, even in the face of extreme injury or indifference by state actors, is not a morally culpable deprivation of liberty by the government.

Jenna MacNaughton, Comment, *Positive Rights in Constitutional Law: No Need to Graft, Best not to Prune*, 3 U. PA. J. CONST. L. 750, 754 (2001) (citing David P. Currie, *Positive and Negative Constitutional Rights*, 53 U. CHI. L. REV. 864, 864 (1986)).

[26] *See* Bowers v. DeVito, 686 F.2d 616, 618 (7th Cir. 1982) (Posner, J.) ("The Constitution is a charter of negative liberties; it tells the state to let people alone; it does not require the federal government or the state to provide services, even so elementary a service as maintaining law and order.").

[27] Louis Henkin, *Economic-Social Rights as Rights*, 2 HUM. RTS. L.J. 223 (1981); Taylor, *supra* note 22, at 318.

[28] Shelton, *supra* note 19, at 122; Taylor, *supra* note 22, at 318.

[29] Gov't of the Republic of S. Afr. v. Grootboom, (2001) (1) SA 46 (CC) (S. Afr.).

[30] FRANCO DEL POZO, *supra* note 19, at 16; Taylor, *supra* note 22, at 318. *But see* SUNSTEIN, THE SECOND BILL OF RIGHTS, *supra* note 15, at 205 (asserting that socioeconomic rights should be argued "in the name of liberty, not equality").

[31] Shelton, *supra* note 19, at 122; Taylor, *supra* note 22, at 318-19.

all the actors on the social scene: the individual, the State, public and private bodies and the international community."[32] These new rights are founded on the concept of solidarity, because they arise out of existing political and social conditions, and they are linked by their collective nature; that is, that contrary to civil and political rights, they do not belong to individuals, but to a collective, or even to the entire human race.[33] Therefore, their 'realization' not only depends on positive governmental action; it requires positive action by all.[34]

Some scholars have questioned the historical basis for these classifications, arguing that, "in the domestic law of some countries and to a certain extent in international law, economic and social rights and their corresponding imposition of duties were the 'first generation,' preceding the recognition of civil and political rights."[35] I have little interest here in debating the importance –or lack of it– of classifying rights according to some chronological scale within the international and domestic human rights discourses.[36] However, some scholars use this classification in order to assert claims about the unenforceability of second and third generation rights.[37] These authors argue that the 'positive' and 'collective' nature of second and third generation rights makes them unsuitable for judicial enforcement, given that, contrary to negative, first generation rights, they require that a State allocate substantial amounts of funds to ensure their realization.[38]

---

[32] Shelton, *supra* note 19, at 122. *See also* Taylor, *supra* note 22, at 319 ("Their primary characteristics are that they are essentially collective in dimension and require international cooperation for their achievement.").

[33] FRANCO DEL POZO, *supra* note 19, at 16; Taylor, *supra* note 22, at 319.

[34] FRANCO DEL POZO, *supra* note 19, at 16; Taylor, *supra* note 22, at 319.

[35] Shelton, *supra* note 19, at 122 n.77.

[36] *See* Sunstein, *Why Does the American Constitution*, *supra* note 15, at 8-9 (discussing the claim that the United States Constitution was ratified at "a time when constitutions were simply not thought to include social and economic guarantees," but arguing that it is not a sufficient explanation for why it still lacks such rights.)

[37] Some of these authors also question whether second and third generation rights are indeed rights. This topic, however, lies outside of the scope of this article.

[38] CHRISTOPHER LINGLE, THE ENVIRONMENT: RIGHTS AND FREEDOMS 5-6 (1992); Cross, *supra* note 15. Other authors oppose the constitutionalization and enforcement of positive rights for different reasons. Some argue that, generally, courts are not suitable forums for adjudicating positive rights claims and that they should nevertheless decline to enforce them for democratic and separation of powers concerns. Ulrich K. Preuß, *The Conceptual Difficulties of Welfare Rights*, *in* WESTERN RIGHTS? POST-COMMUNIST APPLICATION, *supra* note 15, at 211. Others assert that positive rights are too abstract or vague, and that they cannot be defined by courts of law. Antonio Carlos Pereira-Menaut, *Against Positive Rights*, 22 VAL. U. L. REV. 359, 370 (1988). An additional obstacle deals with the possibilities that under enforcement, or lack of enforcement of constitutional positive rights, might lead courts to "debase dangerously the entire currency of rights and the rule of law by openly ceding to executive and parliamentary bodies an unreviewable privilege of indefinite postponement of a declared constitutional right." Frank I. Michelman, *The Constitution, Social Rights, and Liberal Political Justification*, 1 INT'L J. CONST. L. 13, 16 (2003) (hereinafter Michelman, *The Constitution*);

ii. The positive/negative rights objections

In his eloquent piece in defense of distinguishing between positive and negative rights and opposing the constitutionalization and enforcement of the former, Professor Frank B. Cross describes the distinction between both as "intuitive": "One category is a right to be free from government, while the other is a right to command government action. A 'positive right is a claim to something . . . while a negative right is a right that something not be done to one.'"[39] He then uses this distinction to assert that the rights contained in the United States Bill of Rights are negative, and that social, economic and environmental rights are positive in nature.[40] Yet, while it does seem intuitive to distinguish between protection against state encroachment on rights and the imposition of positive governmental obligations to satisfy certain rights, it does not seem that such a distinction is particularly helpful to distinguish between first, second and third generation rights.[41]

Frank I. Michelman, *Socioeconomic Rights in Constitutional Law: Explaining America Away*, 6 INT'L J. CONST. L. 663, 683 (2008) (hereinafter Michelman, *Explaining America Away*). Finally, some critics of judicial enforcement for positive rights, particularly advanced in the context of social and economic rights, question "whether the many constitutions containing social and economic rights have made any difference at all 'on the ground'--that is, there is real doubt about whether such rights have actually led to more money, food, or shelter for poor people." Sunstein, *Why Does the American Constitution*, *supra* note 15, at 15. I will address all of these claims at different points in this paper. For now, however, I am only concerned with claims that civil and political rights are negative rights and economic, social and environmental rights are positive rights.

[39] Cross, *supra* note 15, at 864. *See also* Bryan P. Wilson, Comment, *State Constitutional Environmental Rights and Judicial Activism: Is the Big Sky Falling?*, 53 EMORY L.J. 627, 635 (2004).

[40] Cross, *supra* note 15, at 858-63.

[41] Nonetheless, this classification of rights has exerted an influence over some justices when confronted with the question of whether a state constitutional environmental right is self-executing:

> Unlike the first twenty-six sections of Article 1, s 27, the one which concerns us in the instant case, does not merely contain a limitation on the powers of government. . . . .
>
> . . . .
>
> . . . [T]he remaining provisions of Section 27, rather than limiting the powers of government, expand these powers. These provisions declare that the Commonwealth is the 'trustee' of Pennsylvania's 'public natural resources' and they give the Commonwealth the power to act to 'conserve and maintain them for the benefit of all the people.' Insofar as the Commonwealth always had a recognized police power to regulate the use of land, and thus could establish standards for clean air and clean water consistent with the requirements of public health, s 27 is merely a general reaffirmation of past law. It must be recognized, however, that up until now, aesthetic or historical considerations, by themselves, have not been considered sufficient to constitute a basis for the Commonwealth's exercise of its police power.
>
> Now, for the first time, at least insofar as the state constitution is concerned, the Commonwealth has been given power to act in areas of purely aesthetic or historic concern.

In response to the positive/negative rights distinction, many authors have explained that all rights, even traditional civil and political rights, impose affirmative, and costly, obligations on governments.[42] These positive commitments are primarily related to the maintenance of political, judicial, security and defense institutions, which are necessary for the exercise of individual freedoms.[43] Free speech, for

---

Commonwealth of Pennsylvania v. National Gettysburg Battlefield Tower, 311 A.2d 588, 592 (Pa. 1973). *See also* Robb v. Shockoe Slip Foundation, 324 S.E.2d 674, 676 (Va. 1985) (relying on the assertion that Virginia's constitutional environmental provision "is not prohibitory or negative in character," to conclude that it is not self-executing); Commonwealth of Pennsylvania v. National Gettysburg Battlefield Tower, 302 A.2d 886, 896 (Pa. Commw. Ct. 1973), *aff'd*, 311 A.2d 588 (Pa. 1973) (Mencer, J., concurring and dissenting).

[42] SUNSTEIN, DESIGNING DEMOCRACY, *supra* note 15, at 222-23 (citing STEPHEN HOLMES & CASS R. SUNSTEIN, THE COST OF RIGHTS: WHY LIBERTY DEPENDS ON TAXES (1999)) ("Even conventional individual rights, . . . require governmental action. . . . So-called negative rights are emphatically positive rights. In fact all rights, even the most conventional, have costs."); SUNSTEIN, THE SECOND BILL OF RIGHTS, *supra* note 15, at 198-202; TUSHNET, *supra* note 12, at 233-34; Víctor Abramovich & Christian Courtis, *Hacia la exigibilidad de los derechos económicos, sociales y culturales. Estándares internacionales y criterios de aplicación ante los tribunales locales*, *in* LA APLICACIÓN DE LOS TRATADOS SOBRE DERECHOS HUMANOS POR LOS TRIBUNALES LOCALES 284-87 (Martín Abregu & Christian Courtis, compilator 1997); Louise Arbour, *Economic and Social Justice for Societies in Transition*, 40 N.Y.U. J. INT'L L. & POL. 1, 11-12 (2007); Roberto Gargarella, Pilar Domingo & Theunis Roux, *Courts, Rights and Social Transformation: Concluding Reflections*, *in* COURTS AND SOCIAL TRANSFORMATION IN NEW DEMOCRACIES: AN INSTITUTIONAL VOICE FOR THE POOR? 257-59 (Roberto Gargarella, Pilar Domingo & Theunis Roux, eds. 2006); Hayward, *A Case for Political Analysis*, *supra* note 16, at 119; Michelman, *The Constitution*, *supra* note 38, at 16; Wiktor Osiatynski, *Social and Economic Rights in a New Constitution for Poland*, *in* WESTERN RIGHTS? POST-COMMUNIST APPLICATION, *supra* note 15, at 233; Preuß, *supra* note 38, at 211; Shelton, *supra* note 19, at 123; Sunstein, *Why Does the American Constitution*, *supra* note 15, at 6-8; Woods, *Justiciable Social Rights*, *supra* note 20, at 764-65. Additionally, Professor Sunstein questions the assertion that civil and political rights do not have substantial budgetary implications:

> All constitutional rights have budgetary implications; all constitutional rights cost money. If the government plans to protect private property, it will have to expend resources to ensure against both private and public intrusions. If the government wants to protect people against unreasonable searches and seizures, it will have to expend resources to train, monitor, and discipline the police. If the government wants to protect freedom of speech, it must, at a minimum, take steps to constrain its own agents; and these steps will be costly. It follows that insofar as they are costly, social and economic rights are not unique.

Sunstein, *Why Does the American Constitution*, *supra* note 15, at 7. *See also* In re Certification of the Constitution of the Republic of South Africa, (1996) (4) SA 744 (CC) at ¶ 77 (S. Afr.) ("[E]ven when a court enforces civil and political rights . . . the order it makes will often have [budgetary] implications. A court may require the provision of legal aid or the extension of state benefits to a class of people who formerly were not beneficiaries of such benefits.").

[43] Abramovich & Courtis, *supra* note 42, at 285-86; *see also* G.J.H. van Hoff, *The Legal Nature of Economic, Social and Cultural Rights: A Rebuttal of Some Traditional Views*, *in* THE RIGHT TO FOOD 97 (Philip Alston & K. Tomasevski, eds. 1984).

example, "will not be protected unless taxpayers are willing to fund a judicial system willing and able to protect that right" and, perhaps, to devote resources to open "certain areas where speech can occur, such as streets and parks."[44] Additionally, the rights to jury trial in both civil and criminal cases, and to counsel in criminal prosecutions, serve as examples of positive, and costly, rights imposed by the United States Constitution.[45]

On the other hand, second and third generation rights have both positive and negative components.[46] In the context of the right to housing, for example, Louise Arbour argues that "'forced' eviction (that is, eviction that is arbitrary or does not respect minimum guarantees) requires the same type of immediate action and redress as does the prohibition of torture."[47] A great deal has also been said about how the Supreme Court came close to constitutionalizing social and economic rights in a series of decisions in which the Court prohibited states from imposing a one-year waiting period before new citizens could receive welfare benefits,[48] a one-year residence requirement for receiving state-funded medical care,[49] and from removing welfare benefits from people without complying with due process requirements,[50] all negative applications of social and economic rights.[51]

---

[44] SUNSTEIN, DESIGNING DEMOCRACY, *supra* note 15, at 234. *See* Hague v. Committee for Industrial Organization, 307 U.S. 496, 515 (1939) (Roberts, J.) ("Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions. Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens."); Perry Education Ass'n v. Perry Local Educators Ass'n, 460 U.S. 37, 45 (1983) (identifying streets and parks as "quintessential," or traditional, "public forums"). *See also* TUSHNET, *supra* note 12, at 229 (making a similar case about the effects of the public forum doctrine and the time, place and manner regulations).

[45] U.S. CONST. amend. VI-VII. *See* Sunstein, *Why Does the American Constitution*, *supra* note 15, at 6-7.

[46] Gargarella, Domingo & Roux, *supra* note 42, at 258-59. *See also Certification of the Constitution*, 1996 (4) SA at ¶ 78 ("At the very minimum, socio-economic rights can be negatively protected from improper invasion."); Michelman, *The Constitution*, *supra* note 38, at 17-18; Albie Sachs, *Enforcing Socio-Economic Rights*, *in* SUSTAINABLE JUSTICE: RECONCILING ECONOMIC, SOCIAL AND ENVIRONMENTAL LAW 69 (Marie-Claire Cordonier Segger & C.G. Weeramantry, eds., 2005); Wilson, *supra* note 39, at 639-40.

[47] Arbour, *supra* note 42, at 11. *See also* Michelman, *The Constitution*, *supra* note 38, at 17-18.

[48] Shapiro v. Thompson, 394 U.S. 618 (1969).

[49] Memorial Hospital v. Maricopa County, 415 U.S. 250 (1974).

[50] Goldberg v. Kelly, 397 U.S. 254 (1970).

[51] SUNSTEIN, THE SECOND BILL OF RIGHTS, *supra* note 15, at 159-62; Sunstein, *Why Does the American Constitution*, *supra* note 15, at 20-21. Of course, the Supreme Court did not end up constitutionalizing social and economic rights, a development that Professor Sunstein believes was primarily a consequence of the election of Richard Nixon as President of the United States in 1968 and the subsequent change in the Court's composition. SUNSTEIN, THE SECOND BILL OF RIGHTS, *supra* note 15, at 162-71; Sunstein, *Why Does the American Constitution*, *supra* note 15, at 21-23.

Constitutional environmental protection rights can also have negative features.[52] We could conceivably draft a constitutional provision to protect individuals against State intrusions on their substantive rights to a clean or healthy environment,[53] one that would allow individuals to challenge state actions that they believe degrade the quality of the environment.[54] Additionally, environmental protection rights can be linked to other constitutional rights,[55] like the right to life,[56] the rights to equal protection of the laws,[57] and the right to

---

[52] Brooks, *A Constitutional Right*, *supra* note 7, at 1108-09 (arguing that recognizing constitutional environmental rights "reframes the issue as one in which a government project or a failed government regulation violates an individual's environmental rights within an ecosystem."); *see also* Bruckerhoff, *supra* note 16, at 627 (arguing that environmental rights should be viewed as negative rights); Wilson, *supra* note 39, at 639-40 (suggesting that "[t]hough the right to a clean and healthful environment is usually considered to be a positive right, the right may in fact be a negative one.").

[53] *See* Bruckerhoff, *supra* note 16, at 627 (arguing that "the government does not necessarily provide a healthy environment to its citizenry; instead, it must restrain from acting in ways that harm the environment."); Wilson, *supra* note 39, at 640 ("Unless it is taken by the government or some other party, a person theoretically possesses the right to a clean environment just as he or she possesses a right to speak.").

[54] This, of course, would raise another set of objections related to the ambiguity of said substantive right, and the adequacy of courts to define its content and adjudicate controversies in which it is implicated. I will deal with those later in this paper.

[55] The Constitutional Court of Colombia has devised a paradigmatic example of how these links work. Although environmental protection rights are included in several provisions of the Colombian Constitution, CONST. COLOM., Arts. 79-81, 334, 366, *available at* http://pdba.georgetown.edu/constitutions/colombia/col91.html (last visited May. 23, 2018), they are not included as fundamental rights, but rather as collective rights. Thus, environmental plaintiffs would seem to be precluded from using procedural remedies like the "acción de tutela", designed for violations of fundamental rights. However, in a series of cases decided shortly after the ratification of the Constitution in 1991, the Constitutional Court decided that whenever non-fundamental rights, such as environmental protection rights, could be "connected" to fundamental rights, they could take advantage of the "acción de tutela", as well as any other remedy created for this category of rights. OSCAR DARÍO AMAYA NAVAS, LA CONSTITUCIÓN ECOLÓGICA DE COLOMBIA: ANÁLISIS COMPARATIVO CON EL SISTEMA CONSTITUCIONAL LATINOAMERICANO 145-212 (2002); SANDRA LUCÍA RODRÍGUEZ ROJAS & NARYAN FERNANDO ALONSO BEJARANO, MECANISMOS JURÍDICOS DE LA PROTECCIÓN AMBIENTAL 41-93 (1997); RODAS MONSALVE, *supra* note 4, at 31-107; José María Borrero Navia, *Derecho Ambiental y Cultura Legal en América*, *in* JUSTICIA AMBIENTAL: CONSTRUCCIÓN Y DEFENSA DE LOS NUEVOS DERECHOS AMBIENTALES CULTURALES Y COLECTIVOS EN AMÉRICA LATINA 63-64 (Enrique Leff, coordinator, 2001); Claudia Mora Pineda, *La Defensa Judicial del Medio Ambiente en Colombia*, *in* JUSTICIA AMBIENTAL: CONSTRUCCIÓN Y DEFENSA DE LOS NUEVOS DERECHOS AMBIENTALES CULTURALES Y COLECTIVOS EN AMÉRICA LATINA, *supra* note 49, at 110-19.

[56] The highest courts in several countries, such as India and Pakistan, have followed this route to elevate environmental protection rights to fundamental rights status. Anderson, *supra* note 6, at 213-15; Martin Lau, *supra* note 5. In India, the Supreme Court has used these newly created rights to prevent the State from conducting certain operations that they have interpreted to be hazardous to the environment. NIMUSHAKAVI, *supra* note 6, at 193-226; SINGH SIJAPATI, *supra* note 6, at 37-46; Anderson, *supra* note 6, at 213-15; D.M. Dharmadhikari, *supra* note 6, at 28-29.

[57] *See* Abramovich & Courtis, *supra* note 42, at 299-300; 310-11 (arguing that prohibitions against discrimination form part of the negative component of social, economic and cultural rights).

health,[58] to oppose State activities that implicate these rights. For instance, a constitutional environmental protection right could be interpreted to include an environmental justice component, and could allow poor communities to challenge what they believe are disproportionate and discriminatory allocations of polluting State operations near their dwellings.[59]

A final component of judicial enforcement of constitutional environmental protection rights, one that transcends the positive/negative rights distinctions and is particularly relevant in the United States, is that these provisions can serve as a basis for legislative and executive action, as well as a source for interpretation of existing and new environmental statutes. In recent years, courts have begun to question whether several federal environmental statutes are sufficiently linked to interstate commerce so as to constitute valid exercises of Congress powers under the Commerce Clause, or have any foundation in any of the enumerated constitutional powers of Congress.[60] Where a constitutional environmental protection right drafted or read into the United States Constitution, it could very well provide a safer basis for congressional exercise of its legislative authority.[61] As for state environmental protection rights, several courts have used their respective constitutional provisions to uphold legislative and executive environmental measures.[62]

---

[58] Similar to the examples about the right to life, the highest courts in some countries, such as Ireland and Italy, have constitutionalized environmental protection rights by linking them to their respective constitutional rights to health. *See* Kimber, *supra* note 5, at 250 (Ireland); Guerino D'Ignazio, *La tutela del Ambiente y la protección de las Áreas Naturales en Italia*, *in* DERECHO COMPARADO DEL MEDIO AMBIENTE Y DE LOS ESPACIOS NATURALES PROTEGIDOS, *supra* note 4, at 151 (Italy); Montini, *supra* note 5, at 283-84 (Italy).

[59] Abramovich & Courtis, *supra* note 42, at 299-300; 310-11. *But see* M. Patrice Benford, Note, *Life, Liberty and the Pursuit of Clean Air – Fight for Environmental Equality*, 20 T. MARSHALL L. REV. 269, 275-281 (1995) (discussing the failed efforts and doctrinal difficulties with bringing "environmental racism" claims under the Equal Protection Clause of the Fourteenth Amendment).

[60] Richard J. Lazarus, THE MAKING OF ENVIRONMENTAL LAW 36-38 (2004) (hereinafter, Lazarus, THE MAKING); Richard J. Lazarus, *Human Nature, the Laws of Nature, and the Nature of Environmental Law*, 24 VA. ENVTL. L.J. 231, 243-59 (2005) (hereinafter Lazarus, *Human Nature*); Robert V. Percival, *"Greening the Constitution"–Harmonizing Environmental and Constitutional Values*, 32 ENVTL. L. 809, 842-44 (2002).

[61] Caldwell, *supra* note 7, at 3-5; Craig, *supra* note 14, at 11019-20; Gildor, *supra* note 7, at 830-47. In fact, in light of the Supreme Court's decision in National Federation of Independent Business v. Sebelius, 567 U.S. 519 (2012), some environmental statutes could be at an increased risk of being challenged on Commerce Clause grounds. *See* James R. May, *Healthcare, Environmental Law, and the Supreme Court: An Analysis Under the Commerce, Necessary and Proper, and Tax and Spending Clauses*, 43 ENVTL. L. 233 (2013).

[62] Douglas v. Judge, 568 P.2d 530, 532-33 (1977) (relying on environmental provision to conclude that a tax was levied for a public purpose); State v. Bernhard, 568 P.2d 136, 138 (Mont. 1977) (upholding state criminal statute by using constitutional environmental provision to recognize state police power to "preserve or enhance aesthetic values"); Askew v. Game and Fresh Water Fish Commission, 336 So.2d 556, 560 (Fla. 1976) (using environmental provision to conclude that legislation is constitutional, in a situation where, if not existent, the statute would be unconstitutional); Michigan

Professor Cross does not address the claim that positive rights also have negative components. However, he states that the argument that all rights have positive components because they require a governmental structure to be enforced "is too facile:"

> The notion of a legal right necessarily implies law, which implies government enforcement. The claim that legal rights require legal enforcement is tautological and does not automatically render all rights positive. One might accurately say, as Holmes and Sunstein do, that all rights, including negative ones, require government enforcement, but this does not mean that we cannot distinguish among types of rights.[63]

He instead proposes the following test to distinguish between positive and negative rights: "if there was no government in existence, would the right be automatically fulfilled?"[64] He argues that a negative right "is not dependent upon government in the sense that the abolition of government would intrinsically satisfy the right. In other words, if there is no government, it cannot establish a religion, pass a law denying free speech, or deprive its citizens of life, liberty, or property without due process."[65] Thus, "[w]ithout a state, one is definitionally free from intrusive state actions."[66]

Besides objecting to his stateless baseline because it is unrealistic, something that Professor Cross acknowledges,[67] its reasoning seems to assume that these rights would be respected under an anarchist State. It is true that if governments did not exist, there would be no need to have protections against state intrusions on rights. However, under this scenario, governments would not constitute "the greatest risk to individual freedom of action;"[68] private individuals would, particularly those with power. Finding themselves unconstrained by government, these individuals

---

State Highway Commission v. Vanderkloot, 220 N.W.2d 416 (Mich. 1974) (concluding that the Highway Condemnation Act is constitutional, even though it did not have 'environmental provisions,' because it interprets it in a manner compatible with the environmental clause, and states that it is limited by the substantive provisions on another act, the Environmental Protection Act).

[63] Cross, *supra* note 15, at 865 (paraphrasing HOLMES & SUNSTEIN, *supra* note 42, at 43).

[64] *Id*. at 866.

[65] *Id*.

[66] *Id*. at 867.

[67] *Id*. at 878 ("In any event, the pragmatic critique of my distinction does not necessarily deny my theoretical difference between positive and negative rights but maintains that the difference is one without a justifiable distinction in today's world."). It is interesting to note that if we were to choose a more (albeit still not completely) realistic hypothetical like, say, 'if courts were not allowed to provide relief against rights violations by the State, would the right be automatically fulfilled?,' the distinctions between positive and negative rights would not hold.

[68] *Id*. at 868 (identifying this as a justification for his stateless baseline test).

could very well seek to impose their will on the weaker members of society, limiting their 'negative' civil and political rights.[69] Given these circumstances, the claim that negative rights would be fulfilled under a stateless hypothetical would seem as nothing more than a hollow promise.

All of the aforementioned do not mean that there is no difference between rights in relation to the costs of their respective positive enforcements. As Wiktor Osiatynski asserts, "[i]n the case of civil and political rights, the claim against the state is limited to the creation of a general mechanism which facilitates the implementation of rights. Social and economic rights, by contrast, imply an entitlement to a specific benefit."[70] Thus, Professor Sunstein concedes that "it is possible that [social and economic] rights are unusually costly."[71] He explains:

> For example, to ensure that everyone has housing, it will be necessary to spend more than must be spent to ensure that everyone is free from unreasonable searches and seizures. But any such comparisons are empirical and contingent; they cannot be made on an a priori basis. We could imagine a society in which it costs a great deal to protect private property, but not so much to ensure basic subsistence. Of course, most societies are not like that. In most societies, the management of a social welfare system is more expensive than the management of a system to protect property rights. This kind of distinction--quantitative rather than qualitative in nature--is probably the central one.[72]

In this sense, the positive/negative differences between rights are only matters of degree, and particularly dependent on the social, economic, and political circumstances of a specific country.[73] Therefore, while the theoretical positive/negative rights distinction does not constitute a valid objection to judicial enforcement of economic, social and environmental rights, an argument could be made that, as a matter of policy, courts should not enforce the positive components of these rights,[74] given their substantial budgetary implications. As I will discuss later in this paper, while this policy concern is significant, it is not insurmountable, as courts can devise

---

[69] This is, of course, also speculative, but it is no more than a description of what social darwinist tendencies could lead to.

[70] Osiatynski, *supra* note 42, at 239. In this regard, environmental protection rights would seem to fall under the 'entitlement' category.

[71] Sunstein, *Why Does the American Constitution*, *supra* note 15, at 7. *See also* TUSHNET, *supra* note 12, at 234 (describing Professor Sunstein's claim).

[72] Sunstein, *Why Does the American Constitution*, *supra* note 15, at 7-8.

[73] *Id*. *See also* Abramovich & Courtis, *supra* note 42, at 286-87.

[74] Thus, the negative components of constitutional environmental protection rights would not be affected by this objection.

remedies that could prevent them from frequently imposing costly obligations on governments. In short, while the existence of positive components to environmental rights does not, by itself, preclude their enforcement, courts should take the potential and particular impacts of enforcement of positive rights into account when evaluating the types of remedies that they can grant in those cases.

iii. The individual/collective rights objections

A similar claim can be made about the usefulness of distinguishing between individual and collective rights as a basis for making arguments against enforcement of the latter. While environmental protection rights certainly have collective components, they can also be couched in individual terms.[75] An individual who lives close to a military base could challenge the conduction of military training exercises on environmental grounds, claiming that some of the operations will pollute the surrounding environment and impair his or her health. Whether or not he or she prevails depends on various circumstances, but it is enough here to note that the person would be raising individual claims.

However, some authors argue that enforcing the collective component of rights in favor of particulars who took their claims to the courts would lead to inequalities in the manner in which the rights are granted between those who prayed for judicial relief and those who are in identical situations but did not seek judicial enforcement.[76] This might be true, but it is no less true for environmental rights than of civil and political rights. A pregnant woman may have a qualified right to an abortion, and may desire to get one, and yet, in some places, whether or not she gets one has all to do with whether or not she prays for judicial relief.[77]

Some scholars also assert that contrary to individual civil and political rights, enforcement of collective rights provides benefits for some people at the expense of others.[78] According to this view, which has already been relied on as a basis for

---

[75] Abramovich & Courtis, *supra* note 42, at 301. *See also* Shelton, *supra* note 19, at 124-25 (arguing that "[a]ll human rights involve correlative duties for individuals, groups, and governments.").

[76] Abramovich & Courtis, *supra* note 42, at 299.

[77] This, in turn, raises concerns about the inequalities of litigation as a mechanism for rights protection or even social justice. Given the substantial costs associated with litigation, some individuals would not be able to use it in order to advance their claims. While an in depth study of this important issue lies outside the scope of this paper, I will make some brief remarks on the subject later on.

[78] Osiatynski, *supra* note 42, at 239. Professor Sunstein provides a good description of this objection:

> A more severe objection would be that rights to decent minimum conditions are actually violative of rights, simply because they call for redistribution or resources. On this view, the second bill should be rejected because it compromises rights, properly conceived. The second bill would force some people to assist others through the coercive taking of their resources. To ensure that everyone has a "useful and remunerative job," "adequate food and clothing and recreation," or "a decent home," it will be necessary for many Americans to pay

not addressing questions about the meaning of a state constitutional environmental provision,[79] enforcing social and environmental protection rights "is likely to result in zero-sum or negative-sum policy outcomes: while some groups benefit, others must necessarily lose. In general, individual liberties in the form of private property rights and freedom of exchange will be restricted."[80]

Although the objection might be overstated,[81] there is some force to it. Undoubtedly, in some cases, the enforcement of constitutional environmental protection rights could have considerable impacts on the level of protection of other peoples' rights. However, this is not a feature exclusive to judicial enforcement of these rights, but to all methods of enforcement. Indeed, when the political branches of government enact and implement environmental protection statutes, they are also potentially limiting specific rights. In this regard, this is not an objection against

---

> for others. Perhaps this is a violation of rights. In the words of one critic, the first bill "reflects an individualist political philosophy that prizes freedom, welfare rights a communitarian or collectivist one that is willing to sacrifice freedom."

SUNSTEIN, THE SECOND BILL OF RIGHTS, *supra* note 15, at 204-05.

[79] In addressing the question whether the environmental provision included in Article I, section 27 of the Pennsylvania Constitution is self-executing, various justices of the Pennsylvania Supreme Court relied on this objection to conclude in the negative:

> If we were to sustain the Commonwealth's position that the amendment was self-executing, a property owner would not know and would have no way, short of expensive litigation, of finding out what he could do with his property. The fact that the owner contemplated a use similar to others that had not been enjoined would be no guarantee that the Commonwealth would not seek to enjoin his use. Since no executive department has been given authority to determine when to move to protect the environment, there would be no way of obtaining, with respect to a particular use contemplated, an indication of what action the Commonwealth might take before the owner expended what could be significant sums of money for the purchase or the development of the property.
>
> We do not believe that the framers of the environmental protection amendment could have intended such an unjust result, one which raises such serious questions under both the equal protection clause and the due process clause of the United States Constitution. In our opinion, to insure that these clauses are not violated, the Legislature should set standards and procedures for proposed executive action.

Commonwealth of Pennsylvania v. National Gettysburg Battlefield Tower, 311 A.2d 588, 593-94 (Pa. 1973). *See also* Commonwealth of Pennsylvania v. National Gettysburg Battlefield Tower, 302 A.2d 886, 895 (Pa. Commw. Ct. 1973), *aff'd*, 311 A.2d 588 (Pa. 1973) (Bowman, J., concurring).

[80] LINGLE, *supra* note 38, at 5-6. *See also* Lazarus, THE MAKING, *supra* note 60, at 25 (explaining that "[e]nvironmental law is riddled with controversy because there is almost always a mismatch in the allocation of those distributional costs and benefits. Those who receive the benefits will often not be required to absorb the related costs.").

[81] Whether judicial enforcement of constitutional environmental protection rights will affect the rights of other parties depends on the nature of the case and the remedies prayed for and granted by courts, among many other factors.

judicially enforcing these constitutional values, but a substantive claim that these rights do not belong in a constitution, or that they at least should be always superseded by certain individual liberties.[82]

Additionally, while constitutional environmental rights might have an impact on the protection of other peoples' rights, the same can be said about enforcement of civil and political rights. Residential[83] and abortion clinic[84] picketing cases, for example, involve clashes between individuals and groups' freedom of speech rights, on one side, and individuals privacy rights, on the other. Whichever party comes out on the losing side in those cases might feel as if their rights are not being fully protected. Given that whether or not enforcement of constitutional environmental protection rights implicates other constitutional rights in particular cases is also a matter open to judicial interpretation, the losing party in these cases will feel like the losing party in the picketing cases.

A final objection to collective rights remains. As applied to the United States, this objection is intrinsically related to standing concerns. It is sometimes stated that, since environmental protection rights involve collective, rather than individual, interests, they are not justiciable claims, because they do not fit within the "injury-in-fact" requirement of the Supreme Court's standing doctrine.[85]

---

[82] Professor Sunstein provides a compelling response to this objection:

> Those who possess a great deal do so because laws and institutions, including public institutions, make their holdings possible. Without public support, wealthy people could not possibly have what they own. Their holdings are protected by taxpayer-funded agencies, including the police and the courts. The same is true of liberty itself. In the state of nature –freed from the protection of law and government– how well would wealthy people fare?

SUNSTEIN, THE SECOND BILL OF RIGHTS, *supra* note 15, at 205.

[83] Frisby v. Schultz, 487 U.S. 474 (1988); Carey v. Brown, 447 U.S. 455 (1980); Police Department of Chicago v. Mosley, 408 U.S. 92 (1972).

[84] Hill v. Colorado, 530 U.S. 703 (2000); Schenck v. Pro-Choice Network, 519 U.S. 357 (1997); Madsen v. Women's Health Center, 512 U.S. 753 (1994).

[85] *See, e.g.*, Summers v. Earth Island Institute, 129 S.Ct. 1142, 1149 (2009) (standing requires that a plaintiff petitioning injunctive relief "show that he is under threat of suffering 'injury in fact' that is concrete and particularized;"); Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992); Sierra Club v. Morton, 405 U.S. 727 (1971). *But see* Massachusetts v. EPA, 549 U.S. 497 (2007); Friends of the Earth v. Laidlaw, 528 U.S. 167 (2000). *See also* Randall S. Abate & Michael J. Myers, *Broadening the Scope of Environmental Standing: Procedural and Informational Injury-in-Fact after* Lujan v. Defenders of Wildlife, 12 UCLA J. ENVTL. L. & POL'Y 345, 362-66 (1994); Kimberly N. Brown, *Justiciable Generalized Grievances*, 68 MD. L. REV. 221, 239-46 (2008); Karl S. Coplan, *Refracting the Spectrum of Clean Water Act Standing in Light of* Lujan v. Defenders of Wildlife, 22 COLUM. J. ENVTL. L. 169, 191-93 (1997); Martin A. McCrory, *Standing in the Ever-Changing Stream: The Clean Water Act, Article III Standing, and Post-Compliance Adjudication*, 20 STAN. ENVTL. L.J. 73, 106-08 (2001); Robert V. Percival & Joanna B. Goger, *Escaping the Common Law's Shadow: Standing in the Light of* Laidlaw, 12 DUKE ENVTL. L. & POL'Y F. 119, 120 (2001).

Part of this objection can be easily disposed of by specifically drafting constitutional environmental protection rights that relax standing requirements. A few states have already done so,[86] something that state courts dealing with these provisions have acknowledged without much controversy.[87]

However, some might see this relaxation as an affront on the adversarial juridical system or on important notions about separation of powers and the type of justiciable claims that are suitable for constitutional adjudication.[88] While these are important concerns, it should be noted that the Supreme Court's standing doctrine, particularly its "injury in fact" analysis and foundations, has been the subject of powerful criticisms.[89] On the other hand, Professor Richard J. Lazarus argues

---

[86] *See, e.g.*, HAW. CONST. art. XI, § 9; ILL. CONST. art. XI, § 2.

[87] Fiedler v. Clark, 714 F.2d 77, 79-80 (9th Cir. 1983) (holding that Article XI, section 9 of the Hawaiian Constitution was intended "to remove barriers to standing to sue, not to enlarge the subject matter jurisdiction of the federal courts."); City of Elgin v. County of Cook, 660 N.E.2d 875, 891 (Ill. 1996) (holding that Article XI, section 2 of the Illinois Constitution "does not create any new causes of action but, rather, does away with the "special injury" requirement typically employed in environmental nuisance cases."); Life of the Land v. Land Use Commission, 623 P.2d 431, 437-41 (Haw. 1981) (holding that an environmental organization and its members had standing to challenge a land reclassification, even though they were neither owners nor adjoining owners of said land). *But see* Glisson v. City of Marion, 720 N.E.2d 1034, 1042-45 (Ill. 1999) (holding that Article XI, section 2 of the Illinois Constitution did not grant standing to bring actions to force the government to protect endangered or threatened species, because that is not included in the phrase "healthful environment").

[88] As the Supreme Court has stated:

> In limiting the judicial power to 'Cases' and 'Controversies,' Article III of the Constitution restricts it to the traditional role of Anglo-American courts, which is to redress or prevent actual or imminently threatened injury to persons caused by private or official violation of law. Except when necessary in the execution of that function, courts have no charter to review and revise legislative and executive action. This limitation 'is founded in concern about the proper—and properly limited—role of the courts in a democratic society.'
>
> *Summers*, 129 S.Ct. at 1148. See *Laidlaw*, 528 U.S. at 209 (Scalia, J., dissenting); *Lujan*, 504 U.S. at 559-60; Harold J. Krent & Ethan G. Shenkman, *Of Citizen Suits and Citizen Sunstein*, 91 MICH. L. REV. 1793 (1993); James Leonard & Joanne C. Brant, *The Half-Open Door: Article III, the Injury-in-Fact Rule, and the Framers' Plan for Federal Courts of Limited Jurisdiction*, 54 RUTGERS L. REV. 1 (2001); Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U. L. REV. 881 (1983). *But see* Robert J. Pushaw, Jr., *Justiciability and Separation of Powers: A Neo-Federalist Approach*, 81 CORNELL L. REV. 393 (1996) (arguing that separation of powers concerns require that the courts defer to Congressional grants of standing to sue).

[89] *See, e.g.*, David N. Cassuto, *The Law of Words: Standing, Environment, and Other Contested Terms*, 28 HARV. ENVTL. L. REV. 79 (2004); William A. Fletcher, *The Structure of Standing*, 98 YALE L.J. 221 (1988); Sam Kalen, *Standing of its Last Legs:* Bennett v. Spear *and the Past and Future of Standing in Environmental Cases*, 13 J. LAND USE & ENVTL. L. 1 (1997); Gene R. Nichol, Jr., *Standing for Privilege: The Failure of Injury Analysis*, 82 B.U. L. REV. 301 (2002); Percival & Goger, *supra* note 85; Cass R. Sunstein, *Standing and the Privatization of Public Law*, 88 COLUM. L. REV. 1432 (1988); Cass R. Sunstein, *What's Standing After* Lujan? *Of Citizen Suits, "Injuries," and Article III*, 91 MICH. L. REV. 163 (1992); Philip Weinberg, *Unbarring the Bar of Justice: Standing in Environmental Suits and the Constitution*, 21 PACE ENVTL. L. REV. 27 (2003).

that the Court's actual standing doctrine fails to take into account the "expansive temporal and spatial dimensions of ecological cause and effect," as well as the "kinds of causal connections sought to be vindicated by modern environmental protection law."[90]

B. Objections based on the content of the rights

Apart from taking issue with the 'positive' and 'collective' nature of constitutional rights to environmental protection, opponents of their constitutionalization and enforcement place particular emphasis on the difficulties with defining the content of these rights. Scholars here advance two specific objections. First, it is said that environmental protection rights are too abstract or vague, so that it is very difficult, if not impossible, to define them. This objection stresses the inherent difficulties with providing a workable substantive content for a substantive constitutional right to environmental protection. It is suggested that it is impossible to provide a juridical

---

[90] Professor Lazarus explains:

> Article III of the Federal Constitution provides for federal court jurisdiction only over "cases and controversies," which the Supreme Court has ruled requires that the party bringing the lawsuit establish a "concrete" and "imminent" injury. The nature of cause and effect within the ecosystem--because of how cause and effect are so spatially and temporally spread out--makes it very hard, however, for environmental plaintiffs to establish that their injury is "concrete" or "imminent."
>
> The expansive temporal and spatial dimensions of ecological cause and effect defy traditional notions of concreteness and imminence as defined by the Court's precedent. Environmental plaintiffs can harbor sincere, strong feelings about species that they may in fact never physically visit, but the injury they suffer from their extinction is no less intense or legitimate. Justice Scalia may, as he did writing the opinion for the Court in *Lujan v. Defenders of Wildlife*, mock such a connection as based on a "Linnaean leap." But, for many Americans whose life experiences demonstrate such a connection with distant species, it is no leap at all.
>
> The real disconnect is instead between the Court's precedential touchstone for identifying the requisite injury for Article III standing and the kinds of causal connections sought to be vindicated by modern environmental protection law. It is incumbent upon the Court itself to bridge that gap and return to Article III's basic requirement of ensuring an adequately adversarial judicial proceeding, lest the Constitution be unfairly read as presenting an insurmountable obstacle to the enforcement of important federal environmental mandates.

Lazarus, *Human Nature*, *supra* note 60, at 260 (footnotes omitted). *See also Morton*, 405 U.S. at 755-56 (Blackmun, J., dissenting) ("Must our law be so rigid and our procedural concepts so inflexible that we render ourselves helpless when the existing methods and the traditional concepts do not quite fit and do not prove to be entirely adequate for new issues?"). I have made a similar claim with regards to Puerto Rico's environmental standing case law. Luis José Torres Asencio, *A las puertas del Tribunal*, 46 REV. JUR. UIPR 333 (2012).

definition of these rights, labeling all efforts to define them as arbitrary or political in nature.[91]

The second objection deals with claims that, given the scientific and technical nature of environmental decision-making processes, courts are not adequate forums for adjudicating environmental claims, due to their lack of specialized knowledge on these issues.[92] Thus, courts tend to defer to the judgments of the administrative agencies that are given the responsibility of enforcing these constitutional mandates.[93] I will address these two objections separately.

i. The vagueness objection

Several scholars assert that courts are incapable of adequately defining constitutional rights to environmental protection, given their abstract or vague nature. This claim seems to be particularly directed at substantive rights to environmental protection.[94] These authors claim that there is no general consensus as to what a 'clean,' 'healthy,' 'adequate,' 'decent,' or 'sustainable' environment really means, much less what actions does a right to live in such an environment

---

[91] FRANCO DEL POZO, *supra* note 19, at 65; HAYWARD, CONSTITUTIONAL ENVIRONMENTAL RIGHTS, *supra* note 13, at 95; SMITH, *supra* note 13, at 108; Abramovich & Courtis, *supra* note 42, at 298; Michael R. Anderson, *Human Rights Approaches to Environmental Protection: An Overview*, *in* HUMAN RIGHTS APPROACHES TO ENVIRONMENTAL PROTECTION, *supra* note 5, at 11-12; Brandl & Bungert, *supra* note 7, at 88-89; Brooks, *A Constitutional Right*, *supra* note 7, at 1071; Caldwell, *supra* note 7, at 2; François Du Bois, *Social Justice and the Judicial Enforcement of Environmental Rights and Duties*, *in* HUMAN RIGHTS APPROACHES TO ENVIRONMENTAL PROTECTION, *supra* note 5, at 157; Eckersley, *supra* note 21, at 229-30; Fernández, *supra* note 15, at 381; Gallagher, *supra* note 7, at 123; Hayward, *A Case for Political Analysis*, *supra* note 16, at 117; Hill, Wolfson & Targ, *supra* note 7, at 395; Pollard, III, *supra* note 8, at 376-77; Ruhl, *An Environmental Rights Amendment*, *supra* note 7, at 48; Thompson, Jr., *supra* note 7, at 187-90; Thompson, Jr., *supra* note 8, at 897-98; Cusack, *supra* note 7, at 200. *See also* SUNSTEIN, THE SECOND BILL OF RIGHTS, *supra* note 15, at 210 (describing the same claim, but in the context of social and economic rights); Christian Courtis, *Judicial Enforcement of Social Rights: Perspectives from Latin America*, *in* COURTS AND SOCIAL TRANSFORMATION IN NEW DEMOCRACIES: AN INSTITUTIONAL VOICE FOR THE POOR?, *supra* note 42, at 171 (same).

[92] Anderson, *supra* note 91, at 11; Caldwell, *supra* note 7, at 3; Du Bois, *supra* note 91, at 169; Eckersley, *supra* note 21, at 230; Hayward, *A Case for Political Analysis*, *supra* note 16, at 117-18; Hill, Wolfson & Targ, *supra* note 7, at 395; Thompson, Jr., *supra* note 7, at 189-90, 193-94. *See also* Sachs, *supra* note 46, at 68 (describing the same claim, but in the context of social and economic rights).

[93] Hill, Wolfson & Targ, *supra* note 7, at 395; Thompson, Jr., *supra* note 8, at 902.

[94] HAYWARD, CONSTITUTIONAL ENVIRONMENTAL RIGHTS, *supra* note 13, at 95; SMITH, *supra* note 13, at 107-08; Anderson, *supra* note 91, at 11-12; Brandl & Bungert, *supra* note 7, at 88-89; Caldwell, *supra* note 7, at 2; Gallagher, *supra* note 7, at 123; Hayward, *A Case for Political Analysis*, *supra* note 16, at 117; Hill, Wolfson & Targ, *supra* note 7, at 395; Ruhl, *An Environmental Rights Amendment*, *supra* note 7, at 48; Thompson, Jr., *supra* note 8, at 897-98, 901-02.

require governments to perform.[95] Thus, they argue, these issues should be left for consideration by the political branches of governments.[96] As with the positive/negative rights distinction, some courts have also relied on this objection to hold both that existing constitutional rights to environmental protection are not self-executing or enforceable,[97] and that such rights should not be interpreted from other constitutional provisions.[98]

At the outset, the reader should note the limited scope of this objection. Adducing that substantive constitutional environmental provisions are vague seeks to prevent courts from evaluating whether specific actions or omissions, or

---

[95] *See* HAYWARD, CONSTITUTIONAL ENVIRONMENTAL RIGHTS, *supra* note 13, at 95 (discussing difficulties with defining 'adequate environment'); SMITH, *supra* note 13, at 108 (acknowledging difficulties with defining 'clean' air or water); Anderson, *supra* note 91, at 4 (discussing problems with defining 'decent environment'); Brandl & Bungert, *supra* note 7, at 88-89 (stating that "[t]he terms 'environment,' 'protection,' 'healthy,' and 'beautiful' are broad and indeterminate"); Caldwell, *supra* note 7, at 2 ("Defining a practicable and generally acceptable definition of 'decent' would likely prove an impossible task."); Gallagher, *supra* note 7, at 123 (asserting that the ambiguity of phrases like 'decent' and 'healthful environment' was one of the reasons that doomed the 1968-1970 environmental amendment proposals in the United States); Hayward, *A Case for Political Analysis*, *supra* note 16, at 117 (discussing problems with defining 'decent' or 'adequate' environment); Horwich, *supra* note 7, at 361-62 (describing the terms 'clean' and 'healthful' as vague, within the context of interpreting Montana's constitutional environmental provisions); Ruhl, *An Environmental Rights Amendment*, *supra* note 7, at 48 (questioning the content of a right to "clean and healthful air"); Thompson, Jr., *supra* note 8, at 897-98 (discussing abstract nature of general terms like 'healthful' environment).

[96] SMITH, *supra* note 13, at 108; Fernández, *supra* note 15, at 387; Horwich, *supra* note 7, at 361-65.

[97] In *Commonwealth v. National Gettysburg Battlefield Tower*, a plurality of the Pennsylvania Supreme Court partially relied on this objection to conclude that their constitutional environmental provision was not self-executing, so it could not authorize the state government to present an action to enjoin the construction of an observation tower near Gettysburg Battlefield:

> '[C]lean air,' 'pure water' and 'the natural, scenic, historic and esthetic values of the environment,' have not been defined. The first two, 'clean air' and 'pure water,' require technical definitions, since they depend, to some extent, on the technological state of the science of purification. The other values, 'the natural, scenic, historic and esthetic values' of the environment are values which have heretofore not been the concern of government. To hold that the Governor needs no legislative authority to exercise the as yet undefined powers of a trustee to protect such undefined values would mean that individuals could be singled out for interference by the awesome power of the state with no advance warning that their conduct would lead to such consequences.

Commonwealth v. National Gettysburg Battlefield Tower, 311 A.2d 588, 593 (Pa. 1973). *See also* Robb v. Shockoe Slip Foundation, 324 S.E.2d 674, 676-77 (Va. 1985) (asserting that Virginia's constitutional environmental provision's "language invites crucial questions of both substance and procedure," questions that "beg statutory definition"). For a criticism of the courts' reliance on the vague nature of these provisions to conclude that they are not self-executing, *see* Fernández, *supra* note 15, at 371-75; Horwich, *supra* note 7, at 339-41; McLaren, *supra* note 7, at 132-37.

[98] Tanner v. Armco Steel Corp., 340 F. Supp. 532, 536-37 (S.D. Tex. 1972). *See also* Pinkney v. Ohio Envtl. Protection Agency, 375 F. Supp. 305, 311 (N.D. Ohio 1974).

existing norms, run afoul of certain environmental quality standards imposed by the constitution. This, however, does not rule out the possibility of interpreting that the environmental provisions allow interested parties to present suits seeking to enforce non-compliance with existing statutes and regulations, when these norms otherwise do not have judicial enforcement provisions. In these cases, the laws or regulations in question provide the substantive content of the environmental claim, and the constitutional provision only serves as a source for jurisdictional authority for the case.[99]

As for the objection, I agree with the claim that constitutional rights to some modality of an improved environment are, at the very least, vague. However, I do not believe that vagueness, or general substantive difficulties in defining the content of these rights, should, *per se*, constitute an impediment for judicial enforcement.

As several authors have shown, the vagueness or ambiguity related to the definition of a constitutional right to environmental protection is no more significant than that of the content of several traditional constitutional rights.[100] Professor Sunstein cites several examples to explain this argument, in the context of social and economic rights:[101]

> As we have seen, many old-fashioned rights seem equally vague. The right to "freedom of speech" could mean any number of things. Does free speech encompass commercial advertising, libel, sexually explicit speech, bribery, criminal solicitation, and nude dancing? Courts try to answer this question notwithstanding the vagueness of the text, and in doing so, they typically concede that the right itself is far from self-defining. Or consider the right to be free from "unreasonable searches and seizures." Is that right really more

---

[99] Several courts have declined to interpret substantive constitutional environmental rights provisions as creating new causes of action. *See* Fiedler v. Clark, 714 F.2d 77, 79-80 (9th Cir. 1983) (holding that Article XI, section 9 of the Hawaiian Constitution was intended "to remove barriers to standing to sue, not to enlarge the subject matter jurisdiction of the federal courts."); City of Elgin v. County of Cook, 660 N.E.2d 875, 891 (Ill. 1996) (holding that Article XI, section 2 of the Illinois Constitution "does not create any new causes of action but, rather, does away with the "special injury" requirement typically employed in environmental nuisance cases.").

[100] FRANCO DEL POZO, *supra* note 19, at 65-66; HAYWARD, CONSTITUTIONAL ENVIRONMENTAL RIGHTS, *supra* note 13, at 95-96; Abate, *supra* note 3, at 15-16; Anderson, *supra* note 91, at 4; Brooks, *A Constitutional Right*, *supra* note 7, at 1071; Hayward, *A Case for Political Analysis*, *supra* note 16, at 117; Hill, Wolfson & Targ, *supra* note 7, at 395; Thompson, Jr., *supra* note 8, at 898; McLaren, *supra* note 7, at 136. *See also* SUNSTEIN, THE SECOND BILL OF RIGHTS, *supra* note 15, at 210 (making this same argument in the context of social and economic rights); Courtis, *supra* note 90, at 171-72 (same).

[101] It should be noted that Professor Sunstein has referred to environmental rights within the context of social and economic rights. *See* Sunstein, *Against Positive Rights*, *supra* note 15, at 226-27 (including environmental rights within the category of socioeconomic rights).

> vague than the right to health care? The same question can be asked about most of the original bill of rights.[102]

Yet "[t]his difficulty has never resulted in the conclusion that 'classical' rights are not rights, or that they are not judicially enforceable."[103] To the contrary, "it has led to ongoing work on the specification of their content and limits, though a series of mechanisms aimed at defining their meaning, such as the development of statute law, administrative regulation, and case law."[104]

However, while environmental rights might be no different than conventional rights in terms of their clarity, several commentators point out that they are differentiated by the amount of experience courts have had with enforcing them. Whereas courts have been protecting citizens from government intrusions on traditional civil and political rights for a long time, and have developed a considerable body of case law to determine their content, they have done very little, if anything at all, in dealing with environmental rights.[105] Therefore, according to this view, courts would do well to decline invitations to enforce these relatively new rights, at least until the political branches of government begin to delineate the content of these provisions.[106]

---

[102] SUNSTEIN, THE SECOND BILL OF RIGHTS, *supra* note 15, at 210. *See also* Abate, *supra* note 3, at 15-16 ("[C]ourts have always added meaning to what constitutional protections mean in practical effect, such as with First Amendment liberties, so there does not appear to be a reason for environmental provisions in constitutions to be treated differently."); Brooks, *A Constitutional Right*, *supra* note 7, at 1071 ("[O]ther rights, such as freedom of speech, face similar complications and their limits can only be defined over time."); Thompson, Jr., *supra* note 8, at 898 ("Courts, of course, must frequently make difficult policy determinations in implementing other broad constitutional rights such as freedom of speech or procedural due process."); McLaren, *supra* note 7, at 136 ("[I]n constitutional law, courts frequently interpret imprecise terms such as due process, equal protection, and cruel and unusual punishment.").

[103] Courtis, *supra* note 91, at 171.

[104] *Id*. at 171-72.

[105] Brooks, *A Constitutional Right*, *supra* note 7, at 1099 ("[T]he [United States Supreme] Court does not have readily available an official history or an accepted ethos" for constitutional environmental rights); Caldwell, *supra* note 7, at 3 ("The environment is a relatively new policy focus; . . . . Difficulties are inevitable in reconciling new environmental concepts with traditional legal assumptions."); Fernández, *supra* note 15, at 377-80 ("[L]ong-established rights as due process and freedom of speech, for example, have a far more secure historical foundation than recently developed rights such as the right to a clean environment."); Thompson, Jr., *supra* note 8, at 898 ("In the case of longstanding constitutional rights, moreover, decades of precedent have examined and developed a substantive jurisprudence, while environmental policy provisions would require the courts to confront and generate a totally new framework in a complex field."). *See also* Courtis, *supra* note 91, at 171-74 (describing this claim the context of social and economic rights).

[106] A related consideration deals with the degree of societal consensus that environmental rights generate, as compared to traditional constitutional values. In this regard, some scholars argue that courts should not enforce constitutional environmental provisions, absent a strong system of

Taken to an extreme, this objection seems somewhat circular. If courts can only enforce rights with which they have had prior experience, then they should never enforce rights. Following this rationale, one might wonder what was the justification behind beginning to enforce traditional civil and political rights in the first instance. However, those who assert this claim only seem to state it in the context of economic, social and environmental rights.[107] Therefore, part of this objection could be viewed as a masked substantive argument for only constitutionalizing and enforcing civil and political constitutional rights.

On the other hand, taken as a pragmatic claim based on the particular difficulties of enforcing relatively unexplored rights, this objection provides powerful reasons for limiting judicial enforcement for environmental protection rights. While courts could surely devise imaginative interpretations to fill out the content of these rights, one could very well argue that courts would not constitute the best forums for conducting such an enterprise.[108] Indeed, it could be asserted that public officials and

---

environmental law, out of democratic concerns. They assert that, given that there is a considerable amount of controversy related to these rights, courts should allow democratic and political processes to deliver on these issues until some sort of consensus is finally reached. Fernández, *supra* note 15, at 377-82; Ruhl, *An Environmental Rights Amendment*, *supra* note 7, at 47-48; Sunstein, *Against Positive Rights*, *supra* note 15, at 226-27. I will deal with this claim when I discuss the democratic objection to enforcement of constitutional rights to environmental protection.

[107] Limiting this claim to enforcement of social, economic and environmental rights might also be somewhat arbitrary and unfair. In replying to these same arguments within the context of debates about enforcing social rights in Latin America, Professor Christian Courtis explains:

> The absence of a coherent body of legal regulations, case law and jurisprudence in the area of social rights does not follow from any metaphysical impossibility. Rather, it has ideological origins: symbolic and material resources were disproportionately allocated to the development of the legal basis of the nineteenth-century capitalist market structure, which still dominates the core legal academic curriculum in Latin America. Even if part of the development or nineteenth-century legal culture focused on the development of a legal basis for the welfare state, the lack of development of constitutional and statutory law on social rights, together with a body of case law and jurisprudence, is partly the result of a self-fulfilled prophecy: the ideological operation of the theory of social rights as 'programmatic' rights.

Courtis, *supra* note 91, at 172. It should be uncontroversial to state that Professor Courtis' description of this phenomenon in Latin America applies with equal force to the development of social and environmental rights in the United States.

[108] As Professor Courtis puts it:

> It seems clear that, in the absence of clarity on the content of a right, and the identity of the right holder and the duty bearer, judicial enforcement becomes a difficult task. The adjudication of a right presupposes a relatively clear 'rule of decision' enabling the judge to assess compliance or non-compliance with the obligations stemming from the right. Absent this 'rule of decision', it may be impossible to distinguish adjudication from impermissible judicial law making.

Courtis, *supra* note 91, at 171.

agencies charged with implementing the constitutional environmental mandates are in a better position to define the content of these rights. Given that these arguments relate to the next topic, I will put them aside for the moment and reassess them at the end of the next section.

ii. The technical/scientific content objection

A second objection based on the content of constitutional environmental protection rights deals with claims about the technical and scientific nature of these rights. According to this objection, since environmental issues involve a great deal of ethical, aesthetic and scientific questions,[109] they should be primarily addressed by persons and institutions that possess such knowledge.[110] Courts, therefore, should not be relied on to find solutions to these complex issues, and when they do face these cases, they should defer to the reasoned judgments of expert public officials.[111]

This objection seemed to play a significant role in several of the cases in which environmentalists asked federal courts to recognize a constitutional right to a healthy environment under the Fifth, Ninth and Fourteenth Amendments of the United States

---

[109] In describing some of the difficulties in the implementation and enforcement of the existing environmental protection regime, Professor Richard J. Lazarus identifies the "dominant characteristics of environmental protection laws" as "complexity, scientific uncertainty, dynamism, precaution, and controversy." LAZARUS, THE MAKING, *supra* note 60, at 16-28. All of them also serve as potent obstacles to judicial enforcement of constitutional environmental rights.

[110] SMITH, *supra* note 13, at 107-08 (describing that "the concrete content of these claims cannot be established independently both of some specification of the material culture of those on behalf of whom the claim is made and of the bio-physical sustaining conditions of that culture"); Anderson, *supra* note 91, at 11 ("[P]recise qualitative and quantitative dimensions of environmental protection are not readily translated into legal terms."); Du Bois, *supra* note 91, at 169; Eckersley, *supra* note 21, at 230; Hayward, *A Case for Political Analysis*, *supra* note 16, at 117 (arguing that the nature of environmental issues is such "that their causes are often difficult or impossible to identify with the degree of accuracy necessary to support legal action against specific alleged polluters; it is correspondingly difficult to assign specific duties to individuals or firms that are directly correlative with the right to an adequate environment."); Hill, Wolfson & Targ, *supra* note 7, at 395-96; Thompson, Jr., *supra* note 7, at 189-90, 193-94. For similar discussions in the context of social and economic rights, *see* Sachs, *supra* note 46, at 68.

[111] Hill, Wolfson & Targ, *supra* note 7, at 395-96; Thompson, Jr., *supra* note 8, at 902. In order to circumvent these claims, some authors propose the creation of specialized environmental courts to hear both constitutional and statutory environmental claims. HAYWARD, CONSTITUTIONAL ENVIRONMENTAL RIGHTS, *supra* note 13, at 111-14; Hayward, *A Case for Political Analysis*, *supra* note 16, at 118. In fact, some countries, like Australia, are already experimenting with these courts. For a discussion of some of the debates and experiences related to one of these courts, the New South Wales Land and Environment Court in Australia, *see* HAYWARD, CONSTITUTIONAL ENVIRONMENTAL RIGHTS, *supra* note 13, at 111-14; Paul Stein, *A Specialist Environmental Court: An Australian Experience*, *in* PUBLIC INTEREST PERSPECTIVES IN ENVIRONMENTAL LAW 258, 258-62 (David Robinson & John Dunkley eds., 1995); Paul Stein, *Why Judges are Essential to the Rule of Law and Environmental Protection*, *in* JUDGES AND THE RULE OF LAW: CREATING THE LINKS: ENVIRONMENT, HUMAN RIGHTS AND POVERTY, *supra* note 6, at 53.

Constitution.[112] Particularly, in denying these claims in *Tanner v. Armco Steel Corp*., the federal district court judge stated that:

> [F]rom an institutional viewpoint, the judicial process, through constitutional litigation, is peculiarly ill-suited to solving problems of environmental control. Because such problems frequently call for the delicate balancing of competing social interests, as well as the application of specialized expertise, it would appear that their resolution is best consigned initially to the legislative and administrative processes. Furthermore, the inevitable trade-off between economic and ecological values presents a subject matter which is inherently political, and which is far too serious to relegate to the ad hoc process of "government by lawsuit" in the midst of a statutory vacuum.[113]

While the technical and scientific nature of environmental litigation certainly poses intricate challenges, such complexities do not require that courts abstain from entertaining these suits. As a matter of fact, judges already have to deal with scientific and technical issues in several cases.[114] Medical malpractice litigation, for instance, requires courts to deal with similarly complex issues. Additionally, courts have had almost five decades of experience dealing with cases involving the modern version of the United States environmental law regime, so this subject is not completely unknown to them.[115] If judges are able to adjudicate these cases, particularly with the help of expert submissions by the parties and several procedural and evidentiary mechanisms, it does not seem that they would be unable to do the same with constitutional environmental cases.[116]

---

[112] *See supra* note 8, and sources cited there.

[113] Tanner v. Armco Steel Corp., 340 F. Supp. 532, 536-37 (S.D. Tex. 1972). *See also* Pinkney v. Ohio Envtl. Protection Agency, 375 F. Supp. 305, 311 (N.D. Ohio 1974) ("[T]he task of defining a 'deprivation' as that term relates to the interest in a healthful environment is beyond the competence of the courts and is instead a task characteristically performed by the legislative branch.").

[114] *See* HAYWARD, CONSTITUTIONAL ENVIRONMENTAL RIGHTS, *supra* note 13, at 111 ("[C]ourts do routinely—and not only in environmental cases—have to deal with testimony from experts in order to arrive at judgments.").

[115] For an excellent discussion of the development of our "modern environmental law" system in the 1970s, as well as the role that courts played, given that most of the federal environmental laws had citizen suit provisions, *see* LAZARUS, THE MAKING, *supra* note 60, at 67-97.

[116] Hayward, *A Case for Political Analysis*, *supra* note 16, at 118. Some scholars also suggest that courts should apply the precautionary principle, which requires that "[w]here there are threats of serious or irreversible damage, lack of full scientific certainty should not be used as a reason for postponing cost-effective measures to prevent environmental degradation." SMITH, *supra* note 13, at 110-11; HAYWARD, CONSTITUTIONAL ENVIRONMENTAL RIGHTS, *supra* note 13, at 103-06; Eckersley, *supra* note 21, at 231-32; Hayward, *A Case for Political Analysis*, *supra* note 16, at 118. Graham Smith explains:

> Given the condition of uncertainty and risk surrounding many environmental interventions, reasonable evidence of potential damage, rather than absolute scientific proof, is enough to

On the other hand, while it is wise to note the difficulties with addressing the complex scientific components of constitutional environmental protection rights, we should not forget that these are also constitutional rights. As Justice Albie Sachs, of the Constitutional Court of South Africa, has said in the context of enforcing social and economic rights, "[j]udges know about fundamental rights, about constitutional law."[117] While he acknowledges that the technical components of social and economic rights "require[] a corresponding judicial modesty,"[118] he notes that in dealing with fundamental constitutional rights judges "may be even better equipped than the experts, who are, and correctly so, animated by more bureaucratic and operational considerations."[119] He explains:

> Indeed, the very nature of judicial decision-making is different from theirs. Decisions made by officials and legislatures have to build in compromise; there is nothing inherently wrong with that, compromise is good in public light. It is right that elected officials be directly responsive to the electorate, but judges cannot and should not be, especially when defending fundamental rights. Thus, the compromises bureaucrats appropriately effect, when reconciling different interests are different in nature from the balancing judges set out to achieve when harmonizing competing principles.[120]

Going back to the claims discussed in the last section, we can now see that, while agencies and public officials might be in a better position to ascertain the technical, scientific content of environmental rights, courts are better suited to develop the content of these rights within a constitutional framework,[121] theoretically apart from

---

> require the protection of environmental rights. The principle would act as a procedural norm in the policy-making process and would also benefit citizens seeking legal redress (one of the suggested procedural rights) against decisions that generate serious potential environmental risk, because the burden of proof would be on the defendant to show why preventative action is not necessary.

SMITH, *supra* note 13, at 110-11.

[117] Sachs, *supra* note 46, at 68.

[118] *Id*.

[119] *Id*.

[120] *Id*.

[121] In the context of enforcing social and economic rights, Christian Courtis explains:

> [W]hen judges examine whether a right has been violated, they do not necessarily prescribe the specific course of conduct that the state or individual must follow. Judges usually assess the action required of the duty-bearer in terms of legal standards, such as 'reasonableness', 'proportionality', 'adequacy', 'appropriateness' or 'progressive realisation'. These standards are not alien to the tradition of judicial review of decisions of the political branches. Judges also do not necessarily substitute their views for those of the political branches in deciding

the different policy and political interests which imbue legislative and executive affairs. This, however, does not mean that courts are to develop their own substantive standards for environmental protection out of thin air, or that no deference will be given to the reasoned policy choices of the agencies charged with the implementation of environmental laws.

No serious proposal for judicial enforcement of constitutional rights to environmental protection argues that courts should impose substantive standards with complete disregard to those articulated in existing environmental laws and regulations. Quite the opposite, many authors who advocate in favor of enforcement note that the content of substantive rights should be developed over time, and that "the main work in defining the content and extent of rights should be carried out by the legislative branch and, subsequently, through administrative regulation."[122] Courts would thus serve a supervisory role, "to ensure that the state is both more responsive to, and responsible for, the ecological welfare of its citizens and for the welfare of the new environmental constituency."[123]

In short, the scientific and complex nature of constitutional environmental rights, combined with the brief history they have had as part of the constitutional discourse, limits, but does not preclude, their judicial enforcement. This would probably require that, as courts begin to face constitutional environmental claims, they would be inclined to construe the content of these rights by considering the substantive provisions in existing statutes and regulations as well as the policy judgments of the agencies in charge of implementing these statutes. However, as they gather experience dealing with claims that government actions or omissions run afoul of these rights, and they begin to develop a body of constitutional environmental case law, courts could very well move towards less deferential modes of judicial enforcement. As I will discuss later in this Article, I believe the Montana Supreme Court's enforcement

---

> how a right should be fulfilled, but often examine the effectiveness of the chosen measures in achieving their stated goals. Although the state's margin of appreciation may be wide, certain types of conduct, such as the exclusion of specially protected groups, the failure to satisfy needs associated with the minimum core content of a right, or the adoption of retrogressive measures, are likely to be subjected to judicial review in terms of 'reasonableness' or similar standards.

Courtis, *supra* note 91, at 174.

[122] *Id*. at 172. *See also* Hayward, *A Case for Political Analysis*, *supra* note 16, at 118 ("Risk standards should be specified further at the national level through democratic legislative and regulatory processes, in light of current scientific knowledge and fiscal realities. Thus the substantive meaning of the right may be possible to determine over time.").

[123] Eckersley, *supra* note 21, at 230. *See also* Du Bois, *supra* note 91, at 154 (asserting that enforcement of these rights "should aim at ensuring that the legislative and executive branches of government strike an impartial balance between the 'green' conception of a worthwhile life and rival conceptions. Courts may not be able to implement the necessary environmental policies themselves, but they can and should police their impartiality.").

of its constitutional rights to environmental protection demonstrates how this gradual development can take place.

C. Institutional, separation of powers objections[124]

Moving away from the objections to judicial enforcement of constitutional environmental rights related to their content and classification, we encounter new concerns about the proper role for the judiciary under the Unites States' model of liberal constitutional democracy. According to these claims, judicially enforcing second and third generation rights will pave the way for an "over-extension of the judiciary,"[125] that is, to force judges to perform functions that are more akin to the political branches of government.[126] As Professor Frank I. Michelman has aptly described it in the context of the constitutionalization of socioeconomic rights:

> By constitutionalizing social rights, the argument often has run, you force the judiciary to a hapless choice between usurpation and abdication, from which there is no escape without embarrassment or discredit. One way, it is said, lies the judicial choice to issue positive enforcement orders in a pretentious, inexpert, probably vain but nevertheless resented attempt to reshuffle the most basic resource-management priorities of the public household against prevailing political will. The other way lies the judicial choice to debase dangerously the entire currency of rights and the rule of law by openly ceding to executive and parliamentary bodies an unreviewable privilege of indefinite postponement of a declared constitutional right.[127]

Inasmuch as this objection relies on claims about judiciaries imposing costly "positive enforcement orders" on governments, and that they lack the relevant experience or knowledge to deal with the policy issues behind constitutional environmental protection rights, this objection is nothing much than a restatement of the ones I have already discussed. As we have seen, while those claims present compelling arguments for limiting the scope of enforcing these rights, they do not preclude it.

---

[124] The names for the two next objections, the institutional and democratic objections, are taken from Professor Frank Michelman's article, *The Constitution, Social Rights, and Liberal Political Justification*. Michelman, *The Constitution*, *supra* note 38, at 13.

[125] Michelman, *The Constitution*, *supra* note 38, at 15.

[126] SUNSTEIN, DESIGNING DEMOCRACY, *supra* note 15, at 222-24; SUNSTEIN, THE SECOND BILL OF RIGHTS, *supra* note 15, at 210-11; Arbour, *supra* note 42, at 11-13; Courtis, *supra* note 91, at 174-75; Du Bois, *supra* note 91, at 156, 169; Eckersley, *supra* note 21, at 228-29; Gargarella, Domingo & Roux, *supra* note 42, at 259-60; Hayward, *A Case for Political Analysis*, *supra* note 16, at 120-21; Sachs, *supra* note 46, at 59, 67-69.

[127] Michelman, *The Constitution*, *supra* note 38, at 16. *See also* Michelman, *Explaining America Away*, *supra* note 38, at 683.

However, many proponents of judicial enforcement for social, economic, and environmental protection rights concede that the extent of such enforcement cannot equal to that of traditional civil and political rights.[128] Some authors argue that this disparity in enforcement could lead courts to the weakening of judicial enforcement for traditional constitutional rights, and running the risk of having the constitution become "a mere piece of paper."[129] Thus, they object to enforcement of social, economic, and environmental rights on these new grounds.

Yet, these claims seem speculative, and no studies about how this rights-debasement phenomenon is manifested are presented in its support.[130] Quite to the contrary, Professor Mark V. Tushnet cites and discusses the experience of the Hungarian Constitutional Court in enforcing social and economic rights as an example of how the level of protection of these rights has not led to a reduction in the protection of traditional civil and political guarantees.[131] It seems, then, that "concerns about the spillover effects—that citizens [will] come to regard all constitutional provisions as mere words on paper—of nonenforcement of social and economic rights [are] misplaced."[132]

---

[128] Michelman, *Explaining America Away*, *supra* note 38, at 683 ("In a country like the United States, given both our embrace of popular government and the irreducible uncertainty, contestability, and contingency affecting choices in the field of socioeconomic policy, any constitutionalized socioeconomic commitment inevitably must be couched in abstract, best-efforts terms, South African style."); SMITH, *supra* note 13, at 108, 111; SUNSTEIN, DESIGNING DEMOCRACY, *supra* note 15, at 234; SUNSTEIN, THE SECOND BILL OF RIGHTS, *supra* note 15, at 227-28; Sachs, *supra* note 46, at 64 ("A society does not ration free speech or the vote, but does ration access to resources.").

[129] Sunstein, *Against Positive Rights*, *supra* note 15, at 229. *See also* TUSHNET, *supra* note 12, at 234 (describing the claim).

[130] *See* TUSHNET, *supra* note 12, at 262 ("As a matter of legal analysis, there is no reason why an approach adopted for one category of cases (social and economic rights), for reasons specific to that category (such as concerns about fiscal impact), will leak over into another category (traditional civil liberties and civil rights), where those reasons are irrelevant."). In one of his early publications on the subject of judicial enforcement of 'positive' rights, Professor Sunstein acknowledged this point, but asserted that the risk of debasement was too high. Sunstein, *Against Positive Rights*, *supra* note 15, at 230. He has since endorsed the South African model of enforcement of social and economic rights as one that does not run afoul of the traditional non-substantive objections:

> By requiring reasonable programs, with respect for limited budgets, the court has found a way of assessing claims of constitutional violations without requiring more than existing resources will allow. In so doing, the court has provided the most convincing rebuttal yet to the claim that judicial protection of the second bill could not possibly work in practice. We now have reason to believe that a democratic constitution, even in a poor nation, is able to protect those rights without placing an undue stain on judicial capacities.

SUNSTEIN, THE SECOND BILL OF RIGHTS, *supra* note 15, at 228-29.

[131] TUSHNET, *supra* note 12, at 235-37.

[132] *Id*. at 237.

Nonetheless, some scholars also assert that courts lack the necessary tools to adjudicate the types of cases in which they are involved.[133] For example, Professor Courtis acknowledges that conventional trials "do not constitute the best forum for deciding some of these issues, not least because they involve a multiplicity of actors and interests."[134] Professor Sunstein adds that "[c]ourts lack the tools of a bureaucracy. They cannot enforce government programs. They do not have a systematic overview of government policy."[135]

These structural limitations combine with a stronger version of the institutional objection. Professor Michelman argues that the risks posed by the institutional objection take on a new dimension when we consider that "judicial constitutional review really does serve as a linchpin of constitutional legality" in the United States.[136] Thus, he argues that the "seriously intrusive" form of judicial review prevalent in the United States might serve as a moral impediment to the constitutionalization of these rights.[137] In short, according to this claim, given that judicial enforcement of constitutional rights takes the strongest of forms in the United States, proposals for 'watered-down' versions of judicial enforcement of certain

---

[133] SUNSTEIN, DESIGNING DEMOCRACY, *supra* note 15, at 223 (citing Davis, *supra* note 15) ("[S] coioeconomic rights are beyond judicial capacities. On this view, courts lack the tools to enforce such guarantees."); SUNSTEIN, THE SECOND BILL OF RIGHTS, *supra* note 15, at 211 ("The broader problem is that in order to implement the second bill, government officials have to engage in resource allocation and program management. Courts are not in a good position to oversee those tasks."); Courtis, *supra* note 91, at 175-76; Sachs, *supra* note 46, at 59.

[134] Courtis, *supra* note 91, at 175.

[135] Sunstein, *Against Positive Rights*, *supra* note 15, at 229. *See also* Cross, *supra* note 15, at 891. An additional objection avers that judicial enforcement of constitutional rights to environmental protection would open the floodgates of litigation, and unduly constraining the courts dockets with cases that are probably not best suited to adjudicate. Ruhl, *An Environmental Rights Amendment*, *supra* note 7, at 47-49 ("It is not hard, particularly in this age of aggressive rights enforcement, to envision a litigation *tsunami* emanating from the environmental rights amendment.").

Even assuming that the recognition of a new constitutional right to environmental protection would entice citizens, communities and environmental organizations to bring new cases to courts, a wholly speculative endeavor, this objection does not defeat the judicial enforcement argument by itself, given that there are mechanisms to prevent this 'litigation tsunami.' Article III standing to sue limitations, for example, either under the current articulated Supreme Court standards or under a flexible environmental-controversies-sensible standard, would filter out many of these suits. *See* Hayward, *A Case for Political Analysis*, *supra* note 16, at 118. Additionally, the experience in Colombia, a country that not only has strong constitutional rights to environmental protection but also a Constitutional Court that is willing to enforce them, the number of environmental cases presented before said Court has considerably reduced and leveled off after the initial spike spurred by the ratification of the new Constitution in 1991. Beatriz Londoño Toro, *Algunas reflexiones sobre la exigibilidad de los derechos colectivos y del ambiente*, *in* PERSPECTIVAS DE DERECHO AMBIENTAL EN COLOMBIA 71 (Beatriz Londoño Toro, Gloria Amparo Rodríguez & Giovanni J. Herrera Carrascal, eds., 2006).

[136] Michelman, *Explaining America Away*, *supra* note 38, at 684.

[137] *Id*. at 685.

rights, like the ones usually found in the context of social and economic rights, might be inappropriate.[138]

From a strictly theoretical point of view, the question of whether judicial enforcement of constitutional rights to environmental protection can be achieved within a model of 'strong-form' judicial review,[139] as it exists presently in the United States,[140] lies beyond the scope of this paper. I should note, however, that Professor Michelman's argument is only addressed at the prospects of positive judicial enforcement of social, economic and environmental rights. Given that providing protection for the negative components of environmental protection rights does not require courts to impose budgetary demands on governments, or to intrude in reasonable policy setting any more than with civil and political rights, strong-form review is not an obstacle to their judicial enforcement.[141]

Additionally, the institutional, separation of powers objection as a whole cannot be taken as being opposed to interpretations of constitutional environmental provisions as creating new causes of action to bring claims against government for its lack of compliance with existing statutes.[142] Under these types of cases, parties relying on the constitutional provisions usually seek to have the Executive Branch comply with a legislative mandate. Thus, to oppose the enforceability of this component of constitutional environmental rights by relying on the institutional objection is to undermine, not reinforce, separation of powers concerns.[143]

---

[138] However, Professor Michelman does acknowledge that this objection "fails to take account of recent investigations of the ways in which reviewing courts, employing so-called weak remedies, can hope to respond usefully to complaints regarding performance by governments of best-efforts-style socioeconomic commitments while avoiding both abdication and usurpation." *Id*. at 683 n.71. He does not address whether he considers that these 'weak remedies' could be available to American courts. *Id*. Thus, his analysis "simply assumes that the choice is between total judicial abstinence and seriously intrusive judicial remedies." *Id*.

[139] Professor Tushnet describes the United States' "system of judicial review" as one in which "the courts' reasonable constitutional interpretations prevail over the legislatures' reasonable ones." TUSHNET, *supra* note 12, at 21. Thus, "[c]ourts exercise strong-form judicial review when their interpretive judgments are final and unrevisable." *Id*.

[140] Cooper v. Aaron, 358 U.S. 1, 18 (1958) ("[T]he federal judiciary is supreme in the exposition of the law of the Constitution, and that principle has ever since been respected by this Court and the Country as a permanent and indispensable feature of our constitutional system. It follows that the interpretation . . . enunciated by this Court . . . is the supreme law of the land . . . ."). *See* TUSHNET, *supra* note 12, at 21-22.

[141] Additionally, as we have already discussed, constitutional rights to environmental protection can also be utilized to reinterpret environmental statutes and regulations, or to provide a sounder basis for upholding legislative and executive actions. *See supra* notes 60-62 and accompanying text. Professor Tushnet makes similar claims about the uses of nonjusticiable declaratory rights. TUSHNET, *supra* note 12, at 238-39.

[142] This is, of course, assuming that the relevant constitutional environmental provisions can be interpreted in such a manner, an issue that this article does not address.

[143] Courtis, *supra* note 91, at 175 ("A considerable number of cases involving the violation of social rights deal with situations where the executive is sued for not complying with statutory regulations

As for the positive components of these rights, the strong-form judicial review objection need not be insurmountable. Professor Tushnet argues that the United States Supreme Court has dabbled with weak forms on judicial review[144] when dealing with "core First Amendment rights," on issues that involve "relatively new social phenomena,"[145] like regulations on cable television[146] and regulations on the distribution of indecent material on the Internet.[147] He also discusses the Court's decision[148] upholding the Bipartisan Campaign Reform Act of 2002 (BCRA) as another example of the Supreme Court's use of alternative forms of review, as Justices Stevens and O'Connor's opinion upholding Titles I and II of the act concludes with the following statement: "We are under no illusion that BCRA will be the last congressional statement on the matter. Money, like water, will always find an outlet. What problems will arise, and how Congress will respond, are concerns for another day."[149] Professor Tushnet argues that this opinion came "close to explicitly

---

passed by the legislature. In these cases, adjudication could be seen as reinforcing – and not undermining – the separation of powers."); Hayward, *A Case for Political Analysis*, *supra* note 16, at 120-21 ("[C]ourts have a legitimate function in a democracy. Judicial enforcement of a written constitution means, to quote a venerable source, 'that where the will of the legislature declared in its statutes, stands in opposition to that of the people declared in the constitution, the judges ought to be governed by the latter, rather than the former.' If democracy requires the rule of law, judicial powers cannot be seen as straightforwardly opposed to democratic principles.").

[144] Professor Tushnet describes weak-form review in the following manner:

> Weak-form systems of judicial review hold out the promise of reducing the tension between judicial review and democratic self-governance, while acknowledging that constitutionalism requires that there be some limits on self-governance. The basic idea behind weak-form review is simple: weak-form judicial review provides mechanisms for the people to respond to decisions that they reasonably believe mistaken that can be deployed more rapidly than the constitutional amendment or the judicial appointment process.

TUSHNET, *supra* note 12, at 23. Its fundamental assumption is that "there can be reasonable disagreement over the meaning of constitutional provisions." *Id*. at 26. Therefore, contrary to strong forms of judicial review, judicial interpretations of constitutional provisions are not necessarily final and unreviewable by legislative majorities. *Id*. at 33. Instead, courts engage in constitutional dialogues with legislatures, as well as the executive and the citizenry, over the meaning and scope of constitutional provisions. *Id*. at 34.

[145] *Id*. at 262-63.

[146] Turner Broadcasting v. FCC, 520 U.S. 180 (1997). With regards to this case, Professor Tushnet stated that the Court "acknowledged the importance of giving Congress room to experiment" in this area, as a reason for upholding a regulation that would otherwise be unconstitutional had the bans been applied to "longer-established media." TUSHNET, *supra* note 12, at 262.

[147] Ashcroft v. ACLU, 542 U.S. 656 (2004). According to Professor Tushnet, while the Court here struck down some "regulations of the distribution of indecent material over the World Wide Web," it "merely approved a trial court's decisions that, given the record before it, the government had not shown that technology was inadequate to limit minors' access to such material without limiting the access of adults as well." TUSHNET, *supra* note 12, at 262.

[148] McConnell v. Federal Election Comm'n, 540 U.S. 93 (2003).

[149] *Id.* at 224.

endorsing the idea that the substantive law of the First Amendment would be shaped by interactions among the public acting as campaign donors, Congress acting as regulator, and the Supreme Court acting as the (provisionally) final determiner of the Constitution's meaning."[150] That idea, a constitutional dialogue between these parties, "is the one that underlies weak-form judicial review."[151]

Finally, it is not entirely clear how this strong-form judicial review version of the institutional objection applies to state courts.[152] Whether or not some, or all, of these courts follow the United States fondness for strong-form review, many state courts have experimented with enforcing social, economic, and environmental rights. Professor Sunstein, for example, cites several cases of the New York Court of Appeals in which they enforced a constitutional provision that deals with governmental provision of "aid, care and support" for the needy,[153] "while also respecting reasonable judgments by the legislature."[154] On the other hand, Professor Tushnet cites two North Carolina Supreme Court cases that first "held that the state had a constitutional duty to provide children 'the opportunity to attain a sound basic education,'"[155] and then affirmed a trial court order enforcing the right and imposing weak remedies against the state, such as an "order directing the state 'to conduct self-examinations of the present allocation of resources and to produce a rational[ ], comprehensive plan which strategically focuses available resources and funds towards meeting the needs of all children . . . to obtain a sound basic education.'"[156] Thus, the Court left the state to work out most of the details, while requiring periodic progress reports.[157]

---

[150] TUSHNET, *supra* note 12, at 263.

[151] *Id*.

[152] I do not propose here to conduct a detailed analysis about how certain particularities of state courts, like the fact that many of their judges are elected, play out when facing institutional, democratic, or any other objection to judicial enforcement of constitutional rights to environmental protection. Rather, I am only interested here in discussing those aspects of these objections that seem to be particularly relevant to both federal and state courts. For discussions focused solely on the impact of many these objections at the state level, *see* Fernández, *supra* note 15; Helen Hershkoff, Foreword, *Positive Rights and the Evolution of State Constitutions*, 33 RUTGERS L.J. 799 (2002); Helen Hershkoff, *Positive Rights and State Constitutions: The Limits of Rationality Review*, 112 HARV. L. REV. 1131 (1999); Helen Hershkoff, *Rights and Freedoms Under the State Constitution*, 13 TOURO L. REV. 631 (1997); Ledewitz, *supra* note 7; Popovic, *supra* note 7; Thompson, Jr., *supra* note 8; Cusack, *supra* note 7; Matthew Thor Kirsch, Note, *Upholding the Public Trust in State Constitutions*, 46 DUKE L.J. 1169 (1997); McLaren, *supra* note 7; Pollard, III, *supra* note 8.

[153] N.Y. CONST. art. XVII, § 1.

[154] SUNSTEIN, THE SECOND BILL OF RIGHTS, *supra* note 15, at 212-15 (discussing Aliessa v. Novello, 754 N.E.2d 1085 (N.Y. 2001); Lovelace v. Gross, 605 N.E.2d 339 (N.Y. 1992); Tucker v. Toia, 371 N.E.2d 449 (N.Y. 1977); Barie v. Lavine, 357 N.E.2d 349 (N.Y. 1976)).

[155] TUSHNET, *supra* note 12, at 255 (citing Leandro v. State, 488 S.E.2d 249 (N.C. 1997)).

[156] *Id.* (citing Hoke County v. State, 599 S.E.2d 365, 389 (N.C. 2004)).

[157] *Id*. However, according to Professor Tushnet, the Court did offer "hints that it might later ratchet up the requirements—presumably moving from a planning order to one requiring that specific actions

An example of state judicial enforcement of constitutional rights to environmental protection in the United States also supports the notion that not only can these rights be enforced without running afoul of the institutional objection, but that they can resort to using weaker versions of judicial review. In *Save Ourselves v. Louisiana Environmental Control Commission*,[158] the Louisiana Supreme Court faced a constitutional challenge[159] to a decision of the Environmental Control Commission (ECC) issuing permits to allow construction and operation of a hazardous waste disposal facility. After addressing the relevant statutory and regulatory provisions, the Court held that the constitutional clause imposed "a rule of reasonableness which requires an agency or official, before granting approval of proposed action affecting the environment, to determine that adverse environmental impacts have been minimized or avoided as much as possible consistently with the public welfare."[160] Thus, the Court interpreted that the constitution required "a balancing process in which environmental costs and benefits must be given full and careful consideration along with economic, social and other factors."[161]

The Court then went on to hold that since the ECC was designated as the "primary public trustee of natural resources and the environment in protecting them from hazardous waste pollution," it had to "act with diligence, fairness and faithfulness to protect this particular public interest in the resources."[162] This role, then, did "not permit it to act as an umpire passively calling balls and strikes for adversaries appearing before it; the rights of the public must receive active and affirmative protection at the hands of the commission."[163] However, the Court added that, in discharging its duties, the ECC had discretion to determine the particular results in each case:

> The environmental protection framework vests in the commission a latitude of discretion to determine the substantive results in each particular case. Environmental amenities will often be in conflict with economic and social

---

be taken." *Id*. at 256. Therefore, Professor Tushnet uses these cases as examples of how courts that impose weak remedies might nonetheless move towards imposing stronger remedies as it perceives that their initial remedies are too weak. *Id*. at 254.

[158] 452 So.2d 1152 (La. 1984). [159] The constitutional environmental provision in controversy states:

> The natural resources of the state, including air and water, and the healthful, scenic, historic, and esthetic quality of the environment shall be protected, conserved, and replenished insofar as possible and consistent with the health, safety, and welfare of the people. The legislature shall enact laws to implement this policy.

LA. CONST. art. IX, § 1.

[160] *Save Ourselves*, 452 So.2d at 1157.

[161] *Id*.

[162] *Id*.

[163] *Id*.

> considerations. To consider the former along with the latter must involve a balancing process. In some instances environmental costs may outweigh economic and social benefits and in other instances they may not. This leaves room for a responsible exercise of discretion and may not require particular substantive results in particular problematic instances.[164]

In the end, the Court found that it was not clear from the record that the ECC fully understood its purpose in the case, given that its factual findings and reasons were insufficient to reveal that it had conducted a decision-making process compatible with the constitutional requirements.[165] Therefore, the case was remanded to the agency.

Taken together, these state court cases defeat the notion that only strong-form judicial review is available to enforce these rights.[166] By utilizing flexible standards of review and imposing weak remedies when they found the state to be in violation of said rights, the courts avoided unduly interfering with governmental allocation of funds, required little new monies to be assigned in order to comply with the constitutional provisions, and still managed to give the rights legally cognizable meanings. Therefore, at the very least, by employing weak-form models of judicial review, and initially imposing weak remedies for violations of constitutional rights to environmental protection, courts do not run afoul of the institutional, separations of powers objection.

D. Democratic objections

A related allegation, the democratic or majoritarian objection, focuses on the limits that judicial enforcement places on the policy choices of elected government officials. According to this objection, the constitutionalization and enforcement

---

[164] *Id*.

[165] Specifically, the Court stated:

> From the present record we cannot tell whether the agency performed its duty to see that the environment would be protected to the fullest extent possible consistent with the health, safety and welfare of the people. The record is silent on whether the agency considered alternate projects, alternate sites or mitigation measures, or whether it made any attempt to quantify environmental costs and weigh them against social and economic benefits of the project. From our review it appears that the agency may have erred by assuming that its duty was to adhere only to its own regulations rather than to the constitutional and statutory mandates.

Id. at 1160. For a criticism of this opinion *see* Greg L. Johnson, Comment, *Constitutional Environmental Protection in Louisiana: Losing the Reason in the Rule of Reasonableness*, 42 LOY. L. REV. 97 (1996).

[166] Additionally, the First Amendment federal cases also demonstrate that, contrary to popular assumptions, weak-form enforcement is a possibility, particularly when the Supreme Court is dealing with "relatively new social phenomena." TUSHNET, *supra* note 12, at 263. Were circumstances to allow environmental rights to reach constitutional status at the federal level, they could very well fall under this category.

of environmental protection rights "forecloses" or limits the choices and scope of the debates with regards to addressing ecological injury concerns.[167] As judicial enforcement of these rights increases or strengthens, the alternatives for reasoned public decision-making by elected majorities decrease.[168] This decrease is more often than not induced by the fact that judicial imposition of positive obligations on a State can be considerably expensive, sometimes even requiring redistribution of limited public funds between different policy interests. Thus, by enforcing these constitutional rights, we are "turning over to an unelected judiciary a share of control over policymaking that is far too extensive to be tolerable in a democracy."[169] As a result, some democratic theorists suggest that some "important goods," such as "environmental protection," "should not be recognized in the [United States] Constitution," because it is likely that they "will be adequately guaranteed through ordinary political processes."[170]

As an initial reaction, some authors question whether certain particularities of ecological problems make them inadequate to be effectively addressed in the

---

[167] Sunstein, *Against Positive Rights*, *supra* note 15, at 228 ("These issues should be subject to democratic debate, not constitutional foreclosure."). *See also* HAYWARD, CONSTITUTIONAL ENVIRONMENTAL RIGHTS, *supra* note 13, at 131-33 (citing Jeremy Waldron, *A Rights-Based Critique of Constitutional Rights*, 13 O.J.L.S. 18, 20-27 (1993)); Hayward, *A Case for Political Analysis*, *supra* note 16, at 121; Preuß, *supra* note 38, at 211.

[168] A variant of this objection concerns "the placing of binding constraints on future citizens, limiting their autonomy in policymaking through principles developed on the basis of historically superseded exigencies." Hayward, *A Case for Political Analysis*, *supra* note 16, at 121. *See also* HAYWARD, CONSTITUTIONAL ENVIRONMENTAL RIGHTS, *supra* note 13, at 133-34.

[169] Michelman, *The Constitution*, *supra* note 38, at 28. *See also* HAYWARD, CONSTITUTIONAL ENVIRONMENTAL RIGHTS, *supra* note 13, at 131-33 (citing Waldron, *supra* note 168, at 20-27); LINGLE, *supra* note 38, at 5-6; Gargarella, Domingo & Roux, *supra* note 42, at 261-62. Siri Gloppen, *Theories of Democracy, the Judiciary and Social Rights*, *in* COURTS AND SOCIAL TRANSFORMATION IN NEW DEMOCRACIES: AN INSTITUTIONAL VOICE FOR THE POOR?, *supra* note 42, at 39-40.

[170] Sunstein, *Against Positive Rights*, *supra* note 15, at 226-27.

An additional concern deals with the degree of societal consensus that environmental rights generate, as compared to traditional constitutional values. In this regard, some authors argue that courts should not enforce constitutional rights to environmental protection, absent a strong system of environmental law. They assert that, given that there is a considerable amount of controversy related to these rights, courts should allow the ordinary democratic and political processes to deliver on these issues until some sort of consensus is finally reached. Fernández, *supra* note 15, at 377-82; Ruhl, *An Environmental Rights Amendment*, *supra* note 7, at 47-48; Sunstein, *Against Positive Rights*, *supra* note 15, at 226-27.

The problem with this objection is that courts do adjudicate constitutional claims for which there is little societal or political consensus, so it is unreasonable to subject environmental claims to a different standard. Of course, there is an argument to be made for taking all controversial or polarized issues out of the courts' dockets. While I would disagree with such a narrow view of the judiciary's role in a liberal constitutional democracy, *see* Du Bois, *supra* note 91, at 160 ("Courts, as much as legislatures, are arenas for battles over collective preferences."), the claim here seems arbitrarily limited to enforcement of constitutional environmental rights.

actual, non-constitutional state.[171] As Professor Richard J. Lazarus has stated, "[e]nvironmental law is inherently controversial, for reasons rooted in the spatial and temporal dimensions of ecological injury."[172] These dimensions mean that redressing ecological injuries requires redistribution of costs, benefits, and harms across different populations and places, and at different times.[173]

The temporal and spatial features are aggravated due to the scientific uncertainty that surrounds discussions of environmental issues. Indeed, while it seems reasonable "to accept costs when one can perceive the very real harms that would otherwise be inflicted on others," "when, as is often the case with ecological injury, the related spatial and temporal features deny the certainty of that effect and render invisible its causal mechanisms, such short-term, more immediate costs tend to be far less palatable."[174]

---

[171] SMITH, *supra* note 13, at 105 ("An environmental right to a functioning ecosystem is a necessary (although not sufficient) condition for a functioning democratic polity."); Caldwell, *supra* note 7, at 1-2; Eckersley, *supra* note 21, at 214-18; Freyfogle, *supra* note 14, at 160, 169-71; Gildor, *supra* note 7, at 847-53; Ledewitz, *supra* note 7, at 681 ("[T]he right to a healthy environment, if it is recognized by the courts, will come to exist in light of a serious threat that ordinary political life is not capable of adequately addressing."); Schlickeisen, *supra* note 7, at 197-201.

[172] LAZARUS, THE MAKING, *supra* note 60, at 24. *See also* Eckersley, *supra* note 21, at 214; Richard J. Lazarus, *Restoring What's Environmental About Environmental Law in the Supreme Court*, 47 UCLA L. REV. 703, 760-61 (2000).

[173] *Id*. at 24-26. Some of the issues about climate change, and the debates about regulation of greenhouse gases (GHGs), provide an excellent example. Given that some GHGs stay in the atmosphere for hundreds of years after they are emitted, reducing the level of emissions does not mean that the overall atmospheric levels of GHGs will be reduced, but rather that they will increase at a slower rate. Richard J. Lazarus, *Super Wicked Problems and Climate Change: Restraining the Present to Liberate the Future*, 94 CORNELL L. REV. 1153, 1164-66 (2009), (hereinafter Lazarus, *Super Wicked Problems*). Therefore, the manner in which these gases are treated in the upcoming years will have serious implications for future generations. Also, as emissions "continue to increase, it will require exponentially larger, and potentially more economically disruptive, emissions reductions in the future to bring atmospheric concentrations down to desired levels." *Id*. at 1160. Another feature is that "by a perverse irony," the nations, like the United States, that emit the largest concentrations of GHGs into the atmosphere, are also the "least likely to suffer the most from climate change that will unavoidably now happen in the nearer term." *Id*. Something similar happens within the United States, were coastal states stand to be adversely affected by climate change to a higher extent than non-coastal states. *See* Massachusetts v. EPA, 549 U.S. 497, 522-23 (2007) (highlighting the particular risks that rising sea levels due to global warming would have on coastal states like Massachusetts as a basis for satisfying the injury in fact requirement of Article III standing). *See also* John M. Broder, *Geography Is Dividing Democrats Over Energy*, N.Y. TIMES, Jan. 27, 2009, at A1 (describing the debates concerning climate change legislation between members of the Senate representing coastal and noncoastal states).

[174] LAZARUS, THE MAKING, *supra* note 60, at 27. As Robyn Eckersley has also put it:

> Given the scientific uncertainty associated with many ecological problems, the many different perceptions of environmental risk, the difficulties in attributing blame and responsibility, the costs of the 'mopping up operation', the existence of conflicting political priorities and the short time horizons of liberal democracies (corresponding, at most, to election periods) it is hardly surprising that the environment is regularly traded-off against what appear to be more urgent and/or straightforward political demands.

Eckersley, *supra* note 21, at 215-16.

This is further exacerbated when we take into account that environmental protection endeavors usually implicate entrenched constitutional values, such as the right to property, and that federal congressional action is limited by the scope of the commerce and property clauses.[175] Given these dimensions, deliberation on these issues could very likely lead to scenarios in which perceived 'short term goals,' all within the rhetoric of economic growth and many with considerable ecological injury implications, prevail over 'long term' environmental protection concerns.[176] Thus, it might be that environmental protection concerns are not adequately addressed through ordinary democratic deliberation, but are rather reserved for 'republican moments,' that is, "a time of such heightened civic-mindedness that it is possible to overcome substantial institutional and political obstacles to potentially radical social change."[177] If this is true, and it is only during those short lapses that adequate deliberation can be achieved in order to address complex environmental protection concerns, then constitutional environmental rights could be used as tools to promote, not constrain, adequate democratic deliberation and policy setting.[178] However, even assuming that ecological injury concerns can be addressed through ordinary political processes, allowing courts to enforce constitutional environmental protection rights does not foreclose democratic choice and deliberation.

As I discussed in the previous section, courts can and should use flexible models of review, as well as impose weak remedies for constitutional violations, when dealing with claims about infringement of environmental protection rights. By relying on these remedies, courts will not be immersed in matters that are the

---

[175] *Id*. at 36-38. *See also* Caldwell, *supra* note 7, at 3-5; Craig, *supra* note 14, at 11019-20; Gildor, *supra* note 7, at 830-47; Percival, *supra* note 60, at 842-44; Lazarus, *Human Nature*, *supra* note 60, at 243-59.

[176] LAZARUS, THE MAKING, *supra* note 60, at 40-42. *See also* Eckersley, *supra* note 21, at 215 ("The upshot is that the longer-term public interest in environmental protection is systematically traded-off against the more immediate demands of capital and (sometimes) labour."). Another obstacle to adequate deliberation in environmental protection law might lie in the economic disparities between its supporters and its powerful adversaries. LAZARUS, THE MAKING, *supra* note 60, at 40 ("Clearly, because of its inherently redistributive nature, environmental protection law tends to be most threatening to those who currently have many of the economic resources.").

[177] LAZARUS, THE MAKING, *supra* note 60, at 43-44. *See also* Lazarus, *Super Wicked Problems*, *supra* note 174, at 1155-56; Richard J. Lazarus, *Congressional Descent: The Demise of Deliberative Democracy in Environmental Law*, 94 GEO. L. J. 619 (2006) (hereinafter Lazarus, *Congressional Descent*); Christopher H. Schroeder, *The Political Origins of Modern Environmental Law: Rational Choice vs. Republican Moment*, DUKE ENVTL. L. & POL'Y F. 29 (1998); Daniel A. Farber, *Taking Slippage Seriously: Non Compliance and Creative Compliance in Environmental Law*, 23 HARV. ENVTL. L. REV. 297 (1998); Daniel A. Farber, *Politics and Procedure in Environmental Law*, 8 J.L. ECON. & ORG. 59 (1992).

[178] This topic requires further research. However, at least one scholar has begun to document the recent shortcomings of Congress to address the pressing environmental issues of our time. Lazarus, *Congressional Descent*, *supra* note 178.

province of the political branches of government, like reallocation of state budgets and definition of policy priorities. I have also argued that, initially, judges should look to existing statutes and regulations for substantive guidance when asked to define the content of constitutional rights to environmental protection.[179] I believe that, instead of curtailing democratic deliberation on important environmental protection issues, this framework for enforcement can promote it. Two South African Constitutional Court's cases[180] concerning their social and economic constitutional rights provisions[181] exemplify this point.

The first of these two cases, *Government of Republic of South Africa v. Grootboom*,[182] involved a group of about nine hundred people living in desperately poor conditions at an informal settlement named Wallacedene. They had applied for low-cost housing, but they were placed on a waiting list and had no real prospect of obtaining it in the near future.[183] Tired of waiting, they moved, and settled in an unoccupied tract of privately owned land that "had been earmarked for low-cost housing."[184]

The owner of the land sued and obtained an "ejectment order" against them. After some additional proceedings, the municipality forcibly evicted them, and their shacks and possessions were destroyed. They then settled at a sports field in Wallacedene, under even worse living conditions that they initially were in. Unsatisfied, they sued, claiming violation of their constitutional rights.[185]

---

[179] As I will discuss in the next section, as courts begin to gain experience in adjudicating constitutional environmental claims, they might feel compelled to use stronger models of judicial review.

[180] Minister of Health v. Treatment Action Campaign, (2002) (5) SA 721 (CC) (S. Afr.); Government of Republic of South Africa v. Grootboom, (2001) (1) SA 46 (CC) (S. Afr.).

[181] S. AFR. CONST. 1996 §§ 26-27. The articles deal with the rights to "have access to adequate housing," and to have access to "health care services," "sufficient food and water," and "social security." Both articles have equal provisions that assert that "[t]he state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation" of the rights. *Id*.

The South African Constitution also has an environmental provision. S. AFR. CONST. 1996 § 24. It grants "everyone" the rights to "an environment that is not harmful to their health or well-being," and "to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures" that "prevent pollution and ecological degradation," "promote conservation," and "secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development." Although the Constitutional Court has issued some decisions interpreting section 24, it has not adopted a particular standard for examining claims of violations of the constitutional right to "an environment that is not harmful to their health or well-being." *See* Eric C. Christiansen, *Empowerment, Fairness, Integration: South African Answers to the Question of Constitutional Environmental Rights*, 32 STAN. ENVTL. L.J. 215, 253-66 (2013) (discussing the South African Constitutional Court's environmental case law).

[182] 2001 (1) SA 46 (CC) (S. Afr.).

[183] *Id*. at ¶¶ 7-8.

[184] *Id*. at ¶ 8.

[185] *Id*. at ¶¶ 9-11. The evictees not only claimed that their constitutional rights to access to adequate housing were violated, but also that their children's rights to "basic nutrition, shelter, basic health care

The Constitutional Court interpreted that the plaintiffs' rights of access to adequate housing were judicially enforceable,[186] and ruled in the plaintiffs' favor. The Court first declined interpreting section 26 as establishing a "minimum core" or level of protection, which the state must always provide, because enough information to make a minimum core determination was not presented.[187]

Addressing the substance of the right of access to adequate housing, the Court stated that "there is a difference between . . . those who can afford to pay for housing . . . and those who cannot."[188] With regards to the first, "the state's primary obligation lies in unlocking the system, providing access to housing stock and a legislative framework to facilitate self-built houses through planning laws and access to finance."[189] On the other hand, the state's obligation towards the poor is different, for they "are particularly vulnerable and their needs require particular attention."[190]

The analysis then moved on to ascertaining the meaning of the state's obligation to "take reasonable legislative and other measures, within its available resources, to achieve the progressive realization of the right." According to the Constitutional Court, this required the establishment and implementation of a comprehensive, coherent program directed at achieving the progressive realization of the right, subject to the government's available resources. Yet, the Court was not about to define "[t]he precise contours and content" or the program, or the 'legislative and other measures' to be adopted, for that is "primarily a matter for the legislature and the executive."[191] All that is required is that the measures are "reasonable."[192] Such reasonableness would be measured taking into account the "social, economic and historical context" of housing problems and the particular needs of all 'segments' of society.[193] Particularly, the Court interpreted that the measures needed to primarily address the needs of those in the most precarious of situations:

---

and social services," all under Section 28 of the Constitution, S. AFR. CONST. 1996 § 28, were also being infringed. The High Court ruled in their favor, based on its interpretation that Section 28 "creates a freestanding, absolute right [to housing] on the part of children," and that the childrens' parents were also entitled to housing, as part of the childrens' section 28 right to "family care or parental care." *See* SUNSTEIN, THE SECOND BILL OF RIGHTS, *supra* note 15, at 221.[186] *Grootboom*, 2001 (1) SA 46, at ¶ 20.

[187] *Id*. at ¶¶ 29-33.

[188] *Id*. at ¶ 36.

[189] *Id*.

[190] *Id*.

[191] *Id*. at ¶ 41.

[192] *Id*. *See* SUNSTEIN, DESIGNING DEMOCRACY, *supra* note 15, at 234 (arguing that, in United States' terms, the Constitutional Court basically established "an *administrative law model of socioeconomic rights*," and that, under such a standard, courts "are hardly unwilling to invalidate an agency's choice as arbitrary.").

[193] *Grootboom*, 2001 (1) SA 46, at ¶ 43.

> To be reasonable, measures cannot leave out of account the degree and extent of the denial of the right they endeavour to realise. Those whose needs are the most urgent and whose ability to enjoy all rights therefore is most in peril, must not be ignored by the measures aimed at achieving realisation of the right. It may not be sufficient to meet the test of reasonableness to show that the measures are capable of achieving a statistical advance in the realisation of the right. Furthermore, the Constitution requires that everyone must be treated with care and concern. If the measures, though statistically successful, fail to respond to the needs of those most desperate, they may not pass the test.[194]

This last requirement spelled doom for the existing government program, which did not have particular provisions for those people in desperate need of housing.[195]

The Court's order did require the government "shift [its] priorities to some extent,"[196] given that it was to revise its program to make particular provisions for those in desperate need.[197] However, no particular relief was given to the plaintiffs and no additional obligations were imposed on the state.[198]

The second case, *Minister of Health v. Treatment Action Campaign*,[199] involved the government's refusal to make an antiretroviral drug called nevirapine[200] available at public hospitals, even though its manufacturer was willing to supply as much of it as was needed at no cost.[201] The government purported to make the drug available at specific test sites, about two per province, given that it felt there was not enough information on the long-term effects of the drug, and because its administration also was to be accompanied by counseling by trained medical personnel, something it was not able to provide at the moment.[202]

---

[194] *Id*. at ¶ 44.

[195] *Id*. at ¶¶ 63-69.

[196] TUSHNET, *supra* note 12, at 244.

[197] *Grootboom*, 2001 (1) SA 46, at ¶ 99.

[198] TUSHNET, *supra* note 12, at 244 n.55. Sadly, a newspaper article informed about Ms. Grootboom's passing. Pearly Joubert, *Grootboom dies homeless and penniless*, MAIL & GUARDIAN, Aug. 8, 2008, available at http://www.mg.co.za/article/2008-08-08-grootboom-dies-homeless-and-penniless (last visited May 23, 2018). It seems that the first plaintiff in the case never received the relief she asked for.

[199] 2002 (5) SA 721 (CC) (S. Afr.).

[200] The drug was known to substantially reduce the possibility of mother to child transmission of HIV or AIDS. *Treatment Action Campaign*, 2002 (5) SA 721 at ¶ 2 n.3. *See also* TUSHNET, *supra* note 12, at 245.

[201] *Treatment Action Campaign*, 2002 (5) SA 721 at ¶¶ 2-4 n.5.

[202] *Id*. at ¶¶ 10, 14-15.

Before reaching the merits of the case, the Constitutional Court addressed a question left open in *Grootboom*: whether socioeconomic rights had an enforceable minimum core content. It held they did not, relying on many of the objections to judicial enforcement of these rights I have discussed here.[203] Thus, the Court again relied on the reasonableness test to determine whether the social and economic right in question was infringed.[204]

But did the Court really apply a 'reasonableness' test? As Professor Tushnet argues, the Court's "examination of the government's justifications for restricting the drug's availability was quite searching, and nothing in the relevant sections of the opinions indicates that the Court was giving any real deference to the government's judgments."[205] Such particular scrutiny led the Constitutional Court to reject all of the government's asserted justifications, and to conclude that its limited nevirapine provision program was unreasonable.[206] Thus, the government was ordered "without delay" to remove the restrictions on the availability of the drug at public hospitals and clinics.[207]

Taken together, these cases exemplify how courts can employ weak judicial enforcement for constitutional rights without running afoul of the democratic objections.[208] Discussing both opinions, Professor Sunstein argues that the South

---

[203] *Id*. at ¶¶ 37-39. Specifically, the Court stated:

> It should be borne in mind that in dealing with such matters the courts are not institutionally equipped to make the wide-ranging factual and political enquiries necessary for determining what the minimum-core standards called for by the first and second amici should be, nor for deciding how public revenues should most effectively be spent. There are many pressing demands on the public purse. . . .
>
> Courts are ill-suited to adjudicate upon issues where court orders could have multiple social and economic consequences for the community. The Constitution contemplates rather a restrained and focused role for the courts, namely, to require the state to take measures to meet its constitutional obligations and to subject the reasonableness of these measures to evaluation. Such determinations of reasonableness may in fact have budgetary implications, but are not in themselves directed at rearranging budgets. In this way, the judicial, legislative and executive functions achieve appropriate constitutional balance.

Id. at ¶¶ 37-38.

[204] *Id*. at ¶ 36.

[205] TUSHNET, *supra* note 12, at 246. However, the searching nature of the Court's analysis might have well been related to the fact that the government's stance had been considerably relaxed since the case began. *Treatment Action Campaign*, 2002 (5) SA 721 at ¶¶ 111-16. *See also* SUNSTEIN, THE SECOND BILL OF RIGHTS, *supra* note 15, at 228 (arguing that the case "must be understood in the context of the South African government's palpably inadequate response to the HIV crisis—a response bred partly by the irresponsible denial, among high-level officials, that HIV is responsible for AIDS at all.").

[206] *Id*. at ¶ 93-95.

[207] *Id*. at ¶ 135.

[208] *See* TUSHNET, *supra* note 12, at 242-47 (discussing *Grootboom* and *Treatment Action Campaign* as examples of weak-form judicial review for weak and strong substantive rights).

African Constitutional Court has, in fact, provided an approach that gives significant enforceable content to socioeconomic rights while avoiding intrusions into democratic policy setting and budget allocation:[209]

> The broader point is that a constitutional right to shelter or health care can strengthen the hand of those who might be unable to make much progress in the political arena, perhaps because they are unsympathetic figures or are disorganized and lack political power. Provisions in the second bill of rights can promote democratic deliberation, not preempt it, by directing political attention to interests that would otherwise be disregarded in ordinary political life. By requiring reasonable programs, with respect for limited budgets, the court has found a way of assessing claims of constitutional violations without requiring more than existing resources will allow. In so doing, the court has provided the most convincing rebuttal yet to the claim that judicial protection of the second bill could not possibly work in practice. We now have reason to believe that a democratic constitution, even in a poor nation, is able to protect those rights without placing an undue stain on judicial capacities.[210]

The same argument can be made about applying this model for enforcing constitutional rights to environmental protection. Like the South African Constitutional Court has shown in the context of socioeconomic rights, judicial enforcement of environmental protection rights can be tailored to foster, rather than limit, balanced democratic deliberation on these issues. Governments may be required to develop and implement reasonable comprehensive plans to improve the overall quality of the environment and to design strategies to prevent and reduce unreasonable degradation of natural resources, targeting regions with the highest pollution concentrations first. The object of such a model for judicial enforcement would not be to determine the specific outcomes of environmental decision-making processes, but rather, to ensure that those outcomes reflect, among other, sometimes competing values, the underlying substantive constitutional rights to environmental protection. In this regard, by augmenting the status of these rights in the United States, these constitutional rights could serve as 'rhetorical trumps' in debates, arguments that will require the government to adequately balance the different aspects implicated in environmental issues.[211]

---

[209] SUNSTEIN, THE SECOND BILL OF RIGHTS, *supra* note 15, at 227-29.

[210] *Id*. at 228-29. *See also* SUNSTEIN, DESIGNING DEMOCRACY, *supra* note 15, at 235.

[211] Anderson, *supra* note 91, at 12-13 ("Often, the real value of a human right is that it is available as a moral trump card precisely when legal arrangements fail."); Hayward, *A Case for Political Analysis*, *supra* note 16, at 111. Of course, this stems from dworkian notions about rights. *See* Ronald Dworkin, *Rights as Trumps*, *in* THEORIES OF RIGHTS 153 (J. Waldron ed. 1984). However, while I have

E. The limited promise of judicial enforcement

Now, some might question whether judicial enforcement of constitutional rights to environmental protection will make any positive difference with regards to the overall quality of the environment, or to further their stated goals and policies in general.[212] After all, relying on weak remedies for enforcement of the right of access to adequate housing did not do much, if anything, for Ms. Irene Grootboom, who passed away while still waiting for the realization of her 'right.'[213] In short, there is no evidence that these rights, "when included in constitutions or similar documents, have materially improved anyone's life."[214]

As Professor Jeanne M. Woods has asserted, "[j]udicial enforcement of economic, social and cultural rights is an inherently flawed and inadequate enterprise."[215] Indeed, enforcing these rights will not have major redistributive effects.[216] Thus, political environmental advocacy and community organization, and not justiciable constitutional environmental rights, will continue to be more effective mechanisms for advancing environmental protection goals.

---

referred to 'rhetorical trumps,' in the sense that they help overcome the inequalities in deliberation on environmental concerns, I prefer the approach suggested by Professor Martha Minow, who argues that rights are not "trumps," but instead, "the language we use to try to persuade others to let us win this round." Martha Minow, *Interpreting Rights: An Essay for Robert Cover*, 96 YALE L.J. 1860, 1876 (1987).

[212] *See* Sunstein, *Why Does the American Constitution*, *supra* note 15, at 15 (questioning "whether the many constitutions containing social and economic rights have made any difference at all 'on the ground'—that is, there is real doubt about whether such rights have actually led to more money, food, or shelter for poor people.").

[213] *See supra* note 199, and sources cited therein.

[214] Sunstein, *Against Positive Rights*, *supra* note 15, at 230. *See also* Cross, *supra* note 15, at 896-98. Additionally, there are concerns about relying on litigation as a mechanism for advocating for rights protection. Given the substantial costs associated with litigation, using it as a strategy for rights protection furthers inequalities, because the poorest individuals would not be able to use it in order to advance their claims. Cross, *supra* note 15, at 880-87 (citing CHARLES R. EPP, THE RIGHTS REVOLUTION: LAWYERS, ACTIVISTS, AND SUPREME COURTS IN COMPARATIVE PERSPECTIVE (1998)).

While the inequalities of litigation, and the overall lack of a "support structure" for successful rights advocacy are important concerns, Professor Tushnet explains that they "can be alleviated a bit." TUSHNET, *supra* note 12, at 253. This is due to the fact that "[c]ivil society," taking the form of nongovernmental organizations, public interest and pro bono practitioners, etc., "can sometimes provide the support structure." *Id*. While this might not be enough to alleviate the inequalities, it seems unreasonable to argue that courts should be closed for all cases implicating these rights only based on this. After all, these inequalities also constrain the ability of vulnerable communities and individuals to use courts as agents for advancing social justice concerns in cases involving civil and political constitutional rights.

[215] Woods, *Emerging Paradigms of Protection*, *supra* note 19, at 291. *See also* Eckersley, *supra* note 21, at 233 (arguing that environmental rights are not "a panacea for the green movement or for democracy").

[216] Woods, *Emerging Paradigms of Protection*, *supra* note 19, at 291.

However, that does not mean that constitutionalizing and enforcing environmental rights cannot play an independent, albeit limited, role in environmental protection. The availability of weak-form judicial review for violations of constitutional environmental rights gives citizens unsatisfied with governmental efforts a juridical tool to press for compliance. Also, the mere availability of the remedy can exert influence over governmental decision-making procedures, either as a deterrent for highly polluting actions, or as an incentive to develop and implement green initiatives. Therefore, these remedies could very well serve as safeguards for assuring that constitutional environmental concerns are being pursued in earnest.[217]

Finally, one could question the efficacy of relying on weak remedies for enforcement of these rights. Such remedies might not be as effective as strong ones to deter polluting activities or to encourage the development of new environmental protection measures. If that's the case, governmental deliberation for environmental issues would change very little, if at all.

There might be some truth to these assertions. However, it remains to be seen whether strong-form review should be available for enforcing rights with which courts have not had a considerable body of experience with to rely on, as well as whether, from a practical perspective, courts would feel compelled to assume that new role, with these unexplored rights, within a liberal constitutional democracy.

On the other hand, as Professor Tushnet has argued, it might very well be that "weak-form review can be replaced by strong-form review when enough experience has accumulated to give . . . judges, legislators, and the people alike[ ] confidence that giving the judges the final word will not interfere with our ability to govern ourselves in any significant way."[218] In this regard, the Montana Supreme Court's experience interpreting and enforcing its constitutional environmental provisions might provide a good example of how courts can shift towards stronger forms of judicial enforcement of these rights as they become comfortable with dealing with these types of cases.

Montana's Constitution, passed in 1972, not long after the birth of modern environmental law,[219] has several provisions related to the environment.[220] My focus here is on how the Montana Supreme Court has interpreted two provisions. The first one, Article II, Section 3, is part of the "Declaration of Rights," and the particular section is entitled "inalienable rights:"

---

[217] *Id*. at 292 ("Notwithstanding its inherent limitations, rights ideology is a powerful transformative force, and the demand for judicial enforcement of second- and third-generation rights can play a galvanizing role in the organization and mobilization of the marginalized and disempowered.").

[218] TUSHNET, *supra* note 12, at 263-64.

[219] Thompson, Jr., *supra* note 7, at 173 ("When the Montana electorate ratified the state Constitution in June 1972, environmental law was in its infancy, and Congress had only begun to federalize the field.").

[220] MONT. CONST. arts. II, § 3, IX, §§ 1-4, X, §§ 2, 4, 11.

> All persons are born free and have certain inalienable rights. They include the right to a clean and healthful environment and the rights of pursuing life's basic necessities, enjoying and defending their lives and liberties, acquiring, possessing and protecting property, and seeking their safety, health and happiness in all lawful ways. In enjoying these rights, all persons recognize corresponding responsibilities.[221]

The second provision is that included under Section 1 of Article IX, which is entirely devoted to "Environment and Natural Resources:"

> (1) The state and each person shall maintain and improve a clean and healthful environment in Montana for present and future generations.
>
> (2) The legislature shall provide for the administration and enforcement of this duty.
>
> (3) The legislature shall provide adequate remedies for the protection of the environmental life support system from degradation and provide adequate remedies to prevent unreasonable depletion and degradation of natural resources.[222]

In the first years after the passage of the Constitution, the Montana Supreme Court declined invitations to give strong effects to the Constitution's environmental protection provisions.[223] In *Montana Wilderness Association v. Board of Health & Environmental Sciences*,[224] and *Kadillak v. Anaconda Co.*,[225] the Court was presented with controversies in which environmental advocates prayed for reinterpretations of existing statutes and regulations, related to the obligations of state agencies and departments to prepare environmental impact statements, in light of the state's new constitutional environmental protection provisions. Particularly, in *Kadillak*, the plaintiffs sought revocation of an operating permit issued to a mining company and argued that Montana's constitutional environmental provisions required the state to depart from the federal standards with regards to the types of actions that require the preparation of an environmental impact statement, as well as with the content of that document, and adopt stringent requirements.[226] The Court held that the provisions did not have that effect:

---

[221] MONT. CONST. art. II, § 3.

[222] *Id*. art. IX, § 1.

[223] Thompson, Jr., *supra* note 7, at 167 ("In the years immediately following passage of the 1972 Montana Constitution, the Montana Supreme Court . . . pursued a conservative interpretation of the Constitution's environmental provisions.").

[224] 559 P.2d 1157 (Mont. 1976).

[225] 602 P.2d 147 (Mont. 1979).

[226] *Id.* at 153-54.

> This argument, however, does not have sufficient merit to compel this Court to abandon the rationale of [the federal norm]. Both the MEPA and the HRMA predate the new constitution. There is no indication that the MEPA was enacted to implement the new constitutional guarantee of a "clean and healthful environment." This Court finds that the statutory requirement of an EIS is not given constitutional status by the subsequent enactment of this constitutional guarantee. If the legislature had intended to give an EIS constitutional status they could have done so after 1972. It is not the function of this Court to insert into a statute "what has been omitted." The ordinary rules of statutory construction apply. An EIS was not a requirement at the time Permit 41A was granted.[227]

The only use given by the Court to the constitutional rights to environmental protection during these initial stages was that they were relied on as a source for upholding state legislation. For instance, in *State v. Bernhard*,[228] the Supreme Court upheld a conviction based on a state statute that made it a crime to operate a motor vehicle wrecking facility without a license by using the constitutional environmental rights provisions to conclude that they recognized the state's police power to "preserve or enhance aesthetic values."[229] Additionally, in *Douglas v. Judge*,[230] the Court used the constitutional rights to hold that a tax created in lieu of an act seeking the development of renewable resources in Montana was levied for a "public purpose."[231] Thus, apart from serving as a strong basis for legislative authority, it seemed that Montana's constitutional environmental protection provisions were not going to have the strong impact that their texts seemed to suggest.

After these initial developments, the environmental provisions went "quiescent."[232] According to an environmental practitioner in Montana during those times, environmental and natural resources public interest groups were reluctant to take the constitutional issues to the Supreme Court because they perceived that "the Court's track record on the few environmental disputes that it addressed in the 1970s and 1980s was not encouraging."[233] However, this all changed in 1999, when the Supreme Court was faced with a new major environmental case, *Montana Environmental Information Center v. Department of Environmental Quality*.[234]

---

[227] *Id*. at 153.
[228] 568 P.2d 136 (Mont. 1977).
[229] *Id.* at 138.
[230] 568 P.2d 530, 532-33.
[231] *Id.* at 532-33.
[232] Thompson, Jr., *supra* note 7, at 168 ("For the next twenty years, the environmental provisions in the Montana Constitution were quiescent.").
[233] Jack Tuholske, *The Legislature Shall Make No Law . . . Abridging Montanans' Constitutional Rights to a Clean and Healthful Environment*, 15 SOUTHEASTERN ENVTL. L.J. 311, 324 (2007).
[234] 988 P.2d 1236 (Mont. 1999).

The case involved a challenge of the constitutionality of a legislative measure that exempted "discharges of water from water well or monitoring well tests" from a nondegradation of high quality waters policy and review requirement.[235] Although the original act predated the 1972 Constitution, and therefore, the Court's previous pronouncements in *Kadillak* about the effects of the constitutional provisions in that context were at stake, the plaintiffs argued that the original "nondegradation policy for high quality waters" was "reasonably well designed to meet the constitution's objectives" and that it was "the minimum requirement which must be satisfied for a discharge which degrades the existing quality of Montana water."[236] The Supreme Court agreed.

In denying a standing challenge, the Court held that the plaintiffs had standing to sue because the constitutional environmental provisions were meant to be "both anticipatory and preventative,"[237] Particularly, the Supreme Court asserted that the delegates to the Montana Constitutional Convention "did not intend to merely prohibit that degree of environmental degradation which can be conclusively linked to ill health or physical endangerment. [The] constitution does not require that dead fish float on the surface of our state's rivers and streams before its farsighted environmental protections can be invoked."[238]

With regards to the constitutional analysis under the constitutional environmental provisions, the court held that:

> [T]he right to a clean and healthful environment is a fundamental right because it is guaranteed by the Declaration of Rights found at Article II, Section 3 of Montana's Constitution, and that any statute or rule which implicates that right must be strictly scrutinized and can only survive scrutiny if the State establishes a compelling state interest and that its action is closely tailored to effectuate that interest and is the least onerous path that can be taken to achieve the State's objective.[239]

Additionally, the Court held that even though Article IX, Section 1 of the Constitution was not part of the "Declaration of Rights" and, as such, it would seem that "[s]tate action" that implicated the rights contained in that provision "would normally not be subject to strict scrutiny," "the right to a clean and healthful environment guaranteed by Article II, Section 3, and those rights provided for in Article IX, Section 1 were intended by the constitution's framers to be interre-

---

[235] *Id.* at 1243-44.

[236] *Id*. at 1243.

[237] *Id*. at 1249.

[238] *Id*.

[239] *Id*. at 1246.

lated and interdependent and that state or private action which implicates either, must be scrutinized consistently."[240] Thus, the Court said that it would "apply strict scrutiny to state or private action which implicates either constitutional provision."[241]

Turning to the specific issues involved in the case, the Court held that the original nondegradation policy for high quality waters was "a reasonable legislative implementation of the mandate provided for in Article IX, Section 1," and that to the extent that the new legislation "arbitrarily exclude[d] certain 'activities' from nondegradation review without regard to the nature or volume of the substances being discharged, it violate[d] those environmental rights guaranteed by Article II, Section 3 and Article IX, Section 1 of the Montana Constitution."[242]

Authors have both criticized,[243] and celebrated[244] the Supreme Court's opinion in *Montana Environmental Information Center*. Yet, my purpose here is not to address whether the Court's interpretation of the constitutional environmental provisions in question was correct, but merely to demonstrate how courts can move from providing little enforcement for these 'weak' rights to reinterpreting them as 'strong' ones, even subject to strict judicial scrutiny. The reasons for this transformation are many. Indeed, this shift in constitutional interpretation could be very well due to the ideological preferences of the justices that composed the Supreme Court at two separate periods in time, separated by more than twenty years. Without pretending to discard any explanation, I suggest here that the passage of time and the gaining of experience with environmental litigation can serve as powerful agents in this transition to stronger models of judicial review.

As Professor Barton H. Thompson, Jr. has said, "[w]hen the Montana electorate ratified the state Constitution in June 1972, environmental law was in its infancy, and Congress had only begun to federalize the field."[245] Indeed, as the first constitutional environmental cases began to reach the Supreme Court, the judiciary's role in environmental issues was barely beginning to take form. While some courts and judges embraced an active role in assuring governmental compliance with the new

---

[240] *Id*.

[241] *Id*. Given that this case involved a challenge against a state action, it would seem that the Court's pronouncements with regards to private parties was dictum. However, in *Cape-France Enterprises v. Estate of Peed*, 29 P.3d 1011 (2001), the Supreme Court reaffirmed that the provisions, and strict scrutiny analysis, applied to challenges against actions by private parties. *Id*. at 1016-17.

[242] *Montana Environmental Information Center*, 988 P.2d at 1249.

[243] John L. Horwich, *MEIC v. DEQ: An Inadequate Effort to Address the Meaning of Montana's Constitutional Environmental Provisions*, 62 MONT. L. REV. 269 (2001); Thompson, Jr., *supra* note 7.

[244] Tuholske, *supra* note 234; Cameron Carter & Kyle Karinen, Note, *A Question of Intent: The Montana Constitution, Environmental Rights, and the MEIC Decision*, 22 PUB. LAND & RESOURCES L. REV. 97 (2001); Wilson, *supra* note 39.

[245] Thompson, Jr., *supra* note 7, at 173.

environmental regime,[246] others hesitated to intervene.[247] During those early days of modern environmental law, the Montana Supreme Court was an example of the latter.

However, by 1999, courts had developed a robust body of environmental case law out of thirty years of experience. Additionally, several authors in Montana had spurred the scholarly debate on the proper avenues of interpretation and content of the state's constitutional environmental provisions.[248] Thus, while environmental issues remained highly polarized subjects,[249] many of the objections behind the court's initial reluctance to enforce these provisions had been lessened. In this regard, then, the Court's newfound receptivity for constitutional environmental protection claims can be seen as a reflection of these changes. In short, when it handed down its opinion in *Montana Environmental Information Center*, the Court also announced that it was ready to take on a new, stronger role in environmental decision-making. Aside from ideological considerations, there is no reason to think that the same phenomenon cannot occur as other courts are asked to enforce their pertinent constitutional environmental protection rights.[250]

---

[246] *See, e.g.*, Calvert Cliffs' Coordinating Committee v. United States Atomic Energy Commission, 449 F.2d 1109, 1111 (D.C. Cir. 1971) ("Our duty, in short, is to see that important legislative purposes, heralded in the halls of Congress, are not lost or misdirected in the vast hallways of the federal bureaucracy.").

[247] *See, e.g.*, Tanner v. Armco Steel Corp., 340 F. Supp. 532, 536-37 (S.D. Tex. 1972) ([F]rom an institutional viewpoint, the judicial process, through constitutional litigation, is peculiarly ill-suited to solving problems of environmental control.").

[248] *See, e.g.*, Deborah Beaumont Smith & Robert J. Thompson, *The Montana Constitution and the Right to a Clean and Healthful Environment*, 51 MONT. L. REV. 411 (1990); Horwich, *supra* note 7; Thompson, Jr., *supra* note 8; Tammy Wyatt-Shaw, Comment, *The Doctrine of Self-Execution and the Environmental Provisions of the Montana State Constitution: "They Mean Something"*, 15 PUB. LAND L. REV. 219 (1994). That tendency has continued after the Supreme Court issued its Opinion in *Montana Environmental Information Center*. *See* Horwich, *supra* note 244; C.B. McNeil, *A Clean and Healthful Environment and Original Intent*, 22 PUB. LAND & RESOURCES L. REV. 83 (2001); Rob Natelson, *Montana Constitution Project Unveiled at UM: Project 'May Change Way We Think' About Intent*, 33 MONT. LAW. 14 (May 2008); Thompson, Jr., *supra* note 7; Tuholske, *supra* note 234; Carter & Karinen, *supra* note 245; Chase Naber Note, *Murky Waters: Private Action and the Right to a Clean and Healthful Environment*, 64 MONT. L. REV. 357 (2003); Wilson, *supra* note 39.

[249] *See* Thompson, Jr., *supra* note 7, at 198 (arguing that "[a]lthough environmental protection is critically important, enough disagreement remains over the socially appropriate levels and types of environmental protection that constitutional enshrinement of any particular environmental policies seems premature.").

[250] For instance, after holding in Commonwealth of Pennsylvania v. National Gettysburg Battlefield Tower, 311 A.2d 588, 593-94 (Pa. 1973), that Article I, section 27 of the Pennsylvania Constitution was not self-executing, the Pennsylvania Supreme Court changed course forty years later in Robinson Twp., Washington Cty. v. Com., 83 A.3d 901 (Pa. 2013), and relied in that clause to declare several provisions of a state oil and gas law that facilitated the development of natural gas from the Marcellus Shale. See generally, John C. Dernbach et. al., *Robinson Township v. Commonwealth of Pennsylvania: Examination and Implications*, 67 RUTGERS U.L. REV. 1169 (2015).

III. Conclusion

Constitutional environmental rights can be fully enforceable within constitutional liberal democracies. While some of the traditional objections to judicial enforcement of constitutional rights to environmental protection have force, they only go as far as to limit some aspects of enforcement for these rights. By initially relying on weak-form models of review, and imposing weak remedies for constitutional environmental rights violations, courts can adequately address these objections and still provide significant content to these rights. Therefore, courts should not hesitate to rely on these models for enforcing their respective environmental rights clauses.[251] As time passes and courts begin to feel comfortable with enforcing these provisions with experimental models of review, courts could very well feel compelled to rely on stronger forms of review and stronger remedies. While, questions of the legitimacy of judicial enforcement might resurface at that moment, they should not prevail, given that many of the objections to enforcement will be weakened by the courts' experiences in dealing and defining the content of these rights.

Constitutional environmental rights are, of course, no panacea. While much can be said about environmental law's redistributive component,[252] the rights discourse within liberal democracies has often failed to deliver on its promise to address existing social inequalities and, in many instances, it prioritizes its legal, technical content over its inherent political nature.[253] Yet, inasmuch as environmental issues are mostly adjudicated in the 'vast hallways' of the environmental administrative state, their political and redistributive components are already submitted to the technical and bureaucratic controls. In this regard, I fully agree with Robyn Eckersley's assertion that,

> [I]n so far as trade-offs must be made, it is better that they be made solemnly, reluctantly, as a matter of 'high principle' and last resort, and under the full glare of the press gallery and law reporters rather than earlier in the public decision-making process, via the exercise of bureaucratic and/or ministerial

---

Additionally, the Alaska Supreme Court recently held that the State has a constitutional duty to take a hard look at a project's cumulative environmental impacts. *See* Sullivan v. Resisting Envtl. Destruction on Indigenous Lands (REDOIL), 311 P.3d 625, 637 (Alaska 2013).

[251] Of course, this paper does not deal with constitutional interpretation of particular clauses, so while I would argue for interpretation of some existing constitutional environmental rights in a manner compatible with my analysis, issues of constitutional design, and particular social, economic, political, or juridical circumstances might prevent courts from so doing. I would hope, however, that some parts of the general discussions found here are relevant for these endeavors.

[252] LAZARUS, THE MAKING, *supra* note 60, at 24-28.

[253] *See generally* Duncan Kennedy, *The Critique of Rights in CLS*, in LEFT LEGALISM/LEFT CRITIQUE (Wendy Brown & Janet Halley, eds. 2002), at 178-228.

> discretion that is presently extremely difficult for members of the public to challenge.[254]

Thus, at the very least, judicial enforcement for constitutional environmental rights can provide much needed visibility and spur political debates about the proper place of environmental protection concerns in liberal constitutional democracies. And at its best, these rights can become crucial tools for environmental stakeholders, ones that can at least deter some of the most pervasive elements of extractive economic systems. Therein lies the limited promise, and need, for judicial enforcement of constitutional environmental rights.

---

[254] Eckersley, *supra* note 21, at 229. *See also* Hayward, *A Case for Political Analysis*, *supra* note 16, at 120-21 (agreeing with Eckersley).

VARIETIES OF DIFFERENTIATED CITIZENSHIP IN MULTILEVEL SYSTEMS: ASYMMETRIC AND MULTILEVEL CITIZENSHIP

*Jaime Lluch**

I. Introduction

Comparative citizenship scholars have recently shown a renewed interest in multilevel citizenship ("MLC"), which has led to a challenge to the traditional conceptions of citizenship as a "unitary and homogeneous legal status granted to an individual by a sovereign state"[1] There are many historical and contemporary examples of MLC, challenging the hegemonic narrative of a single, territorial and state-based citizenship.[2]

Both at the supranational level (the EU, for example) and at the sub-state level (regions in decentralized states, sub-state national societies in multinational states), there are institutions and political forces that demand a plural and heterogeneous understanding of citizenship and a recognition that it can manifest itself at more

* Associate Professor of Political Science, Political Science Department, University of Puerto Rico, Río Piedras. J.D., Yale Law School, Ph.D., Yale University. Prof. Lluch works on comparative federalism, public law, comparative constitutional law, comparative politics, etc. The author would like to thank the Junta Editora of this law review for their efficiency and professionalism.

[1] Willem Maas, Multilevel Citizenship 1 (Willem Maas, ed., Philadelphia: University of Pennsylvania Press (2013).

[2] *Id.* at 1-2.

than one level. For example, in decentralized multinational democracies such as the United Kingdom, the institutional arrangements in the three devolved regions are themselves very different. The public attitudes of the citizens of Scotland and Wales demonstrate that we need to examine how they perceive their citizenship: whether in United Kingdom-wide or Scottish/Welsh-only frames or in more nuanced multi-levelled forms.[3]

Moreover, many forms of differentiated citizenship have been implemented by states in different regions and epochs.[4] The specific rationales for civic differentiation have varied, as I explain below. In this article, I seek to distinguish several forms of differentiated citizenship of the sort described by Rogers Smith et al. I want to distinguish between forms of multilevel citizenship as described by Willem Maas and his collaborators, and another category I would label as forms of "asymmetric citizenship," which has not been acknowledged properly in the literature. One could argue that all of them may be encompassed by the umbrella term "differentiated citizenship," but these diverse forms of plural citizenship need to be disaggregated and their normative, constitutional, and empirical parameters need to be specified.

Multilevel citizenship is about vertical differentiation, between different levels of governance, above and below the state level. Asymmetric citizenship is a type of differentiation that within the same state and its territories establishes categories of citizenship, some of which are fragmentary, unique, ad hoc, or inferior, and thus essentially creating horizontal categories of state membership, or group-differentiated horizontal citizenship regimes. Perhaps the most interesting setting for examining asymmetric citizenship regimes has been in the political treatment given by Empires to their territories in the nineteenth and twentieth centuries, but there are a number of contemporary examples of asymmetric citizenship regimes in liberal democratic polities.

The term "asymmetric citizenship" is a novel one, but I think it is especially adequate to describe the constitutional status it denotes. Previous scholarship, both in constitutional law and in politics, is more likely to refer to this inferior constitutional status as "second class citizenship" or "substandard citizenship" or "inferior citizenship." All of the former terms imply a simple ordinal relationship between a primary category of citizenship that enjoys all the privileges afforded by a political status and a secondary category of citizenship that enjoys lesser privileges. But, asymmetric citizenship is more about a categorical inferiority than a simple ordinal relationship. It also implies a system-wide duality between a large number of

---

[3] CHARLIE JEFFERY & DANIEL WINCOTT, CITIZENSHIP AFTER THE NATION STATE: REGIONALISM, NATIONALISM AND PUBLIC ATTITUDES IN EUROPE 32 (Ailsa Henderson, et al. eds., 2014).

[4] Rogers M. Smith, *The Insular Cases, Differentiated Citizenship and Territorial Statuses in the 21st Century*, *in* RECONSIDERING THE INSULAR CASES: THE PAST AND FUTURE OF THE AMERICAN EMPIRE (Gerald L. Neuman & Tomiko Brown-Nagin eds., 2015).

citizens that all possess the same privileges and a reduced number of citizens that are in possession of lesser privileges. Thus, the "asymmetry" in the phrase asymmetric citizenship implies that while most citizens enjoy a fairly symmetrical citizenship, being privy to the same privileges and status, there is also a category of citizens that, exceptionally, has been bestowed a cluster of rights and privileges that are different, and distinctly inferior.

II. Varieties of Differentiated Citizenship

Multilevel citizenship is a form of vertical "differentiated citizenship," while asymmetric citizenship is about horizontal civic differentiation. Differentiated citizenship is the overarching term that refers to forms of civic differentiation, which also generally challenge the hegemonic conception of citizenship as a single, unitary, and symmetric legal status granted equally to all the "citizens" of a sovereign state. In the U.S. context, historically some of the most important forms of differentiated citizenship have been repudiated as systems of unjust inequality.[5] In liberal democracies, there has been a powerful tendency insisting on civic equality and a universal status for all citizens, but historically there have been forms of differentiated or second-class citizenship, especially for non-whites, ethnic minorities, and women. Yet, in the contemporary period, it has been argued that forms of differentiated citizenship -- including distinct forms of territorial membership -- are necessary to achieve "meaningfully equal membership statuses."[6]

According to Smith's typology, the varieties of differentiated citizenship are as extensive as its many forms, but four general patterns can be discerned. Remedial differentiated citizenship refers to policies aiming to overcome the inegalitarian consequences of past unjust differentiations and at opposing current forms of invidious discrimination.[7] Accommodationist differentiation refers to "policies structured to recognize various persons' and groups' distinctive senses of their identities, values, and interests by varying legal regulations and public services so they can flourish in their own ways, yet equally with other citizens."[8] Preservationist differentiation reflects conservative visions "reflecting the desires of powerful political actors to distinguish – usually to limit --- the civic status of some who they see…as threats to current arrangements that these powerful actors value."[9] Legacy differentiated citizenship are forms of differentiation that originated as "inherited policies created for reasons that have lost force, so that they actually have few strong supporters

---

[5] *Id.* at 103.

[6] *Id.*

[7] *Id.*

[8] *Id.*

[9] *Id.*

now…Yet persist because no clear or intensely motivated consensus on alternative policies exists…"[10] The first two types of differentiation are forms of progressive differentiated citizenship, whereas the last two are essentially conservative visions of differentiated citizenship.

The first two (remedial and accommodationist) are often interrelated. In recent times, it is accommodationist civic differentiation arguments that have been gaining supporters. Based on such rationales, the phenomenon of differentiated citizenship has been growing, despite the commonly held belief in the ideals of uniform citizenship.[11] The pervasive success of the accommodationist rationale is evident in the increasing acceptance of multi-level citizenships, dual or multi-national citizenships, etc.[12] The rationale behind accommodationist civic differentiation is that it creates "more meaningful equality of status and opportunities for persons while recognizing their distinct histories, aspirations, and needs, rather than as departures from norms of equal membership. But if they are forms of equal citizenship, they are also generally forms of differentiated citizenship."[13]

Multilevel citizenship is a form of civic differentiation that is essentially based on accommodationist rationales, whereas asymmetric citizenship endures in some states or sub-state regions as a form of civic differentiation on the basis of legacy or preservationist rationales.

A. Multilevel Citizenship and the Myth of a Homogeneous and Single Nation-State Citizenship

The hegemonic conception of citizenship as a single, unitary, monolithic, symmetric, unidimensional, and linear legal status granted equally to all the "citizens" of a sovereign state is increasingly challenged in recent scholarship. The (sometimes mythical) nation-state has traditionally been seen as a singular polity perfectly aligning one nation with one state and serving as a monochromatic political container. As Brubaker noted, modern citizenship serves as both an "object" and an "instrument" of social closure. Together, citizenship's instrument- and object-of closure functions mutually reinforce each other.[14] "This circularity permits nation-states to remain…relatively closed and self-perpetuating communities, reproducing their membership in a largely endogenous fashion, open only at the margins to the exogenous recruitment of new members."[15] Brubaker's conceptualization of

---

[10] *Id.*

[11] *Id.* at 105.

[12] *Id.* at 107.

[13] *Id.*

[14] CHRISTIAN JOPPKE, CITIZENSHIP AND IMMIRGATION 17 (Cambridge: Polity Press 2010).

[15] ROGERS BRUBAKER, CITIZENSHIP AND NATIONHOOD IN FRANCE AND GERMANY 34 (1992).

citizenship as social closure is an enduring contribution, but a corrective needs to be added. If states are polities using citizenship as a mechanism of social closure, states themselves are more multilayered, polychromatic, and more heterogeneous than usually allowed, and moreover, developments at the sub-state and supra-state levels are creating the conditions for a multi-levelled citizenship.

As Maas notes, we need to free citizenship from its entanglement with assumptions about territoriality and exclusivity, opening up new possibilities for exploring the statuses and identities of individuals, groups, and nations "in the interstices of sovereignty."[16] We need to revise the traditional unitary conception of citizenship to take into account new political phenomena, both at the sub-state and supra-state levels. On the one hand, important developments in European Union citizenship may result in meaningful supra-national rights. On the other hand, in multinational federal political systems, the demand for differentiated group rights and for more self-government by territorially-based sub-state nations also challenges the traditional conception of a single, symmetric, and homogeneous legal status for all citizens in a state. In fact, in historical perspective, the "comparative history of citizenship provides rich examples of multilevel citizenship in theory and practice, although such examples are today often forgotten or obscured by the dominant narrative of a single and homogeneous, territorial, state-based citizenship…Indeed, unitary citizenship is the historical exception; more common are varieties of multilevel citizenship."[17]

Theorists of a more heterogeneous and multi-levelled conception of citizenship thus seek to critique narrow, statist, and unidimensional notions of citizenship. Part of the problem, they would argue, is related to one of the common characteristics of postwar social science: its methodological nationalism, which is the unproblematized assumption that the nation-state is the "natural" unit of analysis.[18] Theirs is also a critique of the epistemological presuppositions of methodological nationalism. They put forward the notion that sub-state or regional scales (or sub-state national ones, as in the United Kingdom or Spain), as well as supra-national ones, have become much more important as political place-makers in the last thirty to forty years. They underscore the extent to which citizens "define and pursue collective goals at regional scales and through regional institutions as well as at the scale of the nation-state" and the supra-national level.[19] Thus, they are proponents of both multilevel governance (particularly in the EU context) and the new regionalism in

---

[16] Mass, *supra* note 1, at vii.

[17] *Id.* at 1-2.

[18] CHARLIE JEFFERY, INTRODUCTION: REGIONAL PUBLIC ATTITUDES BEYOND METHODOLOGICAL NATIONALISM *in*, CITIZENSHIP AFTER THE NATION STATE: REGIONALISM, NATIONALISM AND PUBLIC ATTITUDES IN EUROPE 1 (Ailsa Henderson, et al. eds., 2014).

[19] *Id.* at 1-2.

Europe.[20] No longer is there an unreflective preoccupation with the nation-state as an "unchallengeable framework for public action." Now, instead both the region and the supra-national level are seen as important scales for social mobilization, economic activity, and public policy.[21]

Theorists of multileveled citizenship thus consider conceptions of citizenship that are "not necessarily tied to particular states but rather exist over, under, around, and through them."[22] Multilevel citizenship scholars see a need to capture the nuance of citizenship in theory and practice in the contemporary world, showing the "artificiality and arbitrariness of the sovereign state's monopoly on conferring citizenship."[23] This is not to say that the nation-state has become redundant or insignificant as regional-scale and supranational-scale politics become more important.[24] It may yet be that the state-wide scale remains the primary political focus of most citizens, but a purely statist perspective on citizenship would be tantamount to mischaracterizing the contemporary political world. Citizenship needs to be recast as a form of political community that responds to the demands of distinctive regional (or sub-state national) political communities, the supranational level, as well as the state-wide scale.[25] No one is foreseeing the disappearance of the state by regionalizing or supranational tendencies, but rather "the consolidation of a multileveled statehood."[26]

B. Multilevel Citizenship in Practice: Public Attitudes in European States and Regions

Multilevel citizenship can be observed in practice by referring to regional-scale public attitudes. One of the best available data sets of this sort is the Citizenship After the Nation-State ("CANS") project developed by the team led by Charlie Jeffery, Ailsa Henderson, et al. of the University of Edinburgh. Designed to measure public attitudes at regional scales and to explore how citizens negotiate multi-levelled statehood, ultimately this project involved research teams in Austria, France, Germany, Spain, and the United Kingdom. Analyzing public attitudes in fourteen sub-state regions, this project delved into public attitudes in Salzburg, Upper Austria, Vienna, Alsace, Brittany, Île de France, Bavaria, Lower Saxony, Thuringia, Catalonia, Galicia, Castilla-La Mancha, Scotland, and Wales.[27]

---

[20] MICHAEL KEATING, ASYMMETRICAL GOVERNMENT: MULTINATIONAL STATES IN AN INTEGRATING (1999).
[21] JEFFERY, *supra* note 18, at 2-4.
[22] MAAS, *supra* note 1, at 3.
[23] *Id.* at 2.
[24] JEFFERY, *supra* note 18, at 7.
[25] *Id.* at 8-9.
[26] *Id.* at 8.
[27] JEFFERY, *supra* note 3.

Catalonia, Scotland, or Wales are regions with a clear sense of nationhood rather than mere administrative units, while other regions present more of a "regional" identity.[28] This project sought to inquire in the first place into the "extent to which citizens engage in political participation through regional institutions as compared to state-level institutions…Second, do citizens conceive of their obligations to one another at the scale of regional or state-wide community?[29] The project proposed three independent variables –identity, institutional, and economic – that were likely to have an impact on the degree to which citizens identified and pursued collective goals at regional scales.

Their first hypothesis posited that identity (national or regional) "will influence how citizens participate across electoral levels or conceive social solidarity across territorial scales"[30], which requires us to first inquire whether identities themselves are multi-levelled. The project's findings in this regard, using a bi-polar identity scale, was that Scotland, Catalonia, Wales, and Galicia were the regions with the most "regional" (or sub-state "national") identities, when one adds together the respondents that identified with an exclusive or predominantly regional identity. At the other end of the scale, Vienna, Alsace, Lower Saxony, Île de France and Castilla-La Mancha showed a pattern in which state identities effectively outweighed regional identities.[31] Interestingly, their most notable finding is that in all regions there are dual attachments to region and state. Even in Scotland, the "most regional" case, seventy-eight point seven percent (78.7%) of respondents claim some measure of British identity. The most "state-wide" case was Lower Saxony, but even there seven point three (70.3%) of respondents had a degree of regional identity. Scotland, Catalonia, Wales, and Brittany had the strongest relative attachment to the region. Their findings imply that stronger relative attachment to region will lead to greater propensity to favor political participation and to express solidarity at the regional scale. Yet, with the exception of Catalonia, "at least 40% of respondents everywhere had a strong attachment to the state as a whole. Territorial identities clearly appear to be multi-levelled."[32]

Their second hypothesis is that institutional authority will have an impact on how citizens approach political participation and social solidarity at the regional level, as compared to the state-wide level. The question that is formulated is whether the self-rule and shared rule dimensions of "institutional authority have differential effects on how citizens approach political participation and social solidarity, with a strong shared-rule dimension conceivably fostering "state-wideness."[33] Scotland,

---

[28] *Id.* at 38.

[29] *Id.* at 12.

[30] *Id.* at 15.

[31] *Id.*

[32] *Id.* at 16.

[33] *Id.* at 17.

Catalonia, Galicia, and Wales were the top four regions expressing the opinion that regional decisions are very important, "suggesting that subjective measures of the importance of regional decisions may be shaped by the strength of regional identity. There is also a familiar ring in the pattern of attributing importance to *both* regional and (especially) state-level decisions; there is relatively little cross-regional variation around the latter…But the view that regional institutions should have more power is everywhere in our survey a majority view, and one held by supermajorities of three-quarters or more respondents in all but three regions (Castilla-La Mancha, Île de France, and Bavaria)".[34]

In sum, the CANS data points to a number of factors that could nudge citizens to pursue "collective goals at regional scales: Where there are strong regional identities; where there is a strong demand for more powerful regional institutions; and where there is a clear sense that the region is doing well economically relative to others."[35] The data give us an indication of how multilevel citizenship works in practice (at least in Europe): it suggests that "citizens understand their own collective identities and the institutional opportunities they have for pursuing collective goals as being both regional *and* state-wide."[36] In Austria, France, Germany, Spain, and the United Kingdom, multilevel citizenship in these terms may be both regional and state-wide. The CANS data has shown us a portrait of how multilevel citizenship works in practice: it may be that citizens' understanding of their citizenship may be more multi-levelled and multi-hued than is commonly believed.

C. Asymmetric Citizenship in Practice: Civic Differentiation in the U.S. Territories

Asymmetric citizenship refers to forms of civic differentiation in a particular territory of a given state that are inherently unequal, inferior, or fragmentary vis-à-vis the rights and privileges that are enjoyed by the rest of the citizens in the same state. Asymmetric citizenship is *de jure* civic differentiation: within one region of a state there is a type of citizenship that is different from the full-fledged, symmetric citizenship that is offered to the majority of citizens of the state in question. If we look at the history of citizenship in the nineteenth and twentieth centuries, we will find examples of asymmetric citizenship, particularly in the types of citizenship regimes established by empires in some of their territories or by former empires in the way they have treated their former territories in their citizenship policies. The history of differentiated citizenship in the imperial domains in the last 140 years or so is vast and fascinating, and a full account of it is beyond the scope of this

---

[34] *Id.* at 18.

[35] *Id.* at 22.

[36] *Id.*

article. Suffice it to say that examples could be drawn from the history of French colonialism in its treatment of the inhabitants of Algeria from the 1840s until 1962[37] and in the various ways the British offered forms of asymmetric citizenship to some of the inhabitants of its vast Empire, in particular as the Empire transitioned to the British Commonwealth[38] or the way Spain's late nineteenth colonial strategy included offering a form of citizenship in 1897 to some of its remaining colonials.[39] Forms of quasi-asymmetric "citizenship" (or juridical-political status) among some of the conquered peoples of imperial powers is a recurring feature of classic empires such as the Roman, the Austro-Hungarian, or the Ottoman empires.[40] Even liberal democratic states in the twentieth century, in their treatment of some of the citizens in their territories acquired by imperial conquest, have instituted forms of asymmetric citizenship. The United States is the quintessential example of the latter, and we shall now discuss this major case, which remains topical to date.

As Rogers Smith has noted, the USA now exerts its direct sovereignty over more land outside its core federation than any other state on Earth. Currently, this includes the Commonwealths of Puerto Rico and the Northern Mariana Islands, and the territories of Guam, US Samoa, and the U.S. Virgin Islands (Saint Thomas, Saint John, and Saint Croix), and a number of small Pacific Islands.[41] The populations in these extra-federation territories are small, but Puerto Rico has more residents than twenty-two of the current U.S. states.[42]

Pursuant to the *Insular Cases,* all of these territories are "unincorporated territories", which is a legal status denoting Congress' general unwillingness to convert them into units of the federation.[43] Yet, Congress granted U.S. citizenship for the inhabitants of all these territories, except US Samoa. Still, the rights and privileges of these territories vary from those of the citizens of the fifty states. Guam is still a territory governed by Congress' 1950 Organic Act for Guam, which granted U.S. citizenship on its residents. At the height of the civil rights era, Congress authorized popular elections for the governors of Guam and the Virgin Islands, and it

---

[37] TODD SHEPARD, THE INVENTION OF DECONOLONIZATION: THE ALGERIAN WAR AND THE REMAKING OF FRANCE (2006); PATRICK WEIL, HOW TO BE FRENCH: NATIONALITY IN THE MAKING SINCE 1789 (2008); IAN LUSTICK, UNSETTLED STATES, DISPUTED LANDS (1993).

[38] RANDALL HANSEN, CITIZENSHIP AND IMMIGRATION IN POST-WAR BRITAIN (2004). *See* the British Commonwealth Immigrants Act of 1962. *Id.* at 123.

[39] MALAVÉ BURGOS & EDA MILAGROS, GÉNESIS Y PRÁXIS DE LA CARTA AUTONÓMICA DE 1897 EN PUERTO RICO (1997); JOSÉ TRÍAS MONGE, PUERTO RICO: THE TRIALS OF THE OLDEST COLONY IN THE WORLD (1997).

[40] KAREN BARKEY, EMPIRE OF DIFFERENCE: THE OTTOMANS IN COMPARATIVE PERSPECTIVE (2009); JANE BURBANK, & FREDERICK COOPER, EMPIRES IN WORLD HISTORY: POWER AND THE POLITICS OF DIFFERENCE (2010).

[41] Smith, *supra* note 4.

[42] *Id.*

[43] EFRÉN RIVERA RAMOS, THE LEGAL CONSTRUCTION OF IDENTITY: THE JUDICIAL AND SOCIAL LEGACY OF AMERICAN COLONIALISM IN PUERTO RICO (2001).

provided both with non-voting delegates to Congress in 1972.[44] Yet, in the late 1980s, Congress refused to grant greater self-government comparable to its neighbor, the Commonwealth of the Northern Mariana Islands. A segment of the political spectrum in Guam has also sought to have their citizenship status altered "from congressionally based to constitutionally based by a declaration that their status derives from the citizenship clause in Section one of the Fourteenth Amendment, a position that the U.S. has resisted."[45] The U.S. Virgin Islands were acquired from Denmark in 1917 and are governed by a congressional Revised Organic Act of 1954, which amended a 1936 Act that created a Senate that comprises the islands' unicameral legislature. Like Guam, residents there are U.S. citizens and in the early 1970s gained authority to elect their governor and have a non-voting representative in Congress. In 2010, Virgin Islanders approved a constitution for Congress' approval but Congress sent it back for amendments, because it inadequately recognized U.S. sovereignty and seemed to unduly advantage persons of local birth and ancestry.[46] In 1944, the U.S. invaded the Marianas in 1944, then under Japanese domination. In 1947, the U.S. formally acquired the fifteen Northern Mariana Islands. In 1976, the U.S. entered into a Covenant that created the "Commonwealth of the Northern Mariana Islands in political union with the United States, in part because it regarded them, like neighboring Guam, as key to its Pacific strategic interests…"[47] In 1986, the Commonwealth adopted its own constitution, its trusteeship status was terminated, most of its residents became U.S. citizens, and gained a non-voting representative in Congress. In 2008, Congress imposed on the CNMI immigration laws by way of the Consolidated Natural Resources Act.

In all the U.S. territories, what is most politically remarkable is how the United States "continues to assert its legal authority to engage in substantial administrative supervision and to legislate over many if not all territorial matters, including decisions on the scope of the U.S. government's own authority. It does so ultimately on the basis of Congress' Article IV, section three powers to 'make all needful rules and regulations respecting the territory or other property belonging to the United States.' These include powers to treat the citizens of territories differently from state citizens…and U.S. statutes and judicial rulings often do so…"[48]

Apart from the CNMI, Guam, US Samoa, and the USVI, the most interesting U.S. territory is Puerto Rico because of its size, cultural and linguistic traits, and population (about three point six million on the island and going down quickly after Hurricane Maria, and another five point four million plus on the mainland many of

---

[44] Smith, *supra* note 4.

[45] *Id.*

[46] *Id.*

[47] *Id.*

[48] *Id.*

which are circulators).[49] The citizenship regime established since 1898 (and 1917) for the residents of Puerto Rico is the most important contemporary exemplar of asymmetric citizenship in the United States. The asymmetry in their citizenship has three components: first, there is asymmetry in their rights of political participation. Second, there is asymmetry in their social and economic rights (including fiscal rights and privileges). Third, there is asymmetry in the nature of the political status they have on the island, when compared to the constituent units of the federation. The U.S. citizenship of Puerto Ricans was set by federal statute in 1917, and thus it is not Fourteenth Amendment birthright citizenship.

Regarding rights of political participation, their capacity to influence the political process at the federal level through the normal channels of congressional and presidential politics is limited, given that they have no Congresspersons representing them (except for one non-voting representative) and cannot vote in U.S. presidential elections. In the politics of sub-state regions/nations, there is a tradeoff between capacity (to influence the center) and autonomy[50] and the asymmetric citizenship imposed on Puerto Ricans since 1917 is an extreme case of this. Moreover, it is true, that since 1952 there has been a certain willingness on the part of autonomists in Puerto Rico to accept near zero formal political influence on the center in exchange for the perception (real or imagined) of greater regional autonomy.

There is a federal district court on the island: it is in the U.S. First Circuit and its judges are selected by the usual process for federal judges. Curiously, the federal court in Puerto Rico behaves in a symmetric fashion, just like any other federal court in the federation. Thus, for example, Spanish is not an official language of the court. Judges address the court in English, court documents must be in English and if a witness or lawyer speaks in Spanish, this must be translated by an official interpreter into English.

Regarding social and economic rights (including fiscal rights and privileges), the asymmetric citizenship of Puerto Ricans exhibits a remarkable degree of differentiation. "Congress routinely treats Puerto Rico and the other territories worse than it does states. Consider Medicaid, which provides health insurance for the poor. The one billion in annual Medicaid funding that Puerto Rico receives

---

[49] DUFFY BURNETT & BURKE MARSHALL, FOREIGN IN A DOMESTIC SENSE: PUERTO RICO, AMERICAN EXPANSION, AND THE CONSTITUTION (Duffy Burnett & Burke Marshall eds., 2006); Puerto Ricans are circulators: there is a heavy bidirectional flow of people between the U.S. continent and the Island. Estimates of the extent of circulation vary widely, but what is clear is that more and more Puerto Ricans are remapping the borders of their identity by moving frequently between the Caribbean and North America. JORGE DUANY, THE PUERTO RICAN NATION ON THE MOVE: IDENTITIES ON THE ISLAND AND IN THE UNITED STATES 33 (2002).

[50] Eve Hepburn, *The New Politics of Autonomy: Territorial Strategies and the Uses of European Integration by Political Parties in Scotland, Bavaria, and Sardinia, 1979-2005* (2007) (Ph.D. Dissertation, European University Institute, Florence).

from Washington is about twenty percent of the five billion received by similar-size Oregon. Puerto Rico is also treated unequally under Medicare, even though my constituents pay the same federal payroll taxes that fund much of this program. The Affordable Care Act – Obamacare – has been the subject of partisan debate, but the law's rarely mentioned defect is that the territories are barred from most of its new programs and protections…Puerto Rico is excluded from the Supplemental Security Income program that aids the most vulnerable Americans. It does not participate in the federal nutrition program, instead receiving a block grant that shortchanges it by $450 million a year. Puerto Rico is partly excluded from the child tax credit and fully from the earned-income tax credit, which encourages low-income individuals to seek employment. Unlike a state, Puerto Rico cannot authorize its public enterprises to seek relief under Chapter nine of the federal bankruptcy code, which impedes its recovery."[51]

There is a well-worn argument that perhaps asymmetric citizenship in Puerto Rico is justified because Congress does not require Puerto Rico residents to pay federal income taxes on local earnings, but this is not entirely correct. First of all, residents of Puerto Rico do pay federal income taxes in certain circumstances. Federal civil servants in Puerto Rico do pay federal taxes. In addition, one must pay federal income taxes whenever one's source of income originates in the federation or if one's source of income is in a foreign country. Beyond these special cases, the fact is that "nearly half of all stateside households do not earn enough to owe income taxes, but are still treated equally."[52] This situation in fact creates another form of (negative) asymmetry: "because of federal tax credits, a working-class family of four in the States is likely to have greater take-home pay than an identical family in Puerto Rico."[53]

The asymmetric citizenship of the residents of Puerto Rico is inherent in the nature of the political status they have on the island, when compared to the constituent units of the federation. Hence, the unincorporated territory political status means that U.S. laws apply to its residents without their consent. U.S. laws can override the provisions of the ELA constitution. The President of the U.S and

---

[51] Pedro Pierluisi, *Statehood is the Only Alternative for What Ails Puerto Rico*, N.Y. TIMES, (July 10, 2015), https://www.nytimes.com/2015/07/11/opinion/statehood-is-the-only-antidote-for-what-ails-puerto-rico.html. The current political, economic, social, and fiscal crisis of the *Estado Libre Asociado* (ELA) is rooted precisely in the asymmetric citizenship of the residents of PR, and the political/economic strictures of the unincorporated territory status. Puerto Rico is a subordinated sub-state region, subject to the arbitrariness of the federal government. "Unequal treatment at the federal level, combined with mismanagement at the local level, has a debilitating effect on the island's economy. To compensate for the lack of federal support, the Puerto Rico government has borrowed heavily." *Id.* In the last five years, there has been a steady out-migration from PR to the federation, where Puerto Ricans "are entitled to vote for their national leaders and to equal treatment under federal law." *Id.*

[52] *Id.*

[53] *Id.*

the Executive branch can negotiate treaties, etc. that affect PR in important ways without its consent. Moreover, "through the unilateral grant by Congress of diversity jurisdiction, United States courts decide cases involving strictly local matters of law. There is no equality or comparability of rights between United States citizens residing in Puerto Rico and those domiciled in the States. Congress assumes that it can unilaterally exercise plenary powers over Puerto Rico under the territorial clause of the U.S. Constitution. The U.S. government contends that sovereignty over Puerto Rico resides solely in the United States and not in the people of Puerto Rico."[54]

Two recent constitutional developments further dramatize how the asymmetric citizenship of the residents of Puerto Rico is inherent in the nature of the political status they have on the island, when compared to the constituent units of the federation. The first is the recent U.S. Supreme Court case of *Commonwealth of Puerto Rico v. Sánchez Valle*.[55] This is the most important Supreme Court decision on Puerto Rico's political status since *Boumediene et al. v. Bush*.[56] Prior to *Boumediene*, a number of cases seemed to distance themselves (even if timidly) from the traditional doctrine of the *Insular Cases*. For example, in *Harris v. Rosario*[57], Justice Marshall expressed in his dissent that the holding of the Insular Cases was questionable, and in *Torres v. Puerto Rico*,[58] Justice Brennan in his concurrence also questioned the validity of these "old cases" such as *Downes* and *Balzac*. However, in the 2008 case of *Boumediene* the majority opinion stated that the "Court designed in the Insular Cases a doctrine that permitted us to use power frugally and where most needed. This doctrine of more than a century informs our analysis in the current case."[59]

That brings us to *Sánchez Valle*. Ostensibly a case about criminal procedure, it is the most definitive and authoritative statement on the nature of the ELA in recent times. The Court held that the Double Jeopardy Clause bars Puerto Rico and the United States from successively prosecuting a single person for the same conduct under equivalent criminal laws. Ordinarily, a person cannot be prosecuted twice for the same offense. But, under the dual-sovereignty doctrine, the Double Jeopardy Clause does not bar successive prosecutions if they are brought by separate sovereigns.[60] Yet the "sovereignty" in this context does not have its common meaning. Rather, the test hinges on a single criterion: the "ultimate source" of the power undergirding the respective prosecutions.[61] If the two entities derive their power to punish from

---

[54] TRÍAS MONGE, *supra* note 39, at 162.

[55] 136 S. Ct. 1863 (2016).

[56] 553 U.S. 723 (2008).

[57] 446 U.S. 651 (1980).

[58] 442 U.S. 465, 475-6 (1979).

[59] *Boumediene*, 553 U.S. at 759.

[60] United States v. Lanza, 260 U.S. 377, 382 (1922).

[61] United States v. Wheeler, 435 U.S. 313, 320 (1978).

independent sources, then they may bring successive prosecutions. Conversely, if those entities derive their power from the same ultimate source, then they may not.

Under that approach, the States are separate sovereigns from the Federal Government and from one another. Because States rely on "authority originally belonging to them before admission to the Union and preserved to them by the Tenth Amendment," state prosecutions have their roots in an "inherent sovereignty" unconnected to the U.S. Congress.[62] For similar reasons, Indian tribes also count as separate sovereigns. A tribe's power to punish pre-existed the Union, and so a tribal prosecution, like a State's, is "attributable in no way to any delegation…of federal authority."[63] Conversely, a municipality cannot count as a sovereign distinct from a State, because it receives its power, in the first instance, from the State.[64]

With respect to the U.S. territories, the Court concluded in the early twentieth century that they are not sovereigns distinct from the United States.[65] The Court reasoned that the "territorial and federal laws were creations emanating from the same sovereignty,"[66] and so federal and territorial prosecutors do not derive their powers from independent sources of authority. The Court recognized that when the ELA was born in 1950-1952 by virtue of Public Law 600, Congress "'relinquished its control over the Commonwealth's local affairs, granting Puerto Rico a measure of autonomy comparable to that possessed by the States.'"[67] Also, "'Puerto Rico, like a state is an autonomous political entity, is sovereign over matters not ruled by the Federal Constitution.'"[68] The court emphasized the purely local nature of the self-rule powers accorded to Puerto Rico in 1950-52. The Puerto Ricans drew up their owns Constitution in 1950-52, but "back of the Puerto Rican people and their Constitution, the "ultimate" source of prosecutorial power remains the U.S. government, just as back of a city's charter lies a state government."[69] That makes Congress the original source of power for Puerto Rico's prosecutors – as it is for the federal government.

In sum, the Puerto Rico government and the United States' federal government are not separate sovereigns. Puerto Rico is a subordinate autonomy that enjoys a sphere of self-government only for purely local matters, and is not a separate sovereign, as are the constituent units of the USA federation. U.S. states have an "inherent sovereignty" unconnected to, and indeed pre-existing, the U.S. Congress. They are

---

[62] Health v. Alabama, 474 U.S. 82, 89 (1985).

[63] *Wheeler*, 435 U.S. at 328.

[64] Waller v. Florida, 397 U.S. 387, 395 (1970).

[65] Grafton v. United States, 206 U.S. 333 (1907).

[66] People of Puerto Rico v. Shell Co., 302 U.S. 253, 264 (1937).

[67] Examining Bd. of Engineers, Architects and Surveyors v. Flores de Otero, 426 U.S. 572, 597 (1976).

[68] Rodriguez v. Popular Democratic Party, 457 U.S. 1, 8 (1982).

[69] *Wheeler*, 435 U.S. at 320.

separate sovereigns from the federal government and from each other. However, Puerto Rico's authority to govern itself is ultimately derived from the federal government. This holding, therefore, is a veritable reassertion of the subordinate nature of the ELA, absolutely subject to the Territorial Clause of the U.S. Constitution.

Importantly, the Obama Administration, through its Solicitor General Donald Verrilli, filed an amicus brief in this case in December 2015 that supported the positions taken in the majority opinion in *Sanchez Valle*. In that brief, the Solicitor General argued that "Congress may treat Puerto Rico differently from States by virtue of Congress' power under the Territory Clause."[70] Puerto Rico has some control over its purely local affairs as a U.S. territory, but is not a sovereign under the U.S. Constitution. In fact, it does not have an independent and separate existence from the U.S. federal government.[71]

Second, Puerto Rico's current economic and fiscal crisis has deep historical-structural causes. The federal government has responded with a statute known as (after its acronym) PROMESA, which became law on June 30, 2016.

This statute establishes a Fiscal Control Board with broad powers of budgetary and financial control over Puerto Rico. It creates procedures for adjusting debts accumulated by the Puerto Rico government and its instrumentalities. It would expedite approvals of key energy projects and other "critical projects" in Puerto Rico. Section 101 of the statute specifies that the Fiscal Control Board has been established pursuant to the Territorial Clause granting Congress plenary authority over its territories. Section 104 specifies that the Board can hold hearings, issue subpoenas, obtain information, enter into contracts, enforce Puerto Rico labor laws, initiate civil actions to carry out its responsibilities, etc. Title II specifies the enormous powers of the Board to set fiscal plans and budgets. Essentially, under PROMESA the Puerto Rico government no longer has any authority over economic and fiscal plans, or the government's budget. That will all be set by the Fiscal Control Board.

The Board's seven members have been designated (none of which represent the interests of the Puerto Rican people), and the Board is now fully operational. Many have said that it is no longer the Puerto Rican people who are in charge of their own affairs through their government. Instead, the major decisions affecting the people's welfare in the next few years will be taken by an unelected and unaccountable Fiscal Control Board.

In the last forty years, "Spain, Belgium, the United Kingdom, and even France, have moved toward systems that accommodate minorities through autonomy, whether through pluralist federation, devolution within union states or federacies."[72]

---

[70] Brief for Respondents, at 28.

[71] *Id.* at 26.

[72] JOHN MCGARRY ET AL., INTEGRATION OR ACCOMMODATION? THE ENDURING DEBATE IN CONFLICT REGULATION, *in* CONSTITUTIONAL DESIGN FOR DIVIDED SOCIETIES: INTEGRATION OR ACCOMMODATION? 67 (Sujit C houdhry ed., 2008).

Regions with nationally-differentiated communities have been increasingly oriented towards seeking an autonomous special status or towards gaining greater power as a constituent unit of a fully formed federation. There are different varieties of territorial pluralism, and we need to understand which of these varieties tend to institute regimes of asymmetric citizenship.

Most cases of multilevel citizenship occur in regionalized or federalized states. More specifically, many cases of multilevel citizenship tend to occur in sub-state regions that enjoy a degree of political autonomy. Yet, some of these cases also exhibit asymmetric citizenship while others do not. Thus, in what sorts of autonomy arrangements do we see asymmetric citizenship established?[73] Indeed, the asymmetric citizenship of the residents of Puerto Rico is inherent in the nature of the political status they have on the island, when compared to the constituent units of the federation. Puerto Rico's autonomy has very few (or none) elements of federalism, similar to other autonomies such as Guam, the Northern Mariana Islands, the U.S. Virgin Islands, and the Isles of Man, Jersey, Guernsey.

III. Nested Differentiated Citizenship: Asymmetric Citizenship within Multilevel Citizenship

If we take the civic differentiation in the U.S. territories (Puerto Rico in particular) as an example of asymmetric citizenship, it could be argued that, with respect to its citizenship regime, asymmetry is nested within a degree of multilevelledness. Although scholars have not produced a data set comparable to the CANS project reviewed above, I have gathered some data in Puerto Rico that will help us compare one of the components of the CANS dataset. We may recall that the CANS project's first hypothesis regarding "multi-levelled citizens" in sub-state regions in Europe was that the sense of attachment to a particular territorial community such as region or state will influence how citizens participate across electoral levels or conceive of social solidarity across territorial scales.[74] This requires us to examine first of all the degree to which identities themselves are multi-level. Jeffery et al. remarked that their most notable finding is that in all regions there are dual attachments to region and state. As mentioned above, they noted that even in Scotland, the "most regional" case, seventy-eight point seven percent (78.7%) of respondents claim some measure of British identity, etc.

We have seen that the citizenship of the residents of Puerto Rico is a powerful exemplar of asymmetry, but is it also a form of multilevel citizenship?

---

[73] The discussion in this paragraph is based on my previous research. *See* Jaime Lluch, *Autonomism and Federalism*, 42 PUBLIUS: THE JOURNAL OF FEDERALISM 1, 134-161 (2012).

[74] JEFFERY, *supra* note 18, at 15.

I conducted field research in Puerto Rico some years ago that may help us answer this question.[75] This involved open-ended surveys administered to the militants of the principal political parties there. One of the elements in the questionnaire was a question posing a bi-polar identity scale.

Tables 1-3 below present the results of the quantifiable portions of the questionnaire responses received from the militants of the three political parties in Puerto Rico. The questionnaire answers summarized below refer only to Part I of the questionnaire, on Nation and Identity.[76]

Obviously this is not a data set on the scale of the CANS project. But it is a portrait of how independentists, autonomists, and federalists think. I will concentrate on autonomists and federalists, which represent about ninety-five percent (95%) of the political spectrum on the Island.

Federalists exhibit dual attachments to region (or sub-state nation) and state (the USA), with the great majority of them identifying as both Puerto Ricans and Americans, or more Americans than Puerto Ricans. In fact, the majority of them wrote that Puerto Rico was not a nation. Yet, the majority also identified Puerto Rico as their country ("patria"), and the majority wrote that the USA was either their nation or the state to which they belonged as citizens. Autonomists show a strong sense of Puerto Rican nationhood, yet many seem to exhibit dual attachments to region and state, as in the case of the European regions examined by the CANS project, with sixty-three percent (63%) identifying the USA as the "state to which I belong as a U.S. citizen."

---

[75] In the last few decades, the three political parties on the Island have been the *Partido Independentista Puertorriqueño* (PIP), *Partido Popular Democrático* (PPD), and the *Partido Nuevo Progresista* (PNP). The PIP is an independentist nationalist party with a social democratic lineage, while the PPD is a centrist to center-right autonomist national party that lately has developed a minority sovereigntist wing. The PNP is a right-wing federalist party (advocates becoming the fifty-first unit of the U.S. federation) that oscillates between semi-national positions and anti-national ones, from the perspective of Puerto Rican society. These parties together represent ninety-nine (99%) of the political opinions on the Island, given that aside from some very small extraparliamentary political groupings on the left, there are no other sizeable political associations. These three parties have their Congresses every year or two, usually in the summer, and I have been able to attend the Congresses of the PPD and the PNP in 2006-2008. There I distributed a questionnaire among the militants of these parties, originally designed to further my research on varieties of nationalism in minority nations´ national movements and majority-nation nationalism, and as a continuation of the research I have done on Québec-Canada and Catalonia-Spain. The PIP did not give me permission to attend their 2007 Congress, and instead they distributed my questionnaire by email to some of their militants, and in August, 2008 I attended the Congress of another independentist organization, the *Movimiento Independentista Nacional Hostosiano* (MINH). Although the questions were designed as a continuation of my research on sub-state national movements, some of the questions are useful for exploring the depth and breadth of these militants´ national identities. In total, I have received 273 answered questionnaires. Numerous interviews with upper echelon political leaders have been conducted.

[76] Moreover, it was open-ended and therefore there were certain responses that could not fit into a table, but will be presented in the discussion herein.

These militants' responses represent ninety-nine percent (99%) of all Puerto Ricans' views on constitutional politics, since 1952 to date. It would seem that many residents of Puerto Rico exhibit dual attachments to the region (or sub-state nation) and the state (the USA). In this sense at least, the residents of Puerto Rico are multi-levelled citizens, in addition to asymmetric citizens belonging to the broad federal political system that we call the United States. The asymmetry in their citizenship is nested within its multi-levelledness.

Table 1. Regional and state attachments among independentists in Puerto Rico. Responses from PIP and MINH militants (N=27).

Puerto Rico is a Nation?	National Identification	What is the United States?	What is Puerto Rico?	Puerto Rico is Cultural[77] or Political[78] nation?
Yes-99%	Only Puerto Rican- 93%	My *Patria*- 0% ("country")	My *Patria*- 85% ("country")	Political- 7%
No- 0%	More Puerto Rican than United States identity- 0%	My Nation- 0%	My Nation- 14%	Political and Cultural- 74%
Other-1% Colony	Other- 7% Caribbean, Latin American	The State to which I belong as a U.S. citizen-7%	A region of the USA without a national personality-0%	Only Cultural- 19%
		The colonizing state that conquered PR in 1898- 81.4%	Other- 1% Colony	
		Other- 12% Imperial state, Intervener		

[77] Defined as one presenting the distinctive traits of a people, like customs, language, or culture.

Table 2. Regional and state attachments among autonomists in Puerto Rico. Responses from PPD militants (N=197).

Puerto Rico is a Nation?	National Identification	What is the United States?	What is Puerto Rico?	Puerto Rico is Cultural or Political nation?
Yes-99%	Only Puerto Rican-58%	My *Patria*-1% ("country")	My *Patria*- 45% ("country")	Political-22%
No- 0%	More Puerto Rican than United States identity- 33%	My Nation-1%	My Nation- 54%	Political and Cultural-54%
Other-1% Colony	Equally Puerto Rican and U.S.A. identity-9%	The State to which I belong as a U.S. citizen-63%	A region of the USA without a national personality-1%	Only Cultural-24%
	Other- 1% PR with US citizenship	The colonizing state that conquered PR in 1898- 28%	Other- 1% Colony	
		Other- 7% Partner, Good Neighbor, Nothing		

[78] Defined as one presenting a political will combined with a national consciousness.

Table 3. Regional and state attachments among federalists in Puerto Rico. Responses from PNP militants (N=49).

Puerto Rico is a Nation?	National Identification	What is the United States?[79]	What is Puerto Rico?	Puerto Rico is Cultural or Political nation?
Yes-45%	Only Puerto Rican- 6%	My *Patria*- 16% ("country")	My *Patria*- 63% ("country")	Political- 2%
No-55%	More Puerto Rican than United States identity- 6%	My Nation- 38.7%	My Nation- 22%	Political and Cultural- 25%
Other-0%	Equally Puerto Rican and United States identity- 71%	The State to which I belong as a U.S. citizen-49%	A region of the USA without a national personality-16%	Only Cultural- 28%
	More United States than Puerto Rican identity- 14%	The colonizing state that conquered PR in 1898- 14%	Other- 2% Colony, An Island	Other- 8% None
	Other- 3% PR, but US citizen	Other-0%		No answer- 37%

IV. Conclusion: Multilevel Citizenship and Asymmetric Citizenship in Multilevel Systems

The umbrella term "differentiated citizenship" encompasses a variety of forms of civic differentiation, all of which challenge the traditional conception of citizenship as unitary, symmetric, and statist. The political and constitutional history of regional and federal states, and the evolving supranational citizenship of the EU, show that citizenship needs to be reconceptualized as a form of vertical differentiation: it is a *multilevelled* phenomenom, existing over, under, around, and through states. On the other hand, this article has shown that there is a second important category of differentiated citizenship. *Asymmetric* citizenship is a type of differentiation that within the same state and its peripheral regions establishes differentiated categories of citizenship, some of which are fragmentary, unequal, ad hoc, or subordinated, and thus essentially creating horizontal categories of state membership, or group-differentiated citizenship regimes. Asymmetric citizenship

[79] These add up to more than 100% because the respondents sometimes chose more than one alternative, out of five presented.

is much less acknowledged in the literature in constitutional law and in political science, and the use of the phrase in itself is a novel contribution.

Data from the CANS project has shown us how multilevel citizenship works in practice. In many European sub-state regions, residents seem to understand their own collective identities and the institutional opportunities they have for pursuing collective aims in both regional *and* state-wide terms. Asymmetric citizenship often originates in the types of citizenship regimes established by empires in some of their territories or by former empires in the way they have treated their former territories in their citizenship policies. But in the twentieth century, some liberal democracies have established forms of asymmetric citizenship in their treatment of the residents in their territories acquired by imperial conquest. The territories of the USA are good exemplars of the latter, with Puerto Rico being the most paradigmatic case. The asymmetry in the citizenship of residents of an autonomy like Puerto Rico has three components: first, there is asymmetry in their rights of political participation. Second, there is asymmetry in their social and economic rights (including fiscal rights and privileges). Third, there is asymmetry in the nature of the political status they have on the Island, when compared to the constituent units of the federation. Data from one of these territories (Puerto Rico) shows that their asymmetric citizenship is nested within a multi-levelled citizenship.

Lastly, we have examined the territorial basis of civic differentiation. The asymmetric citizenship of the residents of Puerto Rico (and other similar autonomies) is inherent in the nature of the political status of their territory. There are different varieties of territorial pluralism, and not all of them institute regimes of asymmetric citizenship. Most cases of multilevel citizenship occur in autonomies in regionalized or federalized states. However, cases that exhibit asymmetric citizenship arise primarily in autonomies with few (or none) federalist elements.

INTERPRETING THE FOURTEENTH AMENDMENT AND HOW IT EXTENDS TO UNINCORPORATED TERRITORIES SUCH AS PUERTO RICO

*Tamara Valcarcel**

I. Introduction

The Fourteenth Amendment of the United States Constitution declares that "[a]ll persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the State wherein they reside."[1] Deciphering what the Founding Fathers meant when they created the citizenship clause of the Fourteenth Amendment has been the subject of great debate for decades. The concept of citizenship has traditionally served to define the membership or relationship between persons and their political communities.[2] There

*J.D. Candidate, May 2018, Inter American University of Puerto Rico School of Law.

[1] U.S. Const. amend. XIV.

[2] Charles R. Venator-Santiago, United States Citizenship in Puerto Rico, a Short History 3 (2010).

are different ways to identify citizenship. The United States has used at least five types of citizenship to classify its members.[3] The U.S. Constitution only confers two types of citizenship, a naturalized citizenship under Article I[4] and a *jus soli*[5], also known as, birth right citizenship under the Fourteenth Amendment.[6]

Naturalized Citizenship refers to all persons not born in the United States where they voluntarily become U.S. citizens through the process of naturalization.[7] In contrast, birth right citizenship appears to mandate automatic citizenship for people born in the fifty states, the District of Columbia, or territories of the United States that are not otherwise excluded by jurisdictional limitations.[8] It is important to first understand the difference between the two types of citizenship in order to understand how they apply to U.S. territories.

American Samoa, Guam, the Northern Mariana Islands, Puerto Rico, and the U.S. Virgin Islands are the five Islands that currently form today's United States unincorporated territories.[9] What is the status created by the unincorporated territory? It is a status located somewhere in between a territory and a foreign country.[10] It is a liminal status that enables the U.S. to annex new territories without binding its government to past colonialist or imperialist constitutional precedents.[11] In other words, an unincorporated territory is to be caught in limbo although unquestionably subject to American sovereignty.[12] They are considered part of the United States for certain purposes but not for others.[13] This liminal status allows the U.S. government to selectively treat an unincorporated territory as a possession or as a part of the United States for constitutional purposes.[14] It also enables the United States' global

---

[3] *Id.*

[4] U.S. CONST. art. I, § 8, cl. 4.

[5] *Jus soli*, MERRIAMWEBSTER.COM, https://www.merriam-webster.com/dictionary/jus%20soli (last visited May 13, 2018) (Jus soli or birth right citizenship is a rule that establishes that the citizenship of a child is determined by the place of its birth).

[6] CHARLES R. VENATOR-SANTIAGO, PUERTO RICO AND THE ORIGINS OF US GLOBAL EMPIRE THE DISEMBODIED SHADE 65 (Routledge Taylor & Francis Group a Glass House Book eds., 2015).

[7] *Citizenship through Naturalization*, USCIS.GOV, https://www.uscis.gov/us-citizenship/citizenship-through-naturalization (last visited May 13, 2018) (defining Naturalization as the process of applying for U.S. Citizenship and is granted to foreign citizens or nationals after he or she fulfils the requirements established by Congress in the Immigration Nationality Act (INA). All applicants must fill out N-400 Form also known as an Application for Naturalization and study for a Naturalization Test).

[8] U.S. CONST. amend. XIV, § 1, cl. 1.

[9] *Developments in the Law--The U.S. Territories: Introduction*, 130 HARV. L. REV. 1616, 1617 (2017).

[10] VENATOR-SANTIAGO, *supra* note 6, at 63.

[11] *Id.*

[12] Christina Duffy Ponsa, *Are American Samoan's American?* N.Y. TIMES (June 8, 2006), https://www.nytimes.com/2016/06/08/opinion/are-american-samoans-american.html.

[13] *Id.*

[14] VENATOR-SANTIAGO, *supra* note 6, at 63.

empire to choose when to treat territories, such as in the case of Puerto Rico, as a part of the United States or as a separate and unequal possession of the empire.[15]

These unincorporated but organized territories exercise self-governance, while still existing subject to the U.S. Congress' plenary power.[16] Due to these territories' extensive history, this article will only focus on one of the five unincorporated territories, that is, the island of Puerto Rico. Citizenship has frequently been a subject of much conversation between Puerto Ricans who live in the United States' and those who reside in Puerto Rico. The issue of citizenship has been of great concern since 1898. Since 1898, the principal view, among U.S. law and policymakers, is that Puerto Rico is located outside of the United States for citizenship purposes.[17] Thus, previous lawmakers such as U.S. Congress Representative Don Young, have argued, that Puerto Rico is not a part of the United States for constitutional purposes, and therefore, naturalization or birth in Puerto Rico is equivalent to birth or naturalization in a foreign locality.[18] It is believed that Puerto Rico's United States' citizenship has shared a unique history with the United States which has conveyed various federal statutes and treaties.[19] The ratification of these federal statutes and treaties not only establish the citizenship status Puerto Rico currently holds, but it also places conditions on the fundamental rights Puerto Ricans are entitled to.[20]

Throughout the years, the citizenship conditions of those born in Puerto Rico have changed. The nationality laws under the Immigration and Nationality Act ("INA"), form immigration statutes including the citizenship granted to U.S. territories.[21] Today, Puerto Rico partially applies the U.S. Constitution but also establishes its own government.[22] In addition, if one is born in Puerto Rico, the INA establishes that one is entitled to a birth right citizenship.[23] The INA, is the current statute that declares all persons born in Puerto Rico are to be citizens of the United States.[24] Specifically, the statute states:

> All persons born in Puerto Rico on or after April 11, 1899, and prior to January 13, 1941, subject to the jurisdiction of the United States, residing on January 13, 1941, in Puerto Rico or other territory over which the United States exercises rights of sovereignty and not citizens of the United States under

---

[15] *Id.*

[16] *Developments in the Law--The U.S. Territories: Introduction*, *supra* note 9, at 1617.

[17] VENATOR-SANTIAGO, *supra* note 6, at 65.

[18] *Id.*

[19] *Id.*

[20] *Id.*

[21] Immigration and Nationality Act, 8 U.S.C. § 1402 (2018).

[22] *Id.*

[23] *Id.*

[24] *Id.*

> any other Act, are declared to be citizens of the United States as of January 13, 1941. All persons born in Puerto Rico on or after January 13, 1941, and subject to the jurisdiction of the United States, are citizens of the United States at birth.[25]

Since the establishment of Section 1402 of the INA, Puerto Ricans have the right to possess a U.S. passports and can enter in and out the United States with no issue, such as the need to first be inspected by Customs, a requirement for non-US citizens.[26] Notwithstanding this right, the principal concern is that despite being United States Citizens, Puerto Ricans are deprived of certain fundamental rights because of the territory's unincorporated status.

Although Congress enacted a statute that has granted Puerto Ricans U.S. citizenship, there are those who question whether U.S. territories are subject to provisions and protection under the United States Constitution such as those jurists in *Downes v. Bidwell* and *Balzac v. Puerto Rico* also known as *Insular Cases*.[27] These cases will be discussed later in order to understand (1) how the determination of these cases have excluded Puerto Rico from constitutional rights and (2) how these courts are deficient in identifying or interpreting what rights are granted to territories under the Fourteenth Amendment.

Many lawmakers have argued that Puerto Rico should be excluded from the U.S. Constitution for constitutional purposes, and therefore, naturalization or birth in Puerto Rico is equivalent to birth or naturalization in a foreign locality. [28] Under this rationale, persons naturalized or born in Puerto Rico can only acquire a statutory citizenship created by congressional statute not mentioned in the Constitution. The INA is designed to extend access to U.S. citizenship to Puerto Rico and other unincorporated territories.[29] Prevailing interpretations, suggest that statutory citizenship designed for Puerto Rico, confers a less than equal status on its bearer within the U.S. global empire.[30] It is clear that the series of citizenship laws Congress has enacted from (1900-1940) excludes Puerto Ricans who reside on the Island from access to constitutional citizenship.[31] The enactment of previous citizenship laws for Puerto Rico excluded Puerto Rico's access to constitutional citizenship because Puerto Rican citizens found themselves as citizens of an unincorporated territory that they belonged to, but not a part of the United States.[32] Accordingly, the enactment

---

[25] *Id.*
[26] *Id.*
[27] 182 U.S. 244 (1901); 258 U.S. 298 (1922).
[28] VENATOR-SANTIAGO, *supra* note 6, at 65.
[29] *Id.*
[30] *Id.*
[31] *Id.* at 66.
[32] *Id.* at 69.

of these citizenship laws has led many to believe that Puerto Rican citizens may become citizens out of nowhere.[33]

Along the forgoing framework, the main point this article seeks to make is how Congress has extended its *jus soli* or birth right citizenship legislation to Puerto Rico through the Citizenship Clause of the Fourteenth Amendment.[34] This article will also address a recent report written by Professor Charles R. Venator-Santiago from the University of Connecticut wherein he discusses Puerto Rico's statutory citizenship. Professor Venator-Santiago examines the continued debate of Puerto Rico's statutory citizenship and the refusal of the courts to clarify the constitutional status Puerto Rican citizens currently hold.[35] Professor Venator-Santiago's central question regarding the citizenship status of persons born in Puerto Rico is: What is the constitutional source of the citizenship legislation of Puerto Ricans?[36] Professor Venator-Santiago references at least six different theories or interpretations that have been subject of debate regarding Puerto Rico's statutory citizenship.

This article will focus only on Professor Venator-Santiago's sixth theory regarding the Fourteenth Amendment Citizenship by Legislation. In his debate, the Professor Venator-Santiago argues that the legislative history of the Nationality Act of 1940 demonstrates that Congress anchored its *jus soli* or birth right citizenship legislation for Puerto Rico in the Citizenship Clause of the Fourteenth Amendment.[37] Professor Venator-Santiago's[38] interpretation also delves into the "doctrine of extension" which poses that Congress has claimed a plenary power to extend or apply constitutional provisions through legislation.[39] While cases, such as *Downes*, have rejected one interpretation of extension, Congress has used the doctrine of extension to enact birth right citizenship legislation that extends the Citizenship Clause of the Fourteenth Amendment to the territories.[40]

This article will first discuss how citizenship became available to territories to further understand where citizenship arose from. This article will then discuss the historical overview of how Puerto Rico established its current citizenship status in

---

[33] *Id.*

[34] Charles R. Venator Santiago, *Statutory Citizenship*, UNIVERSITY OF CONNECTICUT https://www.cga.ct.gov/lprac/pages/LPRAC_IPRLS_PRCit_FinalReport_2010_R4.pdf, 6-7 (last visited May 13, 2018).

[35] *Id.* at 1.

[36] *Id.* at 6.

[37] *Id.* at 6-7.

[38] *See also* Véase Álvarez González, *The Empire Strikes Out: Congressional Ruminations on the Citizenship Status of Puerto Ricans*, 27 HARV. L. LEGIS. 309, 324 n.59 (1990) (This is a previous law review article that discusses Puerto Rican citizenship which would help understand where Professor Venator Santiago is getting his idea of Puerto Rico's Statutory Citizenship and how the doctrine of extension applies to unincorporated territories through the Fourteenth Amendment).

[39] *Id.*

[40] *Id.*

order to understand how Puerto Rico's current U.S. citizenship has not really changed. The article will then address the Citizenship Clause of the Fourteenth Amendment and how the Doctrine of Extension entitles birth right citizens of Puerto Rico to have the same constitutional rights guaranteed under the Fourteenth Amendment to those born in states. The article will also address how, although it has not formally addressed Puerto Rico's incorporation status, Congress' legislative actions can be interpreted as considering Puerto Rico to be in fact an incorporated territory.[41] The main focus of this article is to highlight how the "Doctrine of Extension" has already been extended to Puerto Rico. The article will further discuss, the various Acts and case law that Congress has enacted, and how one can recognize that although Congress has not formally expressed Puerto Rico's statutory citizenship, it is understood that Puerto Rico has been extended statutory citizenship through the Fourteenth Amendment.

This article will also allude to the reasons why U.S. citizens living in Puerto Rico should be entitled to the same fundamental rights granted to those who live on the mainland. Finally, the article will deliberate how unappealing it is for people from the mainland to move to an unincorporated territory such as Puerto Rico because they know that living in an unincorporated territory means that they will be stripped of certain rights otherwise not lost if living in a state.

II. Historical Background

Although unincorporated territories are self-governing territories, they are required to adhere to the U.S. Congress' plenary power.[42] Long before the INA established citizenship to Puerto Rico, there have been numerous treaties and Acts that have established the citizenship status of people born in Puerto Rico. It is imperative to briefly mention and understand the historical background of how Puerto Rico has reached its current citizenship status with the United States, before attempting to discuss how the doctrine of extension applies to the citizenship clause of the Fourteenth Amendment.

A. Citizenship retained by territories

In order to understand Puerto Rico's current citizenship status, it is important to mention how citizenship became accessible to territories. By 1898, inhabitants of colonial territories could acquire United States' citizenship in at least five ways.[43]

---

[41] GUSTAVO A. GELPI, THE CONSTITUTIONAL EVOLUTION OF PUERTO RICO AND OTHER U.S. TERRITORIES (1898-Present) 104 (2017).

[42] *Developments in the Law--The U.S. Territories: Introduction*, *supra* note 9, at 1617.

[43] VENATOR-SANTIAGO, *supra* note 6, at 35.

Racially eligible residents of colonial territory typically acquired U.S. citizenship through the initial annexation treaty.[44] By 1898, birth in an annexed territory was the same as to birth in the United States for citizenship purposes.[45]

In 1868, Congress enacted the Fourteenth Amendment reproducing the citizenship provision of the Civil Rights Act.[46] Similar to the 1866 Civil Rights Act, the scope of the birth right Citizenship Clause of the Fourteenth Amendment also included the territories.[47] Following the Civil War, Congress extended the citizenship provision of the Fourteenth Amendment to annexed territories.[48] In 1898, the Supreme Court ruled in *United States v. Wong Kim Ark* that all persons born in the United States, including persons born in a territory, were entitled to a birth right citizenship.[49] It is safe to say that by 1898 any person, excluding Native Americans and the children of diplomats, born in a colonial or annexed territory acquired a U.S. citizenship at birth.[50] It is noteworthy, that by 1898, during the development of citizenship in the United States annexed territories subject to colonialism were governed as constitutional parts of the United States.[51]

B. Puerto Rico and the Treaty of Paris

The inhabitants of the island of Puerto Rico were Spanish subjects until April 11, 1898, date on which the Treaty of Paris was signed, thus officially putting an end to the Spanish-American conflict.[52] In Article II of the Treaty, Spain ceded, along with other territories, the Island of Puerto Rico to the United States. Specifically, Spain ceded to the United States the island of Puerto Rico and other islands now under Spanish sovereignty in the West Indies, and the island of Guam in the Marianas or *Ladrones*.[53] As a result of this relinquishment, Puerto Rico ceased to be a Spanish overseas province and became a territory of the United States.[54] As a result, the Treaty of Paris was enacted for the people born in the Peninsular Spain who reside in Puerto Rico.[55] It did not refer to the people born and residing in Puerto Rico. The

---

[44] *Id.*

[45] *Id.* at 36.

[46] *Id.*

[47] *Id.*

[48] *Id.*

[49] 169 U.S. 693 (1898).

[50] VENATOR-SANTIAGO, *supra* note 6, at 36.

[51] *Id.*

[52] Eugenio J. Huot Calderón, *The Concept of Puerto Rican Citizenship*, 35 REV. DER. P.R. 323 (1996).

[53] Art. II, Treaty of Paris, Spain-U.S., 1 LPRA Historical Documents, at. 17 (2016).

[54] Calderón, *supra* note 52, at 323.

[55] John L. A. de Passalacqua, *The Involuntary Loss of United States Citizenship of Puerto Ricans upon Accession to Independence by Puerto Rico*, 19 DENV. J. INT'L L. & POL'Y. 139, 144 (1990).

Treaty of Paris gave the United States Congress the freedom to determine Puerto Rico's civil and political rights.[56] The Treaty of Paris was the first instance where the United States Congress was given the task of determining Puerto Rico's citizenship status. In what has become an infamous provision, Article IX of the Treaty states that "the civil rights and political status of the native inhabitants of the territories hereby ceded to the United States shall be determined by Congress."[57] Although this treaty did not establish Puerto Rico's current citizenship, it is what recognized Puerto Rico's civil and political status as a U.S. territory.[58]

C. Foraker Act

The first Act that further implemented Puerto Rico's affiliation with the United States was the 1900 Foraker Act.[59] The U.S. military controlled the Island until Congress passed the Foraker Act.[60] The Act provided for the establishment of a local government.[61] The Act, among other things, also contained a citizenship provision which expressed that the inhabitants of Puerto Rico shall be deemed and held to be citizens of Puerto Rico.[62] The Foraker Act set forth the economic principles underlying the relationship between the United States and Puerto Rico.[63] Unlike prior organic or territorial acts that treated acquired territories as future states in the making, the Foraker Act treated Puerto Rico as an occupied territory that was not a foreign country or a part of the United States.[64]

The Foraker Act contained a provision that extended a special tax on commercial goods or products that were imported from the Islands into the United States.[65] More importantly, the Foraker Act provided the Federal Government with virtually complete control of the Island's affairs.[66] Significantly, the Foraker Act did not treat Puerto Rico as a state-in-the-making nor as a colonial territory.[67] This Act selectively treated Puerto Rico (an annexed territory) as a foreign country for tax or

---

[56] *Id.*

[57] Art. IX, Treaty of Paris, 1 LPRA Historical Documents, at. 20.

[58] *Id.*

[59] VENATOR-SANTIAGO, *supra* note 6, at 52.

[60] Jon M. Van Dyke, *The Evolving Legal Relationships between the United States and its Affiliated U.S.-Flag-Islands*, 14 U. HAW. L. REV. 445, 472 (1992).

[61] *Id.*

[62] Calderón, *supra* note 52, at 326.

[63] Eduardo Guzman, *Comment, Igartua de la Rosa v. United States The Right of the United States Citizens of Puerto Rico to Vote for the President and the Need to Re-Evaluate America's Territorial Policy*, 4 U. PA. J. CONST. L. 141, 151 (1999).

[64] VENATOR-SANTIAGO, *supra* note 2, at 7.

[65] *Id.*

[66] Puerto Rico v. Sánchez Valle, 136 S. Ct. 1863, 1880 (2016).

[67] VENATOR-SANTIAGO, *supra* note 6, at 52.

commercial purposes representing a departure from prevailing interpretations of the Uniformity Clause, which were premised on treating all annexed territories as parts of the United States for constitutional purposes.[68] This act further recognized Puerto Rico's affiliation with the United States and dependency upon the United States.

D. Jones Act

The second Act, which led to Puerto Rico's current citizenship status is the Jones Act. The Jones Act of 1917, among other things, contains a provision under Section five that makes citizens of Puerto Rico, United States citizens.[69] Section five of the Jones Act provides that:

> That all citizens of Puerto Rico, as defined by section seven of the Act of April twelfth, nineteen hundred, "temporarily to provide revenues and a civil government for Puerto Rico, and for other purposes," and all natives of Puerto Rico who were temporarily absent form that Island on April eleventh, eighteen hundred and ninety-nine, and have since returned and are permanently residing in that Island, and are not citizens of any foreign country, and hereby declared, and shall be deemed and held to be, citizens of the United States. . . [70]

Section five of this Organic Act collectively naturalized all persons born in Puerto Rico and extended a derivative form of parental or *jus sanguinis*[71] citizenship to those born on the Island.[72] Under the Jones Act the phrase "citizens of Puerto Rico" has a different connotation.[73] The phrase established the dual citizenship which all citizens of continental United States have; national citizenship and that of the state in which they reside.[74] It no longer implied a general political status, but merely a political status restricted to that of residence in Puerto Rico.[75] This status was granted to citizens of the United States who reside or who shall hereafter reside in

---

[68] *Id.* at 54-55. Uniformity Clause, requires that indirect taxes, such as income taxes and excise taxes be uniform throughout the United States. *See* U.S. CONST. art. I, § 8, cl. 4.

[69] Jones-Shafroth Act of 1917, Pub. L. No. 64-368, 39 Stat. 951 (1917).

[70] *Id.*

[71] VENATOR-SANTIAGO, *supra* note 2, at 3. (Jus Sanguinis or blood right is a legislative form of derivative or parental citizenship modelled after the Roman tradition that was later developed by U.S. Congress. Jus Sanguinis citizenship was enacted to extend rights and responsibilities to the children of members or the armed forces and embassy staff serving overseas or outside of the United States).

[72] VENATOR-SANTIAGO, *supra* note 2, at 11.

[73] Jones-Shafroth Act of 1917, Pub. L. No. 64-368, 39 Stat. 951 (1917).

[74] Calderón, *supra* note 52, at 344.

[75] *Id.*

the Island for one year.[76] As a result, Puerto Rican citizens of the United States who reside in Puerto Rico for one year are also citizens of Puerto Rico.[77] In other words, this Act created some sort of dual citizenship between Puerto Rico and the United States.[78] Thus, a citizen of the United States who resides in New York is also a citizen of the State of New York.[79] Consequently, Puerto Rico citizens of the United States who reside in Puerto Rico for one year are also citizens of Puerto Rico.[80]

E. Insular Cases

Consistent with the Jones Act and previous cases, the Supreme Court has constantly been confronted with numerous cases that have questioned the constitutional relationship between the new territories and the rest of the United States.[81] The implementation of establishing the constitutional relationship between the new territories and the United States is what we recognize today as the *Insular Cases*. The concepts of "unincorporated" and "incorporated" territories were introduced in the *Insular Cases* decided by the United States Supreme Court in 1901.[82] In these decisions, Justice Edward D. White formulated the view that if a government had the power to expand its territory by any means, then that power also included the right to establish and determine the status of the newly-acquired territory.[83] A newly-acquired territory does not, therefore, automatically become «incorporated» and does not achieve that status until Congress acts to «incorporate» it.[84] Throughout the years these, *Insular Cases* have been questioned over and over again in order to find the rationale behind not awarding Puerto Rico the same constitutional provisions as part of the United States that states have.

Noteworthy to address, before going further into the history of the *Insular Cases*, is the fact that Puerto Rico currently has a "commonwealth" status.[85] According to commentator Jon Van Dyke, the definition of a commonwealth is the following:

---

[76] *Id.*

[77] *Id.*

[78] Calderón, *supra* note 52, at 344.

[79] *Id.*

[80] *Id.*

[81] Kyle Dropp & Brendan Nyhan, *Nearly Half of Americans Don't Know Puerto Ricans are Fellow Citizens*, N. Y. TIMES (Sept. 26, 2017),
https://www.nytimes.com/2017/09/26/upshot/nearly-half-of-americans-dont-know-people-in-puerto-ricoans-are-fellow-citizens.html.

[82] Van Dyke, *supra* note 60, at 445, 449.

[83] Downes v. Bidwell, 182 U.S. 244, 287-344 (1901).

[84] Van Dyke, *supra* note 60, at 449.

[85] *Id.* at 451.

> The concept of a "commonwealth" anticipates a substantial amount of self-government (over internal matters) and some degree of autonomy on the part of the entity so designated. The commonwealth derives its authority not only from the United States Congress, but also by the consent of the citizens of the entity. The commonwealth concept is a flexible one designed to allow both the entity and the United States to adjust the relationship as appropriate over time.[86]

There are different meanings to what each commonwealth constitutional status means. Although Puerto Rico's status has not changed to an incorporated territory, the question raised is whether fundamental rights that apply to a "commonwealth" differ from those unincorporated territories that do not have commonwealth status.

From 1901-1905, the Supreme Court in a series of opinions regarding the *Insular Cases* held that the Constitution extends *ex proprio vigore* to the territories.[87] The definition of the *ex proprio vigore* doctrine is identified as the Constitution following the flag, this is based off the belief that every provision of the United States Constitution is good for everybody, all the time, everywhere.[88] Under the same, the Constitution only applied fully to incorporated territories such as Alaska and Hawai'i, whereas it only applied partially in the new unincorporated territories of Puerto Rico, Guam and the Philippines.[89] Sometime later, courts such as the one in *Downes v. Bidwell*, determined that new states may be admitted by Congress into this Union.[90] Although these words, of course, carry the Constitution with them, nothing is said regarding the acquisition of new territories or the extension of the Constitution over them.[91] This meant these territories could be governed as colonies, with few constitutional restraints.[92]

In *Downes v. Bidwell*, the United States Supreme Court addressed the constitutionality of the military tariffs imposed on goods bought from Puerto Rico and imported into the United States after the enactment of the Foraker Act.[93] The constitutional issue was whether the Tariff Clause in section three of the Foraker Act violated the Uniformity Clause by imposing the Dingley Act[94] on goods traded

---

[86] *Id.* at 451.

[87] GELPI, *supra* note 41, at 105.

[88] Stanley J. Laughlin Jr., *Cultural Preservation in Pacific Islands: Still a Good Idea and Constitutional*, 27 HAW. L. REV. 373 (2005).

[89] GELPI, *supra* note 41, at 105-06.

[90] Downes v. Bidwell, 182 U.S. 244, 286 (1901).

[91] *Id.*

[92] *Id.*

[93] VENATOR-SANTIAGO, *supra* note 6, at 55.

[94] Dingley Tariff Act, ch. 11, 30 Stat. 151 (1897) (This act was created in order to provide a schedule of tariff rates on sugar, salt, tobacco, petroleum, and other goods and commodities).

between Puerto Rico and the mainland.[95] The court determined that Puerto Rico is a territory of appurtenant and belonging to the United States, but not part of the United States within the revenue clauses of the Constitution.[96] The places affected by the court ruling came to be known as "unincorporated" territories.[97]

Downes v. Bidwell drew a distinction between incorporated and unincorporated territories.[98] The court established that Puerto Rico had not been incorporated, and that therefore, the Bill of Rights and other constitutional protections therefore did not apply.[99] However, rights which were "inherent, although unexpressed, principles which are the basis of all free government did."[100]

Subsequently, in *Balzac v. Porto Rico*, the Supreme Court further clarified the Bidwell decision. Specifically, in *Balzac* the Court interpreted the Jones Act to be an Act that provides the authority for Puerto Rico to have a civil government but did not indicate by its title that it has a purpose to incorporate the Island into the Union.[101] *Balzac v. Porto Rico,* unanimously confirmed *Downes*'s notion of territorial incorporation.[102] In *Balzac*, the Supreme Court held that Puerto Rico remained an unincorporated territory and that the Sixth Amendment's guarantee to a trial by jury was not a "fundamental right which goes wherever the jurisdiction of the United States extends."[103] Based on such conclusion, the Court held that judges were allowed to convict Puerto Ricans without giving them an option to have their case be heard by a jury.[104]

After reading these cases, it is clear that courts have affirmed that certain provisions of the U.S. Constitution, such as the right to a trial by jury, apply to unincorporated territories up to a certain extent unless Congress states otherwise.[105] It is undisputed that the *Insular Cases* are a complex collection of decisions whose combined holdings «cannot easily be summarized.»[106] The question of exactly which rights would apply in the unincorporated territories has proven particularly vexing.[107] After considering the history of the *Insular Cases* it is clear to recognize

---

[95] VENATOR-SANTIAGO, *supra* note 6, at 55.

[96] Downes v. Bidwell, 182 U.S. 244, 287 (1901).

[97] *Id.*

[98] *Id.*at 265.

[99] *Developments in the Law--The U.S. Territories: Introduction*, *supra* note 9, at 1620.

[100] *Bidwell*, 182 U.S. at 291.

[101] Balzac v. Porto Rico, 258 U.S. 308 (1922).

[102] *Developments in the Law--The U.S. Territories: Introduction, supra* note 9, at 1620.

[103] *Id.*

[104] *Id.*

[105] *Id.*

[106] *Developments in the Law the U.S. Territories: Chapter Three: American Samoa and the Citizenship Clause: A Study in Insular Cases Revisionism*, 130 HAR. L. REV. 1680, 1681-82 (2017).

[107] *Id.* at 1682.

that, being an unincorporated territory is to be caught in an oblivion that is subject to be entitled to certain constitutional provisions or statutes.[108]

III. The doctrine of extension and how it applies to Puerto Rico within the Fourteenth Amendment

As previously stated, the Fourteenth Amendment guarantees that "[a]ll persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside."[109] Article I, Sec. 8, Clause 4 and the first sentence of the Fourteenth Amendment of the Constitution authorizes Congress to "establish a uniform rule of naturalization."[110] This means that Congress has the power to enact legislation that can provide for the naturalization or the extension of citizenship to persons born outside of the United States.[111] Congress' power to enact legislation also extends to U.S. territories including Puerto Rico.[112]

Congress has developed a legislative form of derivative or parental citizenship modelled after the Roman tradition of *jus sanguinis* or blood right.[113] For most of its history, this form of parental citizenship required that children of citizens born outside of the United States had to reside for a portion of their life in a state or territory within the Union in order to acquire United States rights.[114] Although the Constitution does not contain any language authorizing the extension of parental or birth right citizenship, the Supreme Court has consistently affirmed the power of Congress to develop the necessary legislation to extend this form of citizenship.[115] Through the years the evolution of the Fourteenth Amendment has extended citizenship rights to liberated slaves.[116] However, when the new amendment was introduced it replaced the state-based form of citizenship and created a national citizenship that was based on the principle of birth right in the United States.[117]

Statutory forms have also been used to extend or withhold different types of constitutional rights to groups of people living under the sovereignty of the United States.[118] For instance, one type of citizenship has been used to govern Native Americans and U.S. citizens residing in unincorporated or outlying territories

---

[108] Dropp, *supra* note 81.

[109] U.S. CONST. amend. XIV, § 1.

[110] VENATOR-SANTIAGO, *supra* note 2, at 3.

[111] *Id.*

[112] *Id.*

[113] *Id.*

[114] *Id.*

[115] *Id.*

[116] *Id.*

[117] *Id.*

[118] *Id.* at 5.

such as Guam, American Samoa, the Northern Mariana Islands, the U.S. Virgin Islands, and most would argue Puerto Rico.[119] There have been numerous cases, such as the *Insular Cases*, which have concluded that Puerto Rico is not located in the United States and Puerto Rican born citizens are mere statutory citizens without the same constitutional status as persons born in the United States.[120] The interpretation of the *Insular Cases* has further concluded that persons born and or naturalized in Puerto Rico are merely entitled to a statutory rather than a constitutional citizenship since Puerto Rican born citizens do not acquire a constitutional citizenship.[121]

What the courts have not deemed to acknowledge or simply refuse to discuss is the inequality of Puerto Rico's statutory citizenship. A Congressional Report describes Puerto Rico's particular citizenship brand as the following:

> The statutory citizenship status of the inhabitants of Puerto Rico is not equal, full, permanent, irrevocable citizenship protected by the Fourteenth Amendment, Puerto Ricans' lack of voting representing in Congress, lack of voting rights in elections, rights of equal protections and due process have a different application and effect on the territory rather than the rest of the nation.[122]

Puerto Rico's current status as an unincorporated territory allows Congress to keep these limitations *as is* and use the territory as they see fit and more convenient to them under its plenary power.[123]

Professor Venator-Santiago has provided a different interpretation to what constitutional source of the citizenship legislation applies to Puerto Rico.[124] Professor Venator-Santiago's recent report mentions the different theories referring to Puerto Rico's statutory citizenship that have been subject of debate.[125] As previously mentioned, the only theory being discussed in this article is the sixth theory, in which Professor Venator-Santiago argues how the legislative history of the Nationality Act of 1940, demonstrates how Congress anchored its *jus soli* or birth right citizenship legislation for Puerto Rico in the Citizenship Clause of the Fourteenth Amendment.[126] In other words, in 1940 Congress began to enact citizenship legislation or statutes

---

[119] *Id.*

[120] VENATOR-SANTIAGO, *supra* note 6, at 80.

[121] *Id.*

[122] H.R. REP. NO. 105-131, at 17 (1997).

[123] Adriel I. Cepeda Derieux, *A Most Insular Minority: Reconsidering Judicial Deference to Unequal Treatment in Light of Puerto Rico's Political Process Failure*, 110 COLUM. L. REV. 797, 798 (2010).

[124] Venator-Santiago, *supra* note 34, at 4.

[125] *Id.* at 4-7.

[126] *Id.* at 6-7.

for Puerto Rico that extended the Citizenship Clause of the Fourteenth Amendment to the Island.[127]

Within the Nationality Act of 1940, the legislation included specific provisions that retroactively naturalized all persons born in Puerto Rico after April 11, 1898 and extended birth right or *jus soli* citizenship to all persons born in the Island after 1941.[128] In addition, Section 202 of the Act extended birth right or *jus soli* citizenship to all persons born in the Island without any restrictions.[129] This law was subsequently codified in 1952 as 8 U.S.C. §1402, 66 Stat. 236 (1952) and remains the main source of U.S. citizenship for all persons born in Puerto Rico.

Professor Venator-Santiago drew his interpretation based on the so called "doctrine of extension", which establishes that Congress has claimed a plenary power to extend or apply constitutional provisions through legislation.[130] Meaning that the extension of birth right citizenship, without explicitly changing the unincorporated territorial status of the Island, guarantees that persons born in Puerto Rico can be entitled to a constitutional (Fourteenth Amendment) form of birth right citizenship, a form of *jus soli* citizenship.[131] In addition, birth right citizenship extends to the children of citizens or undocumented migrants alike that are born in the United States.[132] Most policymakers and academics suggest that Congress merely extended a statutory or legislative form of birth right citizenship to the Island because Congress has never explicitly recognized the extension of the Fourteenth Amendment to Puerto Rico.[133] Conversely, others argue that in order to extend *jus soli* citizenship to the Island the Federal government had to treat Puerto Rico as an incorporated territory of the United States.[134]

The interpretation of the doctrine of extension has been rejected before in *Downes v. Bidwell*.[135] The Supreme Court's reasoning for not applying the doctrine of extension was because the Constitution had not been extended to Puerto Rico by the Foraker Act, Congress was free to legislate for the Island and it could impose duties on articles coming from Puerto Rico to the United States.[136] There have also been several other cases which have further affirmed *Balzac* and *Downes*. Consequently, Congress has used this same doctrine of extension to enact birth right citizenship legislation that extends the Citizenship Clause of the Fourteenth Amendment to

---

[127] *Id.* at 7.

[128] VENATOR-SANTIAGO, *supra* note 2, at 13.

[129] *Id.* at 13-14.

[130] Venator-Santiago, *supra* note 34, at 7.

[131] VENATOR-SANTIAGO, *supra* note 2, at 14.

[132] *Id.*

[133] *Id.*

[134] *Id.*

[135] Venator Santiago, *supra* note 34, at 7.

[136] Downes v. Bidwell, 182 U.S. 244, 287 (1901).

the territories.[137] There is evidence of the use of this doctrine by the wide array of organic or territorial Acts that have been implemented in other territories such as Oregon, Alaska, Hawai'i and the U.S. Virgin Islands.[138] Federal agency reports, memorandums and the legislative histories of some congressional citizenship bills can further confirm that the doctrine of extension is applicable to Puerto Rico.[139]

IV. Congress' legislative actions from 1900 to present and how it has slowly extended Puerto Rico rights that would only apply to an incorporated territory

After reading Professor Venator-Santiago' report and examining Congress' legislative actions throughout the years there are two questions that one must ask when looking at Puerto Rico's current statutory citizenship status. The first question to ask is, whether the Constitution today extends in full to Puerto Rico?[140] The second is, whether the Constitution still permits Congress to continue treating this United States' territory, as well as its four million citizens, separately from stateside jurisdictions and United States citizens therein?[141] Actions speak louder than words. Even though Congress has never enacted any affirmative language, such as "Puerto Rico is hereby an incorporated territory," its sequence of legislative actions from 1900 to present has in fact incorporated the territory.[142]

Some examples of how Congress' legislative actions can be interpreted to change Puerto Rico's status as an unincorporated territory are the various Acts and treaties that have been implemented by Congress throughout the years. These treaties and Acts were previously mentioned as the Treaty of Paris, Foraker Act and the Jones Act. Other important legislative actions conducted by Congress is the Elective Governor Act established in 1947 where Puerto Ricans for the first time in over 400 years elected their own governor.[143] Shortly thereafter, the Puerto Rican Federal Relations Act, also known as Law 600, was enacted in 1950.[144] Law 600 authorized Puerto Rico to draft a Constitution of their own, this enactment currently serves as the organic law for the Puerto Rican government.[145] Subsequently, the enactment of Law 600 was later approved by Congress as Law 477 in 1952.[146] Within the

---

[137] *Id.*

[138] *Id.*

[139] *Id.*

[140] GELPI, *supra* note 41, at 104.

[141] *Id.* at 104.

[142] *Id.* at 132.

[143] *Id.* at 133.

[144] *Id.*

[145] *Id.* at 132.

[146] *Id.* at 133.

same year Congress approved of Puerto Rico's Constitution and the President of the United States appointed the first Puerto Rican Judge to the federal court.[147]

Another example showing how Congress' legislative actions treated Puerto Rico as an incorporated territory was during the enactment of Public Law 87-189 of 1961, which granted parties the right to appeal their cases from the Puerto Rico Supreme Court to the United States Supreme Court, just as it is commonly done in cases appealed from State Supreme Courts.[148] Sometime later, Congress created the Article III Courts.[149] Under Article III, also known as the PL 89-571, Congress added seven additional federal judges to the Federal District Court for the District of Puerto Rico.[150] Last but not least, from 1917 to 2008 all United States laws were applied to Puerto Rico unless there was a Congressional exception.[151] Congress' implementation of all of these legislative actions clearly support how Puerto Rico has gradually and indirectly been treated as an incorporated territory rather than an unincorporated territory.

The *Insular Cases* have also had a judicial affect in slowly treating Puerto Rico as an incorporated territory. For instance, the *Insular Cases* established that the Constitution applies *ex propio vigore* to Puerto Rico, however, not all constitutional rights extend to unincorporated territories.[152] *Balzac v. Porto Rico* determined that Puerto Rico continues to be an unincorporated United States' territory where only fundamental constitutional rights apply.[153] All of these cases have slowly played a part in demonstrating how Puerto Rico is treated to be less of an unincorporated territory and more of an incorporated territory.[154]

On the other hand, a recent case such as *Puerto Rico v. Sánchez Valle* further affirms how Puerto Rico and the United States are not separate sovereigns for purposes of the Double Jeopardy Clause.[155] In this case, the court determined that because the ultimate source of Puerto Rico's prosecutorial power was the Federal Government, the Commonwealth and the United States were not separate sovereigns.[156] This case further established how the power that allowed Congress to tailor legislative solutions to a territory's unique circumstances has significantly integrated Puerto Rico into the Nation, but it has also allowed Congress to discriminate against the territory.[157] The

---

147 *Id.*

148 *Id.* at 123.

149 *Id.* at 134.

150 *Id.*

151 *Id.*

152 *Id.* at 133.

153 *Id.*

154 *Id.*

155 *Id.* at 225.

156 *Id.* at 266.

157 *Id.* at 271-72.

result of *Puerto Rico v. Sanchez Valle* has led many to believe that Puerto Ricans are not free in the sovereign sense: they live under Congress' shadow, in the end subject to its will.[158] After assessing the historical background of Congress' legislative actions since the 1900's, it is evident that Congress has subtly and slowly extended to Puerto Rico constitutional provisions through legislation.[159] As a result, it can easily be inferred that Congress has created citizenship legislation or acts that have extended the Citizenship Clause of the Fourteenth Amendment to Puerto Rico.[160]

V. The Effect of excluding Puerto Ricans from having the constitutional provisions granted under Fourteenth Amendment

After discussing the history of Congress' legislative actions it is clear that Congress has extended Puerto Rico's constitutional rights, but it has refused to clarify to what extent the doctrine of extension applies to Puerto Rican residents living on the Island.[161] Additionally, the Supreme Court has tied the exercise of constitutional rights to the status of U.S. territories.[162] For instance, as for incorporated territories, the entire Bill of Rights applies, whereas for unincorporated territories, only some of it does.[163] Overall, the Court's distinction between fundamental and procedural rights deems highly strained and arbitrary.[164] Subsequently, it is important to underline how excluding the United States citizens living in Puerto Rico from constitutional rights under the Fourteenth Amendment impacts residents living there today.

Revealing the types of rights residents currently living on the Island are being deprived of, will further highlight how these residents are being affected by the exclusion of these rights. For instance, current law makes it impossible for the Americans who reside in the territories and commonwealths of the United States to affect laws passed by the federal government through political representation, despite the fact that these residents are subject to all applicable federal laws.[165] Perhaps the most poignant example, because it involves potential death, is that these citizens must register with the Selective Service and subject themselves to United States military service.[166] Citizens residing in the American territories have served with

---

[158] *Constitutional Law: Fifth Amendment Double Jeopardy Dual Sovereignty Doctrine Puerto Rico v. Sanchez Valle*, 130 HARV. L. REV. 347, 356 (2016).
[159] *Id.*
[160] Venator-Santiago, *supra* note 34, at 7.
[161] *Id.* at 4.
[162] Alan Tauber, *The Empire Forgotten: The Application of the Bill of Rights to U.S. Territories*, 57 CASE W. L. REV. 147, 166 (2006).
[163] *Id.*
[164] *Id.* at 167.
[165] Lisa M. Komives, *Enfranchising a Discrete and Insular Minority: Extending Federal Voting Rights to American Citizens Living in United States Territories*, 36 U. MIAMI INTER-AM. L. REV. 122 (2004).
[166] *Id.*

distinction in every United States armed conflict since 1917, and have served in the war against terror in Afghanistan and Iraq.[167] These citizens, however, can neither vote for the Commander-in-Chief of the military, the President, who controls United States combat, nor do they have voting representation in Congress, the official body which declares war.[168] People living in U.S. territories, such as Puerto Rico are also not entitled to a Sixth Amendment Right to a trial by jury.[169]

This exclusion of rights not only applies to American citizens born and residing in the American territories, but also to American citizens who reside in one of the fifty states and move to a United States territory.[170] As previously mentioned when the Jones Act was enacted it established a dual citizenship which not only applied to Puerto Rican citizens residing in the Island but also all those who decided to migrate to Puerto Rico. Meaning that even if a person is born and raised on the mainland and decides to live in Puerto Rico they would not be entitled to the same constitutional rights they had always enjoyed. The new territorial resident is stripped of the right to vote in Presidential or Congressional elections.[171] This second-class form of citizenship is based solely on the arbitrary criterion of locale, for even American citizens residing abroad have the right to vote in federal elections under the Uniformed and Overseas Citizens Absentee Voting Act.[172]

Although the American territories are part of the physical geography of the United States, the citizens residing therein are unconstitutionally disenfranchised.[173] The ability for Congress to strip rights away from a person born and raised on the mainland should be unconstitutional. Additionally, it also makes it uninviting for people from the mainland to consider living in an unincorporated territory such as Puerto Rico. Moreover, it also makes it less appealing for current residents to want to continue living in a U.S. territory that only grants limited rights that they would be afforded if they were to be living on the mainland.

VI. Potential solutions

After examining the case law and legislative actions issues surrounding the debate over the extension of the Constitution to U.S. territories such as Puerto Rico, there are three potential solutions in order to help solve the matter in question.[174]

---

[167] *Id.*

[168] *Id.*

[169] Tauber, *supra* note 162, at 147, 166.

[170] Komives, *supra* note 165, at 123.

[171] *Id.*

[172] *Id.*

[173] *Id.*

[174] Tauber, *supra* note 162, at 173.

The first, and most simplistic option, is for Congress simply to pass legislation that extends the "procedural" rights to the territories.[175] This would entail the least change to the current system, and would not extend citizenship to those thought "unfit" to receive it.[176] As the Court has pointed out in the *Insular Cases,* Congress has always retained the right to extend the protections of the Bill of Rights to the territories.[177] Although these rights have never actually been implicitly extended by Congress, insular cases such as *Balzac v. Porto Rico,* have concluded that the creation of a Bill of Rights for Puerto Rico in the Jones Act justifies the conclusion that the federal Bill of Rights does not apply.[178] Passing legislation that unambiguously extends procedural rights to territories would be the easiest and least controversial solution to apply.[179] It would be the easiest solution to apply since it would only require Congress enacting new legislation that would clearly extend constitutional Fourteenth Amendment provisions to Puerto Rico.

The next option would be to fully incorporate the territories currently held by the United States into the Union in preparation for eventual statehood.[180] As the Court has pointed out, and as the treaty language of other acquisitions implies, this has always been the eventual goal.[181] Clearly over a century of association with the United States has prepared Puerto Rico for full incorporation.[182] The idea of statehood has been debated about in Puerto Rico for almost two decades, which clearly shows that Congress has considered incorporation in the past.[183] Applying Puerto Rico incorporation status would not only extend the constitutional statutes or provisions it is currently being deprived of but could eventually lead the Island to become a state.

The final, and most radical, solution would be to grant Puerto Rico independence if they believe that remaining as an unincorporated territory is more harmful than beneficial.[184] Breaking all ties from the United States would most likely be detrimental for any U.S. territory. Based on the interconnectedness of territorial economies with that of the United States, such a move could be disastrous for the territories.[185] Although it is probably the least appealing for any U.S. territory to

---

[175] *Id.*

[176] *Id.*

[177] *Id.*

[178] Balzac v. Porto Rico, 258 U.S. 308, 306-07 (1922).

[179] Tauber, *supra* note 162, at 173.

[180] *Id.*

[181] *Id.* at 174.

[182] *Id.*

[183] *Id.*

[184] *Id.* at 175.

[185] *Id.* at 176.

consider, many believe that cutting all ties from the United States could maybe be the best solution because it would clear the doubt of where the Island stands.

VII. Conclusion

In summary, it is evident that the status of unincorporated territories such as Puerto Rico has never been clarified by Congress or the courts. Much uncertainty remains as to whether persons with birth right citizenship are entitled to constitutional statutory citizenship through the "Doctrine of Extension". However, one thing is for certain, Puerto Rico's current statutory citizenship is unreliable, given that Congress can decide at any given point whether to break all ties with the Island.[186] Whether Puerto Rico is part of the United States for purposes of the Citizenship Clause continues unresolved but needs to be determined sooner rather than later.[187]

The question that remains unanswered is, whether the extension of birth right citizenship, without officially amending or enacting any new legislation, alters the unincorporated territorial status of the Island. Extending birth right citizenship guarantees that persons born in Puerto Rico are entitled to constitutional Fourteenth Amendment rights.[188] Although there have been numerous cases also known as the *Insular Cases* that have repeatedly expressed that the only rights that Puerto Ricans are entitled to are fundamental constitutional rights. It is evident that due to Congress' legislative actions from 1900 to present have led many to believe Puerto Rico has been extended constitutional provisions that would only be permissible if it were an incorporated territory.

After learning the different analysis concerning Puerto Rico's current statutory citizenship, the Citizenship Clause of the Fourteenth Amendment conflicts with the limitations unincorporated territories, such as Puerto Rico have. Although unincorporated territories have been established through treaties and Acts there is no real explanation as to why the Citizenship Clause does not pre-empt fundamental rights being deprived to unincorporated territories. As well as why these unincorporated territories are not entitled to have extended statutory citizenship that have been applied throughout the years to Puerto Rico. After analysing the related case law and legislative actions conducted by Congress through the years, it is evident that the core issue that has prevented Puerto Rico from retaining the same birth right citizenship as those who live on the mainland is Congress. Consequently, the courts failure to interpret what Congress meant when they granted U.S. Citizenship has been a hindrance. Finding a solution to Puerto Rico's current statutory citizenship

---

[186] Christina Duffy Ponsa, *Are American Samoan's American?*, N.Y. TIMES, newyorktimes.com, (June 8, 2006), https://www.nytimes.com/2016/06/08/opinion/are-american-samoans-american.html.

[187] *Id.*

[188] VENATOR-SANTIAGO, *supra* note 2, at 14.

status is necessary in order to finally define Puerto Rico's political and legal status, where it stands as an incorporated territory or as an unincorporated territory, and whether it is entitled to the same fundamental rights granted to those who live on the mainland. Only time will tell if one of the three solutions presented may finally be the long-awaited answer many have questioned for so long.

MANDATORY TRANSFER OF JUVENILES TO ADULT COURT: A DEVIATION FROM THE PURPOSE OF THE JUVENILE JUSTICE SYSTEM AND A VIOLATION OF THEIR EIGHT AMENDMENT RIGHTS

*Peterson Tavil**

I. Introduction

Prior to the seventeenth century, minors were viewed as property.[1] According to Springer, "during the colonial times and up to the first part of the 1800s, youths labeled as rowdy out-of-control were either sent home for a court-observed

* B.A. University of Central Florida (UCF). M.S. candidate, University of Central Florida. J.D. candidate, May 2019, Inter American University of Puerto Rico School of Law. I want to thank the Lord for His love and mercy. Without His grace, I would not have been able to write this article. I am thankful for the people who have been very supportive of me and who have inspired me during the process of writing this article. I first want to thank my mentor and best friend Josalyn Ayuso for her support, confidence, and encouragement. I also want to thank Professors Jorge Farinacci, Hector Ramos, Dora M. Nevares for their comments, guidance, and feedback. I owe a great deal of gratitude to Stessie L. Auguste for her comments. I also want to thank the editorial board of Revista Juridica for their help and feedback. Finally, I want to thank my family for their support during my law school career. They have encouraged me to pursue my dream and goals.

[1] Robin M. Hartinger-Saunders, *The History of Defining Youth: Current Implications for Identifying and Treating Delinquent Youth*, Georgia State University, https://scholarworks.gsu.edu/cgi/viewcontent.cgi?article=1064&context=ssw_facpub, at 88-104 (last visited May 23, 2018).

whipping, assigned tasks as farmer's helpers, or placed in deplorable rat-infested prisons with hardened adult offenders"[2] and mentally ill individuals regardless of their gender[3] or well-being. The minors were placed with adult offenders due to the lack of other options.[4] During the nineteenth century, however, juveniles started to receive different treatment[5] with the opening of multiple detention facilities for juvenile offenders.[6] Although these detention facilities separated minors from adults, minors were still exposed to harsh and inhumane treatment as when they were previously housed in adult prisons.[7]

In the nineteenth century, many "major social changes"[8] and "ideological changes in the cultural conception of children and in strategies of social control"[9] paved the way for the first juvenile court in Cook County, Illinois, United States in 1899.[10] The first juvenile court was created as a social welfare alternative to the adult courts that minors were exposed to.[11] The juvenile court, which emphasized on rehabilitation rather than punishment,[12] adopted the *parens patriae* legal doctrine to make decisions that best served the interest of the minors.[13]

---

[2] David W. Springer, et. al, *Introduction and Overview of Juvenile Delinquency and Juvenile Justice*: *A Brief Historical Overview of Juvenile Justice and Juvenile Delinquency*, http://samples.jbpub.com/9780763760564/60564_CH01_Springer.pdf (last visited May 17, 2018).

[3] *Juvenile Justice History*, CENTER ON JUVENILE AND CRIMINAL JUSTICE http://www.cjcj.org/education1/juvenile-justice-history.html (last visited May 17, 2018).

[4] *Id.*

[5] *See The History of Juvenile Justice*, AMERICAN BAR ASSOCIATION, https://www.americanbar.org/content/dam/aba/migrated/publiced/features/DYJpart1.authcheckdam.pdf, at 5 (last visited May 17, 2018).

[6] *Id.*

[7] Springer, *supra* note 2, at 4.

[8] Hartinger-Saunders, *supra* note 1.

[9] Barry C. Field, *Juvenile Justice: History and Philosophy*, ENCYCLOPEDIA, http://www.encyclopedia.com/law/legal-and-political-magazines/juvenile-justice-history-and-philosophy (last visited May 17, 2018).

[10] Kristin M. Finklea, *Juvenile Justice: Legislative History and Current Legislative Issues*, CONGRESSIONAL RESEARCH SERVICE, (Nov. 27, 2012), https://cardenas.house.gov/sites/cardenas.house.gov/files/CRS%20-%20Juvenile%20Justice%20Overview.pdf. *See infra* note 27, at 9. ("child savers movement book") ("there is some dispute whether or not Illinois was the first state to create a special tribunal for children. Massachusetts and New York passed laws, in 1874 and 1892 respectively, providing for the trials of minors apart from adults charged with crimes. Ben Lindsey, a renowned judge and reformer, also claimed this distinction for Colorado where a juvenile court was, in effect, established through an educational law of 1899.").

[11] Field, *supra* note 9.

[12] *The History of Juvenile Justice*, *supra* note 5, at 5.

[13] *Id. Parens Patriae* is a doctrine that grants the inherent power and authority of the state to protect persons who are legally unable to act on their own behalf. The Free Dictionary, https://legal-dictionary.thefreedictionary.com/parens+patriae. *See also* Lawrence, History and development of juvenile court and justice process, SAGE PUBLISHING (Feb. 16, 2008), https://us.sagepub.com/sites/default/files/upm-binaries/19434_Section_I.pdf, at 22. The *parens patriae* doctrine was first used in the case of *Ex*

The *parens patriae* doctrine was central to the juvenile justice philosophy which aimed to treat juvenile offenders different from adult criminals.[14] In distinguishing the juvenile justice system from the adult court system, a new set of definitions and labels were created.[15]

One of the main purposes of creating a separate court for minors was to focus on their best interests by treating them differently from adults. Due to the escalation of juvenile violent crimes in the late 1900s,[16] states have enacted laws that allow for minors to be prosecuted in adult criminal courts.[17] As The Office of Juvenile Justice and Delinquency Prevention (OJJDP) acknowledged it, "this trend has increased in recent years to permit transfers [of persons under eighteen years of age] to adult court at lower ages and for more offenses"[18] without considering the purposes and the primary goal of the newly created system, which aims at rehabilitating juveniles who engage in delinquent behavior.

As juvenile crimes escalated, critics were aghast with the leniency of the juvenile justice system to severely punish minors who engaged in criminal activity. As a response, legislators from different jurisdictions within the United States have created different transfer mechanisms to try minors in adult courts. The transfer of minors to adult courts has been detrimental to the minors' well-being as after standing trial in adult courts, they are housed with adults.

This article aims to advocate for a ban on mandatory transfer laws and any other form of transfer that does not give a juvenile court officer the chance to decide whether to transfer the minors after a full hearing, in which a determination is made based on the minors' characteristics, if they are fit to stand trial in adult court. The article is not proffering that minors should not be transferred to adult court, but that they should not be subject to mandatory transfer. They should enjoy the due process right of the Fourteenth Amendment of the United States Constitution that the Supreme Court has established in *Kent*. The transfer procedure should start in

---

parte Crouse, 4 Whart. 9 (Pa. 1839) (Mary Ann Crouse was incarcerated after a complaint made by her mother, Mary Crouse, stating that the minor vicious conduct made it impossible for the mother to exercise her parental control over the minor. The mother asked for the minor to be held in the House of Refuge. The minor's father filed an habeas corpus on behalf of his daughter which the court denied by saying that the institution was not a prison but a reformation institution. The court further stated that "although the right of parental control was a natural right, it was not an unalienable one…and that the child has been snatched from a course that would have ended in confirmed depravity.") *Id.* at 11.

[14] *Ex parte Crouse*, 4 Whart. at 11.

[15] MATTHEW BENDER & CO., INC., REPRESENTING THE CHILD CLIENT ¶ 5.03 (2017).

[16] Juvenile Justice Reform Initiatives in the States 1994-1996, *Juvenile Transfer to Criminal Court*, OFFICE OF JUSTICE PROGRAMS, https://www.ojjdp.gov/pubs/reform/ch2_j.html (last visited May 18, 2018).

[17] Patrick Griffin, et. al., *Trying Juveniles as Adults: An Analysis of State Transfer Laws and Reporting*, 1, U.S. DEPARTMENT OF JUSTICE, (Sept. 2011), https://www.ncjrs.gov/pdffiles1/ojjdp/232434.pdf.

[18] Juvenile Justice Reform Initiatives in the States 1994-1996, *supra* note 16 (emphasis added).

juvenile court where a juvenile court officer will determine the appropriateness of such transfer.

This article suggests that jurisdictions that still allow mandatory transfer, instead of mandatorily transferring minors to adult court, should create a different process in which a minor will appear before a juvenile court officer who will determine whether the minor should be transferred to adult court or whether the juvenile justice system should retain jurisdiction over the minor for rehabilitation purposes. This process will first guarantee fairness and will be in line with the due process and rehabilitation rights of minors. It will also take away the prosecutors' discretionary powers to file charges against minors in adult courts. Second, it will be in accordance with the main goals of the juvenile justice system which are "crime reduction and rehabilitation of minors,"[19] and the different Supreme Court rulings regarding juveniles' constitutional rights.

Part II discusses the history of the juvenile justice system and its main goals. It discusses issues related to transferring juveniles to adult courts. It shows that the purposes of the Juvenile Justice System have been ignored, in violation of the minors' Eighth Amendment rights, which led to the adult treatment of minors who need help and deserve to be rehabilitated.

Part III discusses and distinguishes the juvenile justices and the adult court system. It discusses the reason the juvenile court uses a different set of legal terms and the effect of sentencing minors in adult courts. It further discusses the philosophical ideas behind the creation of both the criminal justice system and the juvenile justice system.

Part IV discusses the different Supreme Court decisions relating to the juvenile's constitutional rights. It also focuses on the Court's analysis in *Miller, Kent, Roper,* and *Graham*, while touches upon the social study that the Court used in *Roper* and *Graham*.

Part V discusses the issues related to mandatory transfers of juveniles to adult court. And also, any other form of transfers that do not give a juvenile court officer the chance to make a finding on whether the minor is fit to stand trial in adult court. This section focuses on the importance of the individualized justice approach.[20] It emphasizes on the need to eliminate mandatory transfer laws which lead to harsher sentences and deviate from the purposes of the juvenile justice system. It also discusses the mental development stages. This article is not proposing a categorical

---

[19] Hilary Hodgdon, *Assessing Juvenile Offenders*, PRINCETON UNIVERSITY, https://www.princeton.edu/futureofchildren/publications/highlights/18_02_Highlights_06.pdf (last visited May 17, 2018).

[20] *See* DAVID MATZA, DELINQUENCY AND DRIFT 115 (1964) ("The individualized justice implies that offense, like many other forms of behavior, is to be taken as an indication or symptom of the juvenile's personal and social disorder. The principle of individualized justice suggests that disposition is to be guided by a full understanding of the client's personal and social character and by his individual needs.").

ban on transfers of juveniles to adult courts, but rather proposes to hold a hearing before a juvenile court officer who will determine the fairness and appropriateness of such transfer.

II. History of the juvenile justice system

The United States Juvenile Justice System, which is the fruit of the nineteenth century movement, is rooted in the sixteenth century "European Educational Reform Movements."[21] Before the creation of the juvenile justice system, in the late eighteenth century, children under seven were presumed to lack criminal intent, and therefore were exempt from criminal prosecution.[22] Meanwhile, children "fourteen years of age and older possessed full criminal responsibility. Between the ages of seven and fourteen years, the law rebuttably presumed that offenders lacked criminal capacity. If found criminally responsible, however, states executed youths as young as twelve years of age."[23]

The early movement for the separation of the adult and juvenile justice systems started in 1825 with the Society for the Prevention of Juvenile Delinquency.[24] Soon thereafter, the first juvenile facility opened in New York.[25] And some years later the first juvenile court opened in Illinois.[26] The opening of the first juvenile court[27] in

---

[21] *Juvenile Justice: A Century of Change*, *The juvenile justice system was founded on the concept of rehabilitation through individualized justice*, NATIONAL CRIMINAL JUSTICE REFERENCE SERVICE (Dec. 1999), https://www.ncjrs.gov/html/ojjdp/9912_2/juv1.html.

[22] *Id.*

[23] Field, *supra* note 9.

[24] *Juvenile Justice: A Century of Change*, *supra* note 21.

[25] Hartinger-Saunders, *supra* note 1, at 93.

[26] Lawrence, *supra* note 13, at 24. *See* Herbert C. Hoover, *Separate Justice: Philosophical and Historical Roots of the Juvenile Justice System*, https://www.cengage.com/custom/static_content/troy_university/data/CJ3325.pdf, at 14 (last visited April 6, 2018) ("By the end of the 1800s, reform schools introduced vocational education, military drill and calisthenics into the institutions' regimens. At the same time, some reform schools changed their names to "industrial schools" and later to "training schools," to emphasize the "treatment" aspect of corrections. For example, the Ohio Reform Farm School opened in 1857, later became the Boy's Industrial School, and was renamed again to the Fairfield School for Boys. Several other significant events occurred during the 1800s that altered the administration of juvenile justice (Griffin and Griffin, p.20): 1870—First use of separate trials for juveniles (Massachusetts) 1877—Separate dockets and records established for juveniles (Massachusetts) 1880—First probation system applicable to juveniles instituted 1898—Segregation of children under 16 awaiting trial (Rhode Island) 1899—First juvenile court established (Illinois)").

[27] *See* ANTHONY M. PLATT, THE CHILD SAVERS: THE INVENTION OF DELINQUENCY 142-43 (1969). ("The role model for the juvenile court judges was doctor-counselor rather than lawyer. Judicial therapists were expected to establish a one-to-one relationship with delinquents in the same way that a country doctor might give his time and attention to a favorite patient. The courtroom was arranged like a clinic and the vocabulary of the participants was largely composed of medical metaphors…the idea that justice can be personalized was a significant clue as to what the child savers hoped to achieve.")

Chicago, Illinois was followed by the opening of a juvenile court in Denver, Colorado.[28] By 1910, thirty-two states had established juvenile courts and/or probation services.[29] By 1917, every single state had passed legislation related to juvenile court except three.[30] By 1925, only two states had no form of juvenile justice system.[31] Through 1932, there were over 600 independent juvenile courts within the United States,[32] and by 1945 every single State had established juvenile courts.[33]

In the 1980s, the skyrocketing of juvenile crimes led to the reform of States juvenile justice practices. As a result, seventeen states redefined their juvenile justice system approaches to focus on community safety, accountability, and punishment.[34] These states have "stressed [on] punitiveness, accountability, and a concern for public safety, [by] rejecting traditional concerns for diversion and rehabilitation in favor of a get-tough approach to juvenile crime and punishment."[35]

A. First juvenile court in the United States

The first juvenile court in the United States was established in Cook County, Illinois[36] with the passage of the Juvenile Court Act of 1899.[37] The Act gave original jurisdiction to the juvenile court over anyone sixteen and under.[38] The separation of the juvenile system from the criminal system was designed with the purpose to rehabilitate youths, who violate the laws, in a non-punitive way.[39] The "Act [of 1899] marked the first time that probation and probation officers were formally made specifically applicable to juveniles."[40]

---

[28] Lawrence, *supra* note 13, at 25.

[29] *Juvenile Justice: A Century of Change*, *supra* note 21.

[30] PLATT, *supra* note 27, at 10.

[31] *Juvenile Justice: A Century of Change*, *supra* note 21.

[32] PLATT, *supra* note 27, at 10.

[33] Lawrence, *supra* note 13, at 25.

[34] JOAN MCCORD, ET. AL., JUVENILE CRIME, JUVENILE JUSTICE 155 (2001).

[35] *Id.*

[36] Hartinger-Saunders, *supra* note 1, at 94.

[37] *Juvenile Justice: A Century of Change*, *supra* note 21. *See also* Hoover, *supra* note 26, at 14. (The act of 1899 is recognized as the first time that a jurisdiction in the United States acknowledged that minors are different therefore need to be detained in separate facilities from, and treated different than, adults. The Act was based on the treatment model, which believed that delinquency, if prevention did not work, could be treated and cured. The Act offered a new societal structure in which a better control can be exercised over minors.).

[38] Hoover, *supra* note 26, at 15.

[39] Martin Gardner, Y*outhful Offenders and the Eighth Amendment Right to Rehabilitation: Limitations on the Punishment of Juveniles*, 83 TENN. L. REV. 455, 472-73 (2016).

[40] Hoover, *supra* note 26, at 15. ("The act stipulated: The court shall have authority to appoint or designate one or more discreet persons of good character to serve as probation officers during the

The creation of that special court for minors was established on the basis that 1) minors are "cognitively" and "morally" underdeveloped, therefore, have lessened culpability, and 2) they can be changed and rehabilitated[41] because their characters are not yet well formed.[42] Because their characters are not well-formed, courts have emphasized that they deserve to be protected and guided, and states should be the guide and protector. For instance, the Supreme Court of Pennsylvania, in 1905, acknowledged that minors are different, therefore need guidance. The Pennsylvania Supreme Court noted that:

> The design [of 1903 Pa. Laws 274] is not punishment, nor the restraint imprisonment, any more than is the wholesome restraint which a parent exercises over his child. The severity in either case must necessarily be tempered to meet the necessities of the particular situation. There is no probability, in the proper administration of the law, of the child's liberty being unduly invaded. Every statute which is designed to give protection, care and training to children, as a needed substitute for parental authority and performance of parental duty, is but a recognition of the duty of the state, as the legitimate guardian and protector of children where other guardianship fails. No constitutional right is violated.[43]

The Court recognized that the *parens patriae* doctrine gives the states the authority to act as the minors' parents, and therefore to make decision in their best interests. The Court also stressed that children and adults are different; hence, when deciding on juvenile cases, courts should operate differently. The different operation system emphasizes on the facts that, unlike in adult court where the judge must consider the offender's due process rights, the juvenile court officer does not have to consider certain constitutional rights when making decision in the minors "best

---

pleasure of the court . . . it shall be the duty of the said probation officer to make such investigation as may be required by the court; to be present in court in order to represent the interests of the child when the case is heard; to furnish to the court such information and assistance as the judge may require; and to take such charge of any child before and after trial as may be directed by the court.").

[41] Hartinger-Saunders, *supra* note 1, at 94.

[42] Miller v. Alabama, 567 U.S. 460, 471 (2012).

[43] Commonwealth v. Fisher, 213 Pa. 48, 56-57 (Pa. 1905) (emphasis added) (Frank Fisher was committed to House Refuge in Pennsylvania under the provisions of the Act of April 23, 1903, P.L. 274. Fisher moved to challenge the decision of the lower court and the constitutionality of the Act because his due process rights were violated, he was denied the right to a jury trial, the tribunal which committed him to the house of refuge had no jurisdiction over him. The court affirmed the seven-year sentence for the minor stipulating that it was in the best interest of the minor. The Court reasoned that when the State's objective is not punishment but rather to provide care and protection, the State has the right and the duty to take custody of the youth. Moreover, that right supersedes the child and parental rights.

interests". In its analysis, the Court acclaimed the state's power to act as the minors' parents but rejected the constitutional due process right of minors. It noted that "[t]he constitutional guaranty that no one charged with a criminal offense shall be deprived of life, liberty, or property without due process of law does not apply in saving a child from becoming a criminal."[44] Although refusing to recognize minors' due process rights in non-criminal cases, the court recognized that minors have some constitutional rights. For instance, the right to a jury trial in criminal cases.[45] The Court also implied the need to use the "individualized approach" in cases involving minors.

The first juvenile courts prioritized the "best interest of the child" doctrine over minors' constitutional rights by relying on two juvenile justice's premises[46] – minors have diminished capacity thus cannot be real criminals and the state power to intervene to guide minors when their parents fail to assume their parental rights. Unfortunately, states have as of lately treated minors as criminals by concluding that they are not corrigible; meanwhile, violating their constitutional rights.

B. Goal of the juvenile justice system

The juvenile justice system aims to provide a setting in which minors can be held accountable for their wrongdoings and receive protection from the states when need be.[47] Prior to the creation of the juvenile justice system, there was no difference between adults and minors in the eyes of the law, they were treated alike.[48] There was a need to create a new and separate system for minors. With the progressive movement, a new and separate system was created.[49] With the creation of the separate system, minors received different legal treatment. The main goals of that

---

[44] *Id.* at 53.

[45] *Id.*

[46] Hartinger-Saunders, *supra* note 1, at 94.

[47] Hoover, *supra* note 26, at 15.

[48] Alyssa Calhoun, Comment, *Youth's Right to Counsel in the Missouri Juvenile Justice System: Is their Constitutional Right Being Upheld?*, 34 ST. LOUIS U. PUB. L. REV. 151, 154 (2014).

[49] Regarding this subject Plat explains that:

> The progressive child savers were a group of reformers who regarded their cause as a matter of conscience and morality, serving no particular class or political interests. They went beyond humanitarian reforms of existing institutions. They brought attention to new categories of youthful behavior which had been hitherto unappreciated. They viewed themselves as altruists and humanitarians dedicated to rescuing those who were less fortunately placed in the social order. They were concerned with protecting children from the physical and moral dangers of an increasingly industrialized and urban society.

See PLATT, *supra* note 27, at 3.

separate System are to 1) reduce crimes;[50] 2) treat; 3) supervise; and 4) rehabilitate minors[51] through the individualized justice approach.[52]

As society changes and crimes increase, critics began to attack the leniency of the juvenile justice system.[53] In the late 1970s, the rehabilitative goal of the juvenile justice system started to dissipate. This created a vacuum within the juvenile system for the prioritization of punishment and deterrence over rehabilitation and states' protections.[54] Legislators from different jurisdictions started to pass punitive laws that harshly dealt with juvenile offenders.[55] These laws categorically shifted from the rehabilitative purposes of the juvenile justice system to punishment, retribution, and deterrence. Furthermore, these states created laws that mandatorily transferred minors to adult courts for the commission of certain violent crimes like murders and carjacking that result in murder. Although mandatory transfer laws were implemented to deal with juvenile crimes, they have been ineffective in tackling juvenile crimes. Not only have mandatory transfer laws been ineffective, they deviate from the purposes of the juvenile justice system. That deviation violates the minors' Eighth Amendment right to rehabilitation and hinders the objective of the juvenile justice system.[56]

A separate justice system for juveniles was created with the approach that juveniles are mentally, physically, and psychologically different consequently need treatments that meet their needs. To accomplish such goal of differentiating minors from adults, to keep a complete separation of the two systems, and to treat minors differently than adults, a new set of legal terms for the juvenile courts were created. Minors who commit violent offenses are not viewed as criminals but delinquents.[57] The difference between the two terms is that one labels and stigmatizes a person for life while the other, although labels, does not stigmatize. The reason for the latter is that it is used to transform minors into productive adults by focusing on rehabilitating them rather than punishing them.[58]

The juvenile justice system's "planners envisaged a system that would practically immunize juveniles from 'punishment' for 'crimes' in an effort to save them from

---

[50] Hodgdon, *supra* note 19.

[51] Bree Langemo, *Serious Consequences for Serious Juvenile Offenders: Do Juveniles Belong in Adult Court?*, 30 OHIO N.U.L. REV. 141, 143 (2004).

[52] *Juvenile Justice: A Century of Change*, *supra* note 21.

[53] *See* Langemo, *supra* note 51, at 144.

[54] *Id.*

[55] Finklea, *supra* note 10. *See also* Griffin, Torbet, and Szymanski, *Trying Juveniles as Adults in Criminal Court: An Analysis of State Transfer Provisions*, (1998) ("From 1992 through 1995, 40 States and the District of Columbia passed laws making it easier for juveniles to be tried as adults.").

[56] Brent Pattison, *Minority Youth in Juvenile Correctional Facilities: Cultural Differences and the Right to Treatment*, 16 LAW & INEQ. 573, 576 (2008).

[57] Lawrence, *supra* note 13, at 24.

[58] *Id*.

youthful indiscretions and stigmas due to criminal charges or convictions."[59] They did not envision a system that makes punishment "so severe as to make it impossible for [minors] to resume or initiate a decent life."[60] They designed a system in which every aspect of the minors' lives are considered with the focus on the offenders rather than the offense(s), and on rehabilitation rather than punishment. This process has given the juvenile court officers the flexibility to make appropriate decision to rehabilitate the minors and attempt to turn them into productive citizens.

C. Punishment over rehabilitation

Trying minors in adult courts subject them to adult treatment.[61] Unlike adults, minors are not mentally fit to be exposed to the adversarial system. However, many states have ignored that fact in the objective of promoting tough on crime policies.[62] The people who advocate for tough on crime policy advance three main reasons: 1) minors who commit crimes are not children but criminals; 2) the juvenile justice system is too lenient on youth offenders and violent crimes committed by youths are rampant; and 3) rehabilitation does not work on minors who commit violent crimes.[63] They have argued that the leniency of the juvenile justice system leads the minors to act as they please because they believe that they will only get a slap on the wrist.[64]

The tough on crime policies have pushed States to enact laws that label minors as young as six years old as delinquents, subject them to the juvenile justice jurisdiction, and reduce the age of adulthood from eighteen to fifteen years old. For instance, thirty-three states do not specify the minimum age for delinquency status which leaves the matter open to prosecutor's discretion. In North Carolina, a minor as young as six years old can be labeled as a delinquent. In Connecticut, Maryland, Massachusetts, New York, and North Dakota minors as young as seven years old can be labeled as delinquents.[65] Meanwhile at the federal level, the age of adulthood for

---

[59] In re Gault, 387 U.S. 1, 60 (1967) (Black, J., concurring). *See also* United States v. A.C.P., 379 F. Supp. 2d 225, 227 (D.P.R. 2005) ("The federal juvenile delinquency process is to remove juveniles from the ordinary criminal process in order to avoid the stigma of a prior criminal conviction and to encourage treatment and rehabilitation."). (Quoting United States v. Brian N., 900 F.2d 218, 220 (10th Cir. 1990)).

[60] PLATT, *supra* note 27, at 17 (quote omitted) (emphasis added).

[61] Langemo, *supra* note 51, at 154.

[62] Field, *supra* note 9.

[63] Elizabeth S. Scott & Laurence Steinberg, *Rethinking Juvenile Justice*, RESEARCHGATE (Dec. 11, 2008), https://www.researchgate.net/publication/37713611_Rethinking_Juvenile_Justice, at 9.

[64] *Id.*

[65] Angel Zang, *U.S. Age Boundaries of Delinquency 2016*, NATIONAL CENTER FOR JUVENILE JUSTICE (2017) http://www.ncjj.org/Publication/U.S.-Age-Boundaries-of-Delinquency-2016.aspx.

certain crimes is sixteen. In New York and North Carolina, persons who are sixteen years old are adults.[66]

The Supreme Court of the United States has established that minors and adults are not alike. Minors are not yet mature; they are easily influenced by peers.[67] The Court has long recognized that the individualized sentencing is the best approach when dealing with minors.[68] In *Allen*, the Supreme Court of the United States noted that "a person between the ages of twelve and fourteen is incapable of discerning good from evil, until the contrary is affirmatively shown."[69] The Court in this opinion established the importance of the individualized sentencing in the juvenile justice system which counters the mandatory transfer. In stating minors between the ages of fourteen and twelve are incapable of knowing good and bad until it can be proven otherwise, the Court emphasized that there should be an individualized finding in regard to each specific youth who stands before the court.

The individualized justice approach is "the basic precept in the philosophy of the juvenile court"[70] thus crucial when adjudicating minors. It "differs fundamentally from equity,"[71] which gives juvenile courts the flexibility needed to make decision based on the needs of the minor who is before the court. Each minor's social background is different; as a result, they require special and individual attention. Punishment over rehabilitation will not serve the purpose of the juvenile justice system because it sets society up for more social and legal issues for the years to come. Mass incarceration of juveniles in adult jails also will not serve as deterrence, thus will not help minors nor society. Minors who are incarcerated with adults know only what they are being taught by those adult offenders. They are not learning any valuable lessons. They are losing their social values and bonds with the community. Keeping the minors separately from adults can increase their likelihood of being

---

[66] *Id.* (Louisiana on June 14, 2016 passed Louisiana Act 501 which raised the minor's age to seventeen starting July 1, 2018 and others starting July 1, 2020. New York on April 10, 2017 passed the A3009C legislation which raised the minor's age to sixteen years of age starting on Oct. 1, 2018 and to seventeen starting on Oct. 1, 2019. North Carolina on June 14, 2017 passed SL2017-57 which raised the minor's age to seventeen starting Dec. 1, 2019. South Carolina on June 6, 2016 passed the South Carolina Act 268 which raised the minor's age to seventeen starting July 1, 2019. After the implementation of these laws, only five states (GA, MI, MO, TX and WI) will prosecute seventeen-year olds as adults.).

[67] Graham v. Florida, 560 U.S. 48, 68 (2010).

[68] 150 U.S. 551, 558 (1893).

[69] *Id.*

[70] MATZA, *supra* note 20, at 111.

[71] *Id*. at 113. ("Equity in criminal proceedings is a doctrinal qualification of the principle of equality. Individualized justice is itself a principle. It is a principle which on first appearances seems merely to substitute one set of relevant criteria for another. This it does – and considerably more. It does more than simply substitute frames of relevance for two reasons. To understand why this is so, we must first appreciate that the usual claim that equality is violated by individualized justice is at least in theory wrong, or beside the point.").

rehabilitated. Increasing educational and rehabilitative programs such as vocational skills and social responsibilities can help them turn their lives around and turn them into responsible, productive and law-abiding citizens.[72]

Two major issues can arise when dealing with minors – mental health issues and recidivism.[73] In dealing with these two issues, the individualized approach is warranted. The frequency of "youth with mental disorders within the juvenile justice system is found to be consistently higher than those within the general population of adolescents."[74] It is resulted from the fact that minors who have mental health issues often engage in delinquent behaviors. Engaging in delinquent behaviors is a "method of coping with some underlying problem adjustment. The delinquent differs from the non-delinquent in that he has frustrations, deprivations, insecurities, anxieties, guilt feelings, or mental conflicts which differ in kind or degree from those of non-delinquent children."[75] These young persons need to be assessed individually before being transferred to adult courts. In the event they commit crimes, "although incarceration and detainment [are] necessary…long-term confinement experiences tend to do more harm than good, often leading to continued offending and recidivism."[76] To help and rehabilitate these minors, there is a need for a combined effort from the following institutions: "education, child protection, juvenile justice, and mental health."[77] A combined effort from these institutions will help to prevent recidivism within this population, which is a huge problem within the juvenile's population.[78]

The juvenile justice system can vary from state to state, county to county, and municipality to municipality; meanwhile, the federal government has its own juvenile system.[79] Although each jurisdiction has its own juvenile justice system, they all

---

[72] Lawrence, *supra* note 13, at 30. *See also A.C.P.*, 379 F. Supp. 2d 225 (D.P.R. 2005) (The District Court of the United States for the District of Puerto Rico denied the motion to transfer A.C.P. to adult court after the minor, who was involved in an armed robbery, was rehabilitated. The minor, during the armed robbery, shot a guard three times and the guard was unconscious for a month but survived. The minor was detained and placed in juvenile detention. The minor became a leader while in detention. He has shown remorse for his action. While in juvenile detention, he became a leader and mature. Because of the rehabilitative program, he became a new person.)

[73] Gina M. Vincent, *Screening and Assessment in Juvenile Justice Systems: Identifying Mental Health Needs and Risk of Reoffending*, MODELSFORCHANGE (Jan. 18, 2012), http://www.modelsforchange.net/publications/328.

[74] Lee A. Underwood & Aryssa Washington, *Mental Illness and Juvenile Offenders*, INT. J. ENVIRON. RES. PUBLIC HEALTH, 2016, https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4772248/, at 2.

[75] ALBERT K. COHEN, DELINQUENT BOYS: THE CULTURE OF THE GANG 15 (1955).

[76] Underwood, *supra* note 74, at 2. (emphasis added) (quote omitted).

[77] *Id.*

[78] Brittany Bostic, *Reducing Recidivism for Juvenile Criminal Offenders* (March 11, 2014), MICHIGAN YOUTH VIOLENCE PREVENTION CENTER, http://yvpc.sph.umich.edu/exploring-rehabilitation-programs-juvenile-criminal-offenders/.

[79] MCCORD, *supra* note 34, at 155.

have "common aspects that make them universally different from the criminal [justice] system."[80] To better deal with youth offenders, states have used different juvenile justice models.[81] The traditional model focuses on the minors rather than the offenses. The restorative model focuses on a more balanced approach where the needs of the offender, the victims and the community are all considered. The tough-on-crime approach focuses on punishment and deterrence.[82] Any model that fails to take into account the minors' mental health will fail in its objective because "punishment on the basis of deterrence is inherently unjust," and ineffective.[83]

III. The difference between the juvenile justice system and the criminal justice system

The distinction between the juvenile justice system and the criminal justice system is based on the English Common Law.[84] The main difference is based on the age and the intent of the offender.[85] To find someone guilty of a crime, two elements are crucial – 1) *actus rea* or criminal act and 2) *mens rea* or the intent to commit the act.[86] These two elements are equally important although the latter is often ignored.[87] With minors, the question becomes: When are they capable of forming intent to commit crimes?[88] This question serves as the basis for a separate court system for juveniles.

Juvenile court proceedings differ from adult court proceedings[89]– "the court hearings in the juvenile justice system are less formal than criminal court proceedings."[90] In creating the juvenile justice in the nineteenth century, the progressives envisioned a system that is "informal, [and a] discretionary social welfare agency whose dispositions reflected the 'best interests' of the child."[91] However, that changed in *In re Gault* when the Supreme Court extended due process rights to minors. [92]

---

[80] Juveniles Justice System vs. Criminal Justice System, GET A REAL DEGREE, https://getarealdegree.com/juveniles-justice-system-vs-criminal-justice-system/ (last visited May 17, 2018).
[81] MCCORD, *supra* note 34, at 155.
[82] *Id.*
[83] PLATT, *supra* note 27, at 17.
[84] Lawrence, *supra* note 13, at 28.
[85] *Id.*
[86] *Id.*
[87] *Id.*
[88] *Id.*
[89] *Adjudication of Youths as Adults in the Criminal Justice System,* AMERICAN ACADEMY OF CHILD & ADOLESCENT PSYCHIATRY, https://www.aacap.org/App_Themes/AACAP/docs/clinical_practice_center/systems_of_care/AoYaACJS.pdf (last visited May 17, 2018).
[90] *Juvenile Justice: A Century of Change*, *supra* note 21.
[91] Field, *supra* note 9.
[92] 387 U.S. 1, 13 (1967).

The juvenile and the adult justice systems are based on two different viewpoints. The adult justice system commonly called the criminal justice system focuses on deterrence, punishment, retribution, and rehabilitation. The juvenile justice system, on the other end, focuses on the offenders' needs – rehabilitation and supervision – which gives the court the latitude to divert cases from court action.[93] The juvenile justice system views youths' behavior as malleable; therefore, rehabilitation is the best approach when dealing with them. On the other end, the criminal justice system focuses on the proportionality of the punishment.

A. Juvenile Court v. Adult Court

The criminal court decides on guilt.[94] On the other end, the juvenile court decides on the type of treatment that is more beneficial to the minors' well-being. The difference between the procedures in juvenile court and the adult court is based on the notion that minors and adults are different.[95] The difference in juveniles' maturity is based on their limited knowledge of the law and its consequences, and their mental capability to understand the severity of their actions.

To differentiate the juvenile justice system from the adult court system, a new set of legal terms were invented. As I mentioned earlier, minors are called delinquents instead of criminals.[96] They are adjudicated rather than sentenced.[97] In juvenile court, the proceedings are not open to the public; only selected people – attorneys, parents, minor, social workers, the person who files charges against the minor, and probation officers[98] – are allowed in the court. Meanwhile adult court proceedings are open to everyone. There is also a limitation to public access to juvenile court proceeding information.[99] The court proceedings information is released for very specific and limited reasons in order to assure that the minors' information is kept confidential. The purpose of using different proceedings and legal terms in juvenile courts instead of the ones that are used in adult courts is to turn the minors into productive adults when they age out of the juvenile justice system, and to protect them from being labeled and from societal stigmas.[100] This change increases the states' focus on rehabilitation instead of punishment. The juvenile court does not

---

[93] Lawrence, *supra* note 13, at 28.

[94] *Id.*

[95] *Id.*

[96] *Id.*

[97] *Juvenile Justice: A Century of Change*, *The juvenile justice system differs from the criminal justice system, but there is common ground*, NATIONAL CRIMINAL JUSTICE REFERENCE SERVICE, https://www.ncjrs.gov/html/ojjdp/9912_2/juv4.html (last visited May 17, 2018).

[98] Lawrence, *supra* note 13, at 29.

[99] *Id.*

[100] Finklea, *supra* note 10, at 3.

consider legal guilt because minors are not mature and cannot appreciate the legal consequences of their actions.[101] It, however, focuses on treatment rather than punishment, on minors' social and family backgrounds and history, and, on short term supervision and detention.[102]

In the juvenile justice system, the concept of legal guilt is absent. Minors are deemed incapable of forming criminal intent with the exceptions of some minors who demonstrate great sense of maturity.[103] Because of this conclusion, the individualized approach should be used in every juvenile case, either resulting in detention or not. More importantly, it is a crucial component in deciding whether a minor should be transferred to adult court. In the criminal justice system, offenders are presumed to possess the capacity and can commit crimes and appreciate the legal consequences of their offenses. The juvenile justice system, on the other end, favors rehabilitation over punishment. Unlike the criminal justice system, the juvenile justice system's purposes are to treat minors and guide them while protecting the community.[104] Lastly, the juvenile justice system, among other factors, focuses on the minors' social backgrounds, community ties, educational backgrounds, mental health, and family histories.[105]

B. Juvenile Court Proceedings

The juvenile court system, unlike the adult court system, is a non-adversarial system.[106] Although in "a series of decisions beginning in the 1960's, the U.S. Supreme Court required that juvenile courts become more formal – more like criminal courts"[107] – it has clarified that minors are different, thus require different treatment than adults.[108] The extension of the constitutional rights to minors should not be taken as a leeway to treat juveniles as adults or to mandatorily transfer them to adult courts. Since its creation, "juvenile courts have traditionally emphasized

---

[101] Lawrence, *supra* note 13, at 28.

[102] *Id.*at 29.

[103] *Id.* at 28.

[104] *Id.*

[105] *Id.*

[106] *The History of Juvenile Justice*, *supra* note 5.

[107] *Juvenile Justice: A Century of Change*, *supra* note 21.

[108] Roper v. Simmons, 543 U.S. 551, 569-70 (2005) (Simmons, eighteen years of age, was sentenced to death in 1993 due the commission of a capital offense. He appealed his case to both state and federal courts but to no avail. Simmons filed another appeal to the Missouri Supreme Court which set aside Simmons' death sentence but sentenced him to life without parole. The Supreme Court of the United States affirmed the decision of the Supreme court of Missouri. The Court differentiates youths from adults. The Court stated three reasons why youths are different from adults: 1) lack of maturity and underdeveloped sense of responsibility; 2) more vulnerable to negative influences and easily succumb to peer pressures; and 3) youths' characters are not well formed as adults' characters.).

on social rehabilitation for young offenders, but recent legal trends toward punitive justice have substantially diluted rehabilitation efforts."[109]

To avoid labeling the minors, to keep them separate from adults, and separate the juvenile justice system from the criminal justice system, as we said earlier, different legal terms are used in the juvenile courts. The legal terms used in juvenile court reflects the minors' immaturities.[110] Minors are not taken to jail, but they are taken into custody. This term reflects the *parens patriae* doctrine. A delinquency petition is filed in juvenile court contrary to adult court where a criminal indictment is filed. The minors are adjudicated instead of convicted. Unlike trials in adult courts that open to the public, juvenile court proceedings are not public. This helps to protect the minors' records and prevent societal stigma, as well as to facilitate a smooth rehabilitative process and community reentry.[111]

C. Effect of sentencing minors in adult court

Sentencing a minor in adult court defeats the purpose of the juvenile justice system's objective. Minor offenders cannot, with certainty, be classified among the worst offenders when their characters are not well formed compared to adult offenders.[112] They are at the stage of their lives where they are acting out of impulse. Furthermore, their immaturities impede their ability to appreciate the legal consequences of their actions. Sentencing them in adult court will not change that. It, however, stigmatizes them which can affect their lives once becoming adults. For instance, a number of studies have shown that negative *labeling* and system involvement can negatively affect a youth's employment, social life, and education.[113]

Minors sentenced and imprisoned in adult court are more likely to reoffend.[114] The exposure to adult treatment may strongly and negatively affect them. Since the "transition from youth to adulthood is largely a process of increasing one's investment in conformity and developing one's social identity, an interruption as stigmatizing and socially crippling as serious involvement in the criminal justice system early in life may have serious long-term implications."[115] Therefore, it is in

---

[109] Pattison, *supra* note 56, at 575.

[110] *See* Lawrence, *supra* note 13, at 29.

[111] MCCORD, *supra* note 34, at 154.

[112] Graham v. Florida, 560 U.S. 48, 68 (2010).

[113] *The context of Juvenile Justice: Defining Basic Concepts and Examining Public Perceptions of Juvenile Crimes,* http://samples.jbpub.com/9780763762513/62513_ch01_elrod3e.pdf., at 5 (last visited April 6, 2018) (emphasis added).

[114] Jason Ziedenberg, *You're An Adult Now, Youth in Adult Criminal Justice Systems*, NATIONAL INSTITUTE OF CORRECTIONS (Dec. 2011), https://nicic.gov/youre-adult-now-youth-adult-criminal-justice-systems, at 55.

[115] Nathaniel Ascani, *Labeling Theory and the Effects of Sanctioning on Delinquent Peer Association: A New Approach to Sentencing Juveniles*, 81, UNIVERSITY OF NEW HAMPSHIRE, https://cola.unh.edu/sites/cola.unh.edu/files/student-journals/P12_Ascani.pdf. (last visited May 17, 2018).

the best interest of the minors, as it is the main goal of the juvenile justice system, to rehabilitate them rather than incarcerate them along with adult criminals.

The unfortunate effect of mandatory transfer of minors to adult courts "[u] nnecessarily saddle a youth with the lifelong stigma of a criminal conviction."[116] Youths' delinquent behaviors are due to their immaturity, they are easily influenced by peers, they have an underdeveloped sense of responsibility, and their characters are not well formed.[117] It will not serve the interest of justice to sentence to a prison term a person who cannot appreciate the legal consequences of his actions.

IV. Constitutional rights of minors

The Supreme Court of the United States has recognized – in different decisions – that youths are different but have constitutional rights.[118] In *Kent*, the Supreme Court of the United States decided that minors are entitled to "essential due process" in transferring them to adult courts.[119] In *In re Gault*, the Court extended the due process right to minors when the hearing may result in commitment to a detention facility.[120] In *In re Winship*, the Court held that "beyond reasonable doubt" is the standard to be used in the adjudication phase.[121] In *McKeiver*, the Court stated that the due process clause of the Fourteenth Amendment does not require a jury trial in juvenile proceedings.[122] In *Breed*, the Court held that the adjudication of a minor in juvenile court is the equivalent of sentencing the minor in adult court; therefore, it would be double jeopardy to try the minor in both courts.[123]

The Supreme Court's extension of constitutional rights to minors make the juvenile justice system a mock of the criminal justice system yet keeps a thin line

---

[116] Neelum Arya, *Using Graham v. Florida to Challenge Juvenile Transfer Laws*, 71 LA. L. REV. 99, 107 (2010).

[117] *Graham*, 560 U.S. at 68.

[118] Roper v. Simmons, 543 U.S. 551, 569-70 (2005).

[119] 383 U.S. 541 (1966).

[120] 387 U.S. 1 (1967).

[121] 397 U.S. 358 (1970).

[122] 403 U.S. 528 (1971).

[123] 421 U.S. 519 (1975). Gary Jones was found guilty of an offense that would be considered robbery if he was subject to adult court jurisdiction. After disposition, the juvenile court determined that Jones should be tried in adult court because he was unfit for juvenile treatment. Jones filed an habeas corpus arguing that he was subject to double jeopardy. His petition was denied by the trial, appellate, and Supreme Court of California. Jones was found guilty of robbery in the first degree. Jones filed an habeas corpus in federal court. The District Court denied the habeas corpus holding that the two systems are different, therefore, double jeopardy does not apply. The Court of Appeals for the Ninth Circuit reversed the District Court decision. The appellate court decision was stayed pending the Supreme Court decision. The Supreme Court held that trying Jones in both juvenile and adult courts is double jeopardy.

between the two systems. Extending the constitutional rights to minors can be beneficial meanwhile can also have adverse consequences. In a dissenting opinion in *In re Gault*, justice Stewart stated that extending due process to minors might have adverse consequences.[124] He further stated that before the nineteenth century, juveniles and adults received the same due process rights, which resulted to minors receiving the same treatment as adults.[125] He noted that the court decision moved the court backwards into the nineteenth century.[126] Although justice Stewart statement is partly true, withholding due process rights of the minors will not also serve justice. It will move the Court backwards during the time when minors were arbitrarily detained.

In *McKeiver*, the court refused to extend jury trial to minors stating that the juvenile justice system is not adversarial in nature. [127] The Supreme Court decision to extend certain constitutional rights to minors should not be taken as if the Supreme Court wants the juvenile court to operate as the criminal justice system. It, however, wants to assure that minors, before all, are humans and are entitled to the basic fairness provided by the Constitution. The Court decisions remind us that the juvenile justice system is a part of the American legal system – adversarial system. However, to accomplish the goals and objectives of the juvenile justice system, all the components of the adversarial system cannot apply to juvenile court proceedings. As stated in the National Criminal Justice Reference Service:

> The impact of the Court's *Gault* and *Winship* decisions was to enhance the accuracy of the juvenile court process in the fact-finding stage. In *McKeiver*, the Court argued that juries are not known to be more accurate than judges in the adjudication stage and could be disruptive to the informal atmosphere of the juvenile court, tending to make it more adversarial.[128]

The U.S. Supreme Court reasons to extend and withhold certain constitutional rights to minors are 1) to clarify that persons (either minor or adult) have inviolable constitutional rights, thus should not be subject to arbitrariness in a court of law; and 2) juvenile court is not adversarial in nature although it is a part of the adversarial legal system. It is informal and aims at rehabilitating rather than punishing. Lastly, "the juvenile court's departure from strict adherence to due process has been upheld

---

[124] 387 U.S. at 80.

[125] *Id.*

[126] *Id.* at 79.

[127] 403 U.S. at 541.

[128] *Juvenile Justice: A Century of Change*, *U.S. Supreme Court cases have had an impact on the character and procedures of the juvenile justice system*, NATIONAL CRIMINAL JUSTICE REFERENCE SERVICE, https://www.ncjrs.gov/html/ojjdp/9912_2/juv2.html (last visited May 17, 2018).

on the grounds that it is a civil court which dispenses protective care to its wards rather than penal sanctions to criminals."[129]

A. Due process

The Due Process clause of the Fourteenth Amendment requires a state to hold a transfer hearing in which a minor is represented by a counsel before waiving or transferring him to adult court.[130] The criminal justice system and the juvenile justice system were created on two different and distinct philosophies. Raising a minor's delinquent status to criminal status should not be a decision made by a prosecutor; it should be decided in a court of law by a juvenile court officer because that decision is critical, thus should not be a one-man-decision. Mandatory transfer laws disrupt the juvenile justice's objectives and goals because it takes away its original jurisdiction over juvenile matters. Juvenile court has original jurisdiction over juvenile matters at the onset of the juvenile court. Taking that jurisdiction away should be in line with due process established by the Supreme Court in *Kent*.

After the decision of the Supreme Court in *Kent*, Congress amended the Juvenile Court Act to give full discretionary power to United States attorneys to bypass the juvenile court and directly file charges in adult courts against minors who commit certain crimes. The amendment of the Juvenile Court Act poses a legal question that the Supreme Court left unanswered by denying certiorari to *Bland v. United States*.[131] In his dissenting opinion, justice Douglas reiterated that Congress has the power to vest power in jury and judges to decide on punishment that should be imposed in situations, but not to vest in prosecutors such power because judges and juries are prescribed to protect individual freedom. Moreover, their decisions are made after public trials in which a defendant has the right to be represented by an attorney.[132]

In *In re Gault*, the Supreme Court of the United States stated that "neither man nor child can be allowed to stand condemned by methods which flout constitutional requirements of due process of law."[133] Since mandatory transfer laws infringes on the constitution's due process clause, they are unconstitutional. It should not be forgotten that minors are entitled to their due process right before being transferred

---

[129] MATZA, *supra* note 20, at 11.

[130] Kent v. United States, 383 U.S. 541, 554 (1966).

[131] Brice Hamack, *Go Directly to Jail, Do Not Pass Juvenile Court, Do Not Collect Due Process: Why Waiving Juveniles Into Adult Court Without a Fitness Hearing Is a Denial of Their Basic Due Process Rights*, 14 WYO. L. REV. 775, 780 (2014) ("The Supreme Court was asked to decide whether the due process protections announced in Kent were based on the statutory language of the Juvenile Court Act at the time, or whether juveniles have a basic liberty interest in those protections.").

[132] Bland v. United States, 412 U.S. 909, 911-12 (1973), (Douglas, J. dissenting).

[133] 387 U.S. at 13.

to adult court.[134] Although the *parens patriae* doctrine gives the states the power to act as the minors' parents, it "is not an invitation to procedural arbitrariness."[135] In *Aalim*,[136] the Supreme Court of Ohio recognized that mandatory transfer violates the due process clause of the Fourteenth Amendment, therefore unconstitutional. Unfortunately, it vacated its own decision after rehearing the case the following year.[137] The Supreme Court of Ohio, by vacating its own decision, displays the issues that the juvenile justice system is facing in the United States. In his dissenting opinion, O'Connor, C. J., stated that "the majority's decision today brings us one step closer to the anarchy about which Madison warned."[138] He further stated that the majority decision failed to bring justice to the minors who are the frailest among the citizens.

The issues facing the juvenile justice system is not only at the state's level, but at the federal level as well. In *Bland*, the U.S. Supreme Court denied certiorari after the United States Court of Appeals for the District of Columbia overturned the decision of the United States District Court for the District of Columbia which declared the amended portion of the Juvenile Justice Act unconstitutional.[139] The District Court, in declaring the amended statute unconstitutional, stated that the intention of Congress is to preserve a juvenile justice system that acts as parens patriae that can try to help and

> [R]ehabilitate people under…eighteen. Congress created a system of rights and protection for those under eighteen but a system where some could be denied that assistance and those protections arbitrarily with no assurance that they were being excluded for the reasons intended by Congress…is invalid as violative of basic *due process*.[140]

Mandatory transfer laws also violate the constitution because they ignore the individualized sentencing approach that the United States Supreme Court established.

---

[134] *Kent*, 383 U.S. at 545-46.

[135] *Id.* at 555.

[136] 150 Ohio St. 3d 463 (2016) (vacated); 150 Ohio St. 3d 489 (2017).

[137] State v. Aalim, 150 Ohio St. 3d 489 (2017).

[138] *Id.* at 506 (O'Connor, C. J., dissenting). Madison warned that:

> Justice is the end of government. It is the end of civil society. It ever has been, and ever will be pursued, until it be obtained, or until liberty be lost in the pursuit. In a society under the forms of which the stronger faction can readily unite and oppress the weaker, anarchy may as truly be said to reign as in a state of nature, where the weaker individual is not secured against the violence of the stronger.

The Federalist No. 51, at 351 (James Madison) (Cooke Ed.1961).

[139] 401 U.S. 909 (1973).

[140] United States v. Bland, 330 F. Supp. 34, 37-38 (D.D.C. 1971) (quote omitted) (emphasis added).

They "[p]reclude juvenile court judge[s] from taking any individual circumstances into account before…sending a child…to adult court. This one-size-fits-all approach runs counter to the aims and goals of the juvenile system."[141] Moreover, they run counter to the proportionality principle of sentencing which requires that the offender's characteristics be taken into account as well as the offense.

There can be serious due process concerns when a minor is exposed to a court system not designed for persons of his or her capacity.[142] Holding a transfer hearing to decide whether the minor will be fit for the criminal justice system is ideal because the "[j]uvenile court judges are in the best position to evaluate each juvenile's suitability for juvenile or adult court."[143] Moreover, "[f]undamental fairness requires that juveniles have the opportunity to demonstrate a capacity to change and suitability to juvenile court, and an amenability hearing is accordingly necessary before juveniles are transferred."[144]

B. Rehabilitation

The Eighth Amendment of the United States, which was incorporated into the Bill of Rights in 1791, originated from the 1689 English Bill of Rights.[145] The purpose of the article within the English Bill of Rights was to eradicate the practice of executions and tortures.[146] During the Congressional debate on the Eighth Amendment, one of the Congressmen objected to the insertion of the term "cruel and unusual" as he deemed it was too indefinite.[147] However, the Court construes the Eighth Amendment to include the constitutionality of certain punishments, the administration of certain punishments, and punishments that are disproportionately imposed to the offenders.[148]

The interpretation of "cruel and unusual" has evolved throughout the American history and the Supreme Court has used several tests to determine whether a punishment is cruel and unusual.[149] In 1988, the Supreme Court vacated the death sentence of William Wayne Thompson stating that the punishment was

---

[141] *Aalim*, 150 Ohio St. 3d at 471.

[142] Jarod K. Hofacket, *Justice or Vengeance: How Young is Too Young for a Child to be Tried and Punished as an Adult?*, 34 TEX. TECH L. REV. 159, 162 (2002).

[143] *Aalim*, 150 Ohio St. 3d at 469 (emphasis added).

[144] *Id.*

[145] Ronald H. Rosenberg, *Constitutional Law - The Eighth Amendment and Prison Reform*, THE WOLF LAW LIBRARY, http://scholarship.law.wm.edu/facpubs/670 (last visited May 24, 2018).

[146] *Id.*

[147] *Eight Amendment: Further Guarantees in Criminal Cases*, AUTHENTICATED U.S. GOVERNMENT INFORMATION, https://www.gpo.gov/fdsys/pkg/GPO-CONAN-2002/pdf/GPO-CONAN-2002-9-9.pdf, at 1570 (last visited May 17, 2018).

[148] Arya, *supra* note 116, at 110.

[149] Rosenberg, *supra* note 145, at 1540.

unconstitutional because it is "cruel and unusual" to sentence to death a person who was under sixteen years of age at the time of the commission of the crime.[150] In its decision, the plurality clarified that "[t]he normal [*person of sixteen years of age*] is not prepared to assume the full responsibilities of an adult."[151] In its reasoning, the Court referenced the American Bar Association and the American Law Institute which oppose the death sentence of any person under the age of eighteen.[152] In this case, the "Supreme Court planted the seeds for its eventual conclusion that minors, specifically adolescents, are a categorically distinct class from adults for purposes of the Cruel and Unusual Punishments Clause of the Eighth Amendment."[153] Indeed, seventeen years later, in *Roper v. Simmons*, the Supreme Court buried the imposition of death penalty sentencing on persons under the age of eighteen years.[154]

Sixteen years after upholding the death penalty for persons sixteen and seventeen years of age,[155] the court overturned what we can consider as the last death sentence for persons under the age of eighteen.[156] The Court held that imposing the death penalty on persons under the age of eighteen when the offense was commissioned is cruel and unusual punishment, and therefore, unconstitutional. In *Graham* and *Miller*, the Court also overturned mandatory life without parole for minors. In *Miller*, the Court noted that "[t]he mandatory sentencing scheme violates this principle of proportionality, and so the Eighth Amendment's ban on cruel and unusual punishment."[157] By banning Life WithOut Parole (LWOP) for minors, "the Court has now recognized that rather than enjoying a right to be punished, young people, specifically adolescents, instead uniquely possess the quite different-indeed in many ways antithetical-constitutional right to a meaningful opportunity to be rehabilitated."[158]

---

[150] Thompson v. Oklahoma, 487 U.S. 815 (1988). *See* Lawrence, *supra* note 13, at 34. (Discussing the issue of imposing death sentence to juveniles in the United States. United States is among the few industrialized and democratic countries that allow minors to be sentenced to death. From 1973-2004 (thirty-one years), 228 minors were sentenced to death. Among the 228 sentenced, twenty-two minors were executed and 134 were either reversed or commuted. The State of Texas alone is responsible for over half of the twenty-two executions. Seven thousand death sentences have been imposed in the United States since 1973. Three percent (two thirds of the death sentences were imposed on seventeen-year-olds and one third were imposed on fifteen and sixteen-year olds) of that number are juveniles. By the end of 2005, twenty states authorized the execution of minors. (Nine states set the minimum age at sixteen and under, five states set the minimum age at seventeen, and six states had no age minimum).

[151] *Thompson,* 487 U.S. at 825.

[152] *Id.* at 830.

[153] Gardner, *supra* note 39, at 481.

[154] Roper v. Simmons, 543 U.S. 551, 574 (2005).

[155] Stanford v. Kentucky, 492 U.S. 361 (1989) (abrogated by Roper v. Simmons, 543 U.S. at 551).

[156] *Roper*, 543 U.S. at 551.

[157] Miller v. Alabama, 567 U.S. 460, 489 (2012).

[158] Gardner, *supra* note 39, at 459.

The United States Supreme Court has made it clear that when a court is deciding on the fate of youthful offenders, there is a need to determine whether the offenders are incorrigible. However, the Court recognizes that "incorrigibility is inconsistent with youth"[159] because they lack maturity, are vulnerable to peer influences, impulsive, etc.…[160] It violates the eighth amendment, from the start, to decide that youth offenders are not fit to reenter society.[161] The Supreme Court also recognizes that "the objectives [of a statute creating a juvenile court] are to provide measures of guidance and rehabilitation for the child and protection for society, not to fix criminal responsibility, guilt, and punishment."[162]

The Court's decision in *Graham* recognizes that youth offenders are entitled to rehabilitation. Not giving minors the possibility for rehabilitation violates their Eighth Amendment right because it presumes that minors are incorrigible.[163] In the event a minor and an adult commit the same crime, "less culpability should attach to [the] juvenile offender than to [the] adult offender."[164]

V. Mandatory transfer

Every jurisdiction in the United States including the federal government allow for the transfer of persons under the age of eighteen to adult court under some circumstances through certain transfer mechanisms.[165] These transfer mechanisms drastically increase the number of minors who are transferred to adult court. For instance, "between 1990 and 2010 the number of juveniles in adult jails went up by nearly 230%."[166] Moreover, "nearly 200,000 youth enter the adult criminal-justice system each year, most for non-violent crimes."[167] These minors who are transferred to adult court have been exposed to abuse by both inmates and prison staff.

Transferring and trying juveniles in adult courts exposes them to great danger because adult courts are not set up to take into consideration the minors' well-beings.[168] It exposes them to a system not designed to consider their best interest

---

[159] *Miller*, 567 U.S. at 473 (quoting Graham v. Florida 560 U.S. 48, 72–73 (2011)); *see also* Workman v. Commonwealth, 429 S.W.2d 374, 378 (Ky. App. 1968)).

[160] *Id.* at 472.

[161] *Graham*, 560 U.S. at 75.

[162] Kent v. United States, 383 U.S. 541, 554 (1966) (emphasis added).

[163] *Graham*, 560 U.S. at 71.

[164] Dominic J. Ricotta, *Eighth Amendment--The Death Penalty for Juveniles: A State's Right or a Child's Injustice*, 79 J. CRIM. L. & CRIMINOLOGY 921, 928 (1988).

[165] *See* discussion, *infra* note 174.

[166] *Children in Adult Jails: Treating Young Offenders Like Grown-ups Makes Little Sense*, THE ECONOMIST (March 28, 2015), https://www.economist.com/news/united-states/21647347-treating-young-offenders-grown-ups-makes-little-sense-children-adult-jails.

[167] Lahey, *infra* note 194.

[168] Ziedenberg, *supra* note 114, at 2.

or their mental and physical developments when deciding on their fates. Mandatory transfer gives no juvenile court officer the chance "to assess the rehabilitative needs of [the] youth, and to consider individualized factors to determine whether the severe consequence of treating a youth as an adult is appropriate."[169] Although the Supreme Court in *Miller* clarifies that if the States fail to consider the youths' ages and characteristics before imposing sentence on them, the law or statute will be flawed,[170] states have continued to transfer juveniles to adult court without considering their ages and characteristics. For instance, in 2007, fourteen states excluded minors under the age of eighteen from juvenile jurisdiction solely because of their age. In 2017, seventeen-year-olds were automatically excluded from the juvenile court in five states – Georgia, Michigan, Missouri, Texas, and Wisconsin.[171] In some other states, for instance, New York and North Carolina, minors as young as sixteen years old are adults for certain criminal conducts.[172]

In 1970, only eight states had statutorily excluded juveniles from the jurisdiction of the juvenile courts for certain crimes.[173] Now, every single one of the fifty states and the District of Columbia have at least one form of transfer mechanisms[174] that

---

[169] *The Impact of Mandatory Transfer Statutes*, CAMPAIGN FOR YOUTH JUSTICE (Nov. 29, 2016), http://www.campaignforyouthjustice.org/images/factsheets/Mandatory_Transfer_Fact_Sheet_FINAL_1_1.pdf.

[170] Miller v. Alabama, 567 U.S. 460, 474 (2012).

[171] Jeree Thomas, *Raising the Bar: State trends in keeping youth out of adult courts 2015-2017*, CAMPAIGN FOR YOUTH JUSTICE, http://cfyj.org/images/StateTrends_Repot_FINAL.pdf (last visited May 24, 2018).

[172] Ziedenberg, *supra* note 114, at 4.

[173] Thomas, *supra* note 171.

[174] *See* Appendix: Summary of Transfer Laws, OFFICE OF JUSTICE PROGRAMS, https://www.ojjdp.gov/pubs/tryingjuvasadult/appendix.html (last visited May 17, 2018). Defining the different transfer mechanisms. *Discretionary Waiver* – the discretionary power of a juvenile judge possesses whether to waive the juvenile court jurisdiction over a case involving a minor to allow prosecution in adult court. Under the discretionary waiver, the prosecutor has the burden of proof; however, some states allow this burden to be shifted to the child under certain circumstances. *Mandatory Waiver* – states required waiver under certain circumstances by juvenile courts to allow the prosecution of juveniles in adult court. Under mandatory transfer, the juvenile court must transfer a case to adult court if the offender commits a specific offense, meets certain age requirement, and other criteria. Under this circumstance, the juvenile court has no role beside confirming that the statute requirement has met to waive the case to adult court. *Presumptive Waiver* – "If the State designates a category of cases in which waiver to criminal court is rebuttably presumed to be appropriate, a description of the pertinent law is included under Presumptive Waiver." Under the presumptive waiver, the rebuttable presumption applies if the juvenile meets the statutory criteria that qualifies the case for presumptive waiver treatment. Presumptive waiver falls into three categories: 1) some jurisdiction gives the most weight to the current offense; 2) minors who are older are targeted. Their offenses trigger a presumption even if the offenses which they are accused of would not have otherwise triggered a presumption if they were younger; and 3) some jurisdictions prioritize a minor's prior offense history over other factors. *Direct File* – the power states give to prosecutors to choose either to file a petition in juvenile courts or charges in criminal court against minors. *Statutory Exclusion* – the exclusion of certain crimes from

allow for young offenders to be prosecuted in adult courts.[175] As of 2016, forty-six states have discretionary waiver, twelve have presumptive waiver, thirteen have mandatory waiver, twenty-eight have statutory exclusion/direct filing, thirty-five have "once and adult, always an adult", fourteen have prosecution discretion.[176]

A. Case against mandatory transfer

The mandatory transfer of juveniles to adult court makes it impossible for juveniles to benefit from the rehabilitative programs they are entitled to. It violates their Eighth Amendment right to rehabilitation by exposing them to the same penalties and treatments as adults,[177] which the designers[178] of the juvenile justice system were trying to avoid by designing a different court for minors.[179] It is excessive punishment under the Eighth Amendment of the United States Constitution for a state to mandatorily transfer a minor to adult court.[180] Determining cruel and unusual punishment is not solely based on extreme cruelty but rather on moral judgement.[181] Although the Supreme Court has long held that for a punishment to be cruel and unusual it should be disproportionate to the crime,[182] it has also considered, "[w]hether the challenged sentencing practice serves legitimate penological goals."[183]

One purpose of the juvenile justice system is to "guide a juvenile offender toward life as a responsible, law-abiding adult."[184] To achieve such goal, the juvenile justice

---

juvenile court jurisdictions. A case must be filed in adult court under the statutory exclusion if the minor meets the minimum age requirement and commits at least one of the crimes that are statutorily excluded. *Once an Adult/Always* – the power states have to terminate the juvenile courts jurisdictions over minors who have been prosecuted as adults.

[175] Anne Teigen, *Juvenile Age of Jurisdiction and Transfer to Adult Court Laws* (April 17, 2017), NATIONAL CONFERENCE OF STATE LEGISLATURES, http://www.ncsl.org/research/civil-and-criminal-justice/juvenile-age-of-jurisdiction-and-transfer-to-adult-court-laws.aspx.

[176] *Jurisdictional Boundaries*, JUVENILE JUSTICE GEOGRAPHY, POLICY, PRACTICE & STATISTICS, http://www.jjgps.org/jurisdictional-boundaries (last visited May 17, 2018).

[177] *Juvenile Transfer to Criminal Court*, OFFICE OF JUSTICE PROGRAMS, https://www.ojjdp.gov/pubs/reform/ch2_j.html (last visited May 17, 2018).

[178] *See The context of Juvenile Justice: Defining Basic Concepts and Examining Public Perceptions of Juvenile Crimes*, *supra* note 113. (The Progressists designed the juvenile justice system as a response to the social problems cities were facing during the industrialized era. During that time, minors were exposed to dangerous work and inhuman living conditions. The progressists got involved to lead the minors away from a life of crime. The Child Savers, a group of middle class women, were the first to lobby, on behalf of the youths, for a separate court, law and correctional system for these minors.).

[179] *Id.*

[180] Roper v. Simmons, 543 U.S. 551, 560 (2005).

[181] Graham v. Florida, 560 U.S. 48, 58 (2010).

[182] *Roper*, 543 U.S. at 561.

[183] *Graham*, 560 U.S. at 67 (quoting Kennedy v. Louisiana, 554 U.S. 407, 443 (2008)).

[184] *The History of Juvenile Justice*, *supra* note 5.

system operates as a non-criminal court,[185] and as a non-adversarial system.[186] The juvenile justice system emphasizes on an informal court process, non-adversarial, and flexible approach.[187] This approach gives the juvenile court judges the flexibility to make decisions in the best interest of the minors. When a minor is transferred to adult court, he has become an adult; therefore, he or she risks losing the benefit of the rehabilitative programs for people of his or her age. In some jurisdictions, once transferred to adult court, they become adults for any future crimes. For someone to be accountable for a crime, the person must: 1) have a vicious will to commit the act and 2) actually commit such crime.[188] Absence of the former can negate the latter.[189] Minors rarely have the vicious will to commit crimes although they often engage in criminal acts.[190] When a minor commits a criminal act, the juvenile court is there to decide on the most beneficial program that can rehabilitate the minor.[191] When a minor is tried and sentenced in adult court, it might have an adverse consequence. For instance, a study by the Campaign for an Effective Crime Policy [hereinafter *CECP*] found that juveniles prosecuted as adults in Florida are more likely to commit more crimes and serious offenses upon their releases into the community than minors whose cases were adjudicated in juvenile courts.[192] And when sentenced in adult court, minors often lose the opportunities they would otherwise enjoy if they were adjudicated in juvenile court. For instance, in some states, minors convicted of a felony crime are not eligible for federal or state student loans or housing loans.[193] Furthermore, "they lose out on the educational and psychological benefits offered by juvenile-detention facilities. Worse, they are much more likely to suffer sexual abuse and violence at the hands of other inmates and prison staff."[194]

---

[185] *Id.*

[186] Lawrence, *supra* note 13, at 29.

[187] *The History of Juvenile Justice*, *supra* note 5.

[188] Lawrence, *supra* note 13, at 28.

[189] *Id.*

[190] *The History of Juvenile Justice, supra* note 5.

[191] *Id.*

[192] *Juvenile Transfer to Criminal Court*, *supra* note 177.

[193] *Adjudication of Youths as Adults in the Criminal Justice System*, *supra* note 89.

[194] Jessica Lahey, *The Steep Costs of Keeping Juveniles in Adult Prisons*, THE ATLANTIC, (Jan. 8 2016), https://www.theatlantic.com/education/archive/2016/01/the-cost-of-keeping-juveniles-in-adult-prisons/423201/. (There are approximately 1,200 juveniles in federal and state prisons within the United States. These minors have been sexually abused by other inmates. The National Inmate Survey (NIS) reported that 1.8 percent of sixteen and seventeen-year olds who are imprisoned with adults experienced sexual abuse. Juveniles who are housed with adults are thirty-six times more likely to commit suicide than the ones who are housed separately from adults. Juveniles who are housed with adults are thirty-four times more likely to recidivate than the ones house separately.). *See* also, Edward P. Mulvey and Carol A. Schuber, *Transfer of Juveniles to Adult Court: Effects of a Broad Policy in One Court*, U.S. DEPARTMENT OF JUSTICE (Dec. 2012), https://www.ojjdp.gov/pubs/232932.pdf. (Juveniles who are housed with adults are five times more likely to be sexually assaulted and two times more

The United States Supreme Court in *Miller* reasoned that mandatory life without parole violates minors' Eighth Amendment right.[195] Although the Court's decision is based on mandatory life without parole, it does not declare life without parole unconstitutional, but "mandatory" life without parole. The Court believed that the minors should not be mandatorily sentenced because mandatory sentencing fails to consider the minors' characteristics, thus bypassing the individualized sentencing for juveniles. This decision should also be interpreted to convey the message that "mandatory" transfers should not be imposed on juveniles because it fails to consider the minors' individual characteristics. There should be an individualized evaluation of the minors' characteristics before a juvenile court officer who would decide on the appropriateness of such transfer.

Mandatory transfers of minors to adult courts violates "[t]he basic precept of justice that punishment for crime should be graduated and proportioned to both the offender and the offense."[196] Even in the context of when a minor has committed a heinous crime, the state must consider the minor's "attributes" before transferring him or her to adult court.[197] This decision should be made by a juvenile court officer after conducting a transfer hearing on the appropriateness of transferring the minor to adult court.[198]

The main goals of trying juveniles in adult courts are deterrence, lowering the recidivism rate, and community safety.[199] However, this process has failed to accomplish said goals. Instead, it greatly affects the youths' well-beings and disrupts their family ties.[200] When their cases are waived to adult courts, juvenile offenders are most likely to reoffend after serving their terms.[201] Youths who are prosecuted in adult courts are thirty-four percent more likely to commit more violent offenses after their releases.[202] Mandatory transfer laws are "[f]lawed because [they] give no significance to the character and record of the individual offender or the circumstances of the offense and excludes from consideration the possibility of compassionate or mitigating factors."[203]

---

likely to be physically abused by prison staff. In 2005, twenty-one percent of inmate-on-inmate sexual violence involved a minor under the age of eighteen. Moreover, minors who are transferred to adult courts and incarcerated with adults can experience developmental issues, in addition to the physical and psychological abuses, that are harmful to their well-beings.).

[195] Miller v. Alabama, 567 U.S. 460, 465 (2012).

[196] *Id.* at 469 (quoting Weems v. United States, 217 U.S. 349, 367 (1910)).

[197] Graham v. Florida, 560 U.S. 48, 58 (2010).

[198] Juvenile Transfer to Criminal Court, *supra* note 176.

[199] *Adjudication of Youths as Adults in the Criminal Justice System*, *supra* note 89.

[200] *Id.*

[201] Ascani, *supra* note 115.

[202] *The Impact of Mandatory Transfer Statutes*, *supra* note 169.

[203] Miller v. Alabama, 567 U.S. 460, 475 (2012) (quoting Woodson v. North Carolina, 428 U.S. 280, 304 (1976)).

Instead of trying minors in adult courts, states should create a more balanced juvenile justice system in which minors are fairly punished for their crimes – that is recognizing that the minors are immature, impulsive, and easily influenced by peers – while focusing on rehabilitation and considering public safety. A more balanced system can help the states deal with violent youth offenders without subjecting them to adult treatment or transferring them to adult courts. Mandatory transfers expose minors to the adversarial system which is detrimental to their well-beings. They lose the identity protection given to minors as well as their ability to build a new life.[204]

B. Minors are different

Minors, unlike adults, are "considered less mature and less aware of the consequences of their actions."[205] They are "incapable of being fully responsible for antisocial and criminal behavior;"[206] "particularly during the formative years of childhood and adolescence, minors often lack the experience, perspective, and judgment expected of adults."[207] Minors are "malleable and more capable of rehabilitation than adults, and that treatment rather than punishment should be the focus of the juvenile justice system."[208]

The Supreme Court draws a line between adolescence and adulthood. It has "solidified age 18 as the defining line between childhood and adulthood."[209] It should not be an assumption that minors are adults when they attain eighteen years of age, but when they actually become adults.[210] People's brains do not mysteriously transform on their eighteenth birthdays.[211] It is a process for the brain to mature. During the adolescent stage, a person's ability to judge, a person's identity and physical body change so much that it makes it difficult for others to comprehend those changes.[212] For instance, scientists have discovered that teenage brains overproduce

---

[204] Rachel Jacobs, *Waiving Goodbye to Due Process: The Juvenile Waiver System*, 19 CARDOZO J.L. & GENDER 989, 991 (2013).

[205] Lawrence, *supra* note 13, at 24.

[206] Hoover, *supra* note 26, at 16.

[207] Thompson v. Oklahoma, 487 U.S. 815, 834 (1988) (quoting Bellotti v. Baird, 443 U.S. 622, 635 (1979)).

[208] Hoover, *supra* note 26, at 16.

[209] Arya, *supra* note 116, at 150.

[210] Tim Requarth, *Neuroscience Is Changing the Debate Over What Role Age Should Play in the Courts*, NEWSWEEK (April 18, 2016, 10:01 AM), http://www.newsweek.com/2016/04/29/young-brains-neuroscience-juvenile-inmates-criminal-justice-449000.html.

[211] *Id.*

[212] Adam Ortiz, *Adolescence, Brain Development and Legal Culpability*, Juvenile Justice Center, (Jan. 2004), file:///I:/Law%20Review/Research%20for%20article%20on%20Juvenile/crimjust_juvjus_Adolescence.authcheckdam.pdf.

gray matter,[213] then there is a pruning period which accompanied by "myelination, a process in which *white matter*[214] develops that balance the brain's functions," which allows the minors to make better and more balanced decisions.[215]

The distinction between adulthood and adolescence is not "simply one of age, but one of motivation, impulse control, judgment, culpability and physiological maturation."[216] Because the frontal regions of the minors' brains are not fully developed, unlike adults, adolescents rely on the emotional part of the brain when making decisions.[217] This reliance might be the reason minors often engage in dangerous and criminal behaviors. As Dr. Ruben C. Gur, neuropsychologist and Director of the Brain Behavior Laboratory at the University of Pennsylvania stated,

> The frontal lobe is involved in behavioral facets germane to many aspects of criminal culpability. Perhaps most relevant is the involvement of these brain regions in the control of aggression and other impulses…. If the neural substrates of these behaviors have not reached maturity before adulthood, it is unreasonable to expect the behaviors themselves to reflect mature thought processes.[218]

Minors, unlike adults, are not mature, therefore they deserve to be treated differently than adults. The different treatment that they deserve is not limited to housing them in separate facilities [from adults]. Their characteristics need to be considered when being sentenced because "[p]unishment for crime should be graduated and proportioned to both the offender and the offense"[219] in order to pass

---

[213] Gray matter – the brain tissue that does the "thinking".

[214] White matter – is fatty tissue that serves as insulation for the brain's circuitry, making the brain's operation more precise and efficient.

[215] Ortiz, *supra* note 212.

[216] Coalition for Juvenile Justice Emerging Concepts Brief, *What Are the Implications of Adolescent Brain Development for Juvenile Justice?*, file:///I:/Law%20Review/Research%20for%20article%20on%20Juvenile/what%20are%20the%20implications%20of%20the%20adolescent%20brain%20development.pdf, at 2 (last visited May 17, 2018).

[217] *Id. See also* Ortiz, *supra* note 212. Describing the frontal lobe:

> The largest part of the brain is the frontal lobe. A small area of the frontal lobe located behind the forehead, called the prefrontal cortex, controls the brain's most advanced functions. This part, often referred to as the "CEO" of the body, provides humans with advanced cognition. It allows us to prioritize thoughts, imagine, think in the abstract, anticipate consequences, plan, and control impulses.

Id.

[218] Ortiz, *supra* note 212.

[219] Miller v. Alabama, 567 U.S. 460, 469 (2012) (quoting Weems v. United States, 217 U.S. 439, 367 (1910)).

the Eighth Amendment "cruel and unusual" test.[220] This principle of proportionality cannot be taken into account without giving juvenile court officers the chance to decide whether the minors are fit to stand trial in adult courts. It is concluded that mandatory transfer of minors to adult courts without a hearing before a juvenile court officer is unconstitutional because it is not proportioned to the offender, although it might be proportionated to the offense.

VI. Recommendations

A categorical ban on transfers of juveniles to adult courts can be counterproductive. A balanced model which considers the minors' mental and intellectual development and community safety should be applied when dealing with youth offenders. Some states have already implemented such model. A categorical ban on transfer laws can also negatively affect the individualized sentencing scheme that juvenile advocates have been supporting since the progressive era. The categorical ban will likely fail to consider the community safety.

As an alternative to a categorical ban on transfer laws, states should make it mandatory to have a transfer hearing to assess the minor's social background, intellectual capacity, family circumstances, ties to the community, mental and physical condition, and determine whether the minor understands the legal consequences of his or her actions along other factors that might be deemed important. It will serve the interest of justice to use the individualized sentencing when adjudicating minors to decide whether they are likely to be rehabilitated. This can be done only in juvenile court by a juvenile court officer and through the juvenile justice system. States should raise the age for juvenile jurisdiction from eighteen to twenty-three for rehabilitative purposes. Raising the age for juvenile jurisdiction will give the states enough time to work with juvenile offenders who are sixteen or seventeen years of age. More importantly, the states can adequately address their needs during their "dramatic hormonal and emotional changes."[221] Some states have raised the ages of juvenile jurisdictions from eighteen to twenty or twenty-one. For instance, in Connecticut, Illinois, Massachusetts and Vermont legislators have proposed bills to expand the juvenile justice's jurisdiction to persons under the ages of twenty-one or twenty-two.[222] States should follow the Commonwealth of Puerto Rico's lead and clearly stipulate in their constitutions that it is forbidden to keep a person under the age of sixteen in jail or prison.[223] However, minors under sixteen who commit violent

---

[220] *Id*. (quoting Roper v. Simmons, 53 U.S. 551, 560 (2005)).
[221] Ortiz, *supra* note 212.
[222] Thomas, *supra* note 171.
[223] CONST. PR. art. II, § 15. ("The employment of children less than fourteen years of age in any occupation which is prejudicial to their health or morals or which places them in jeopardy of life or limb is prohibited. No child less than sixteen years of age shall be kept in custody in a jail or penitentiary.").

crimes can be housed in rehab centers or educational program centers where they can be monitored and rehabilitated. Any person sixteen and older, after determining whether the person is incorrigible in a hearing before a juvenile court officer, should be transferred to adult court or kept under the juvenile jurisdiction for rehabilitation purposes.

The necessity to keep the community safe is as crucial as the need to rehabilitate the minors. The safety of the community should not be sacrificed the same way the need to rehabilitate the minors should not be sacrificed. Implementing a balanced approach which considers the victims, the community, and the minor is necessary. The juvenile justice is not built to punish minors but to rehabilitate them; however, the rehabilitation process and plan should include the safety of the community. That is said "on occasion it will be both in the best interest of the child and the best interest of public safety to transfer a juvenile into the adult criminal system."[224] But, that should always be the last resort.

It can be said that trying a case in juvenile court may be financially burdensome if the case will be tried again when it is transferred to adult court. The answer to that is, justice is priceless. Detaining a minor in juvenile court costs less than incarcerating a minor in jail with the adults. Furthermore, not only does housing minors in juvenile hall cost less than housing them in adult prisons, it costs way less to rehabilitate them than housing them in juvenile hall.[225]

Some States have already got rid of mandatory transfer laws. For instance, California, with the implementation of Prop 57, got rid of its mandatory transfer law.[226] With the passage of Prop. 57, juvenile cases must go before a judicial officer who will decide whether the minor should be transferred to adult court. The minors are the most vulnerable in our society, so they should be led and guided. The process

---

[224] Hamack, *supra* note 131, at 785.

[225] The Act 4 Juvenile Justice affirms that:

> Incarcerating young people in juvenile detention facilities costs between $32,000 and $65,000 per year and operating just one bed over a twenty-year period can cost between $1.25 million and $1.5 million. Alternatives to incarcerating youth not only reduce crime but save money. Research has shown that every dollar spent on evidence-based programs [e.g., Multidimensional Treatment Foster Care (MTFC), Multisystemic Therapy (MST), and Functional Family Therapy (FFT)] can yield up to $13 in cost savings. Early interventions that prevent high-risk youth from engaging in repeat criminal offenses can save the public nearly $5.7 million in costs over a lifetime.

Act 4 Juvenile Justice, *Youth In The Adult System*, ACT 4 JUVENILE JUSTICE, https://www.act4jj.org/sites/default/files/ckfinder/files/ACT4JJ%20Youth%20In%20Adult%20System%20Fact%20Sheet%20Aug%202014%20FINAL.pdf (last visited April 6, 2018). *See also* National Conference of State Legislatures, *Cost-Benefit Analysis of Juvenile Justice Programs*, ncsl.org, http://www.ncsl.org/documents/cj/jjguidebook-costbenefit.pdf. (last visited April 6, 2018) (discussing how different states have created rehabilitative programs that help them save money.).

will not be duplicated because the hearing before the juvenile officers will differ from the one in adult court. The former will be about the fitness of the minor to stand trial in adult court while the latter will be about the guilt, if the case is transferred.

VII. Conclusion

Mandatory transfers of juveniles to adult court violates the minors' right to rehabilitation because it fails to consider that the punishment should be "[g]raduated and proportioned to both the offender and the offense."[227] Although "the United States Supreme Court has championed the creation of tangible differences between juveniles and adults in our legal system,"[228] states continue to mandatorily transfer minors, disregarding the minors' "[l]ack of maturity and…underdeveloped sense of responsibility." [229]

Transferring a minor to adult court when it can be shown that the minor is fully mature and can appreciate the legal consequences of such action is constitutional. However, if it cannot be proven that the minor can appreciate the legal consequences, he should not be punished under the same standard as someone who fully understands and comprehends what he or she was doing. This does not mean a minor is "[n]ot absolved of responsibility for his actions, but his transgression is not as morally reprehensible as that of an adult."[230]

Mandatory transfer of minors to adult court is unconstitutional because it violates the minor's Eighth amendment right of rehabilitation and due process rights. The states should hold a transfer hearing before a juvenile court judge who should decide on the appropriateness of transferring the minors to adult courts. In adult courts, the question is: are minors guilty or innocent? But, in juvenile court, the question would not be a matter of guilt or innocence but "how culpable are they, how do we punish them?"[231]

There is a great need to incorporate science in the juvenile justice system. The implication of "science may also help us understand which juvenile offenders are

---

[226] Prop. 57 was passed by the majority of California voters on November 8, 2016. It essentially requires that juvenile petitions be filed in all matters where a person under the age of eighteen and at least sixteen is alleged to have committed any felony, or a crime listed in 707(b) if the minor was fourteen or fifteen years of age at the time when the crime was committed. The District Attorney no longer has the discretion to directly file complaints in adult court and must file a motion to transfer the matter to adult court jurisdiction. Once a transfer motion has been filed, the juvenile court must make the determination which court should exercise jurisdiction over the minor's case.

[227] Miller v. Alabama, 567 U.S. 460, 469 (2012).

[228] Amanda Huston, *Jurisprudence vs. Judicial Practice: Diminishing Miller in the Struggle Over Juvenile Sentencing*, 92 DENV. U.L. REV. 561, 564 (2015).

[229] Graham v. Florida, 560 U.S. 48, 68 (quoting Roper v. Simmons, 543 U.S. 551, 569-70 (2005)).

[230] *Id*. (quoting Thompson v. Oklahoma, 487 U.S. 815, 835 (1988)).

[231] Requarth, *supra* note 210.

likely to commit future crimes and which may not."[232] For instance, "neuroscience is improving our understanding of adolescents, and potentially, juvenile offenders."[233] With neuroscience, we can develop better preventive measures to guide the minors and create better plans to rehabilitate them.

The question becomes, how can and should common delinquency prevention and juvenile justice practices and laws change to incorporate a more sensible approach to addressing the needs of adolescents, while balancing them with community safety needs?[234] The best approach is to make use of the individualized sentencing approach while integrating it into the balanced sentencing approach. The individualized sentencing approach, on one end, will allow the juvenile court to decide whether the minor is fit to stay in juvenile court or to go to adult court based on scientific research, the minor's social background, family ties, educational background, mental health, physical development, along with the other factors. The balanced sentencing approach, on the other end, will consider the community safety, the victim, and the offender's needs. At last, if the juvenile has not reached maturity to think and behave as an adult, the case should stay in juvenile court.

Mandatorily transferring minors to adult court on the basis that the juvenile justice system is too lenient is a misconception of the role of the juvenile justice system. The juvenile justice system punishes minors based on the minors' capacities because "the offenses of juveniles, to begin with, are mitigated though not negated."[235] In mandatorily transferring the minors to adult courts, the court should ask "does the indulgence of the court in its sentencing outweigh the loss of protection inherent in the relative absence of due process?"[236]

Mandatorily transferring minors to the criminal justice system by bypassing the juvenile justice system violates their due process clause of the Fourteenth Amendment, violates their Eighth Amendment right to rehabilitation, and deviates from the purposes of the juvenile justice system; therefore, it is unconstitutional.

---

[232] Coalition for Juvenile Justice Emerging Concepts Brief, *supra* note 216, at 2.

[233] *Juvenile Justice & the Adolescent Brain*, MASSACHUSETTS GENERAL HOSPITAL http://clbb.mgh.harvard.edu/juvenilejustice/, (last visited May 23, 2018).

[234] Coalition for Juvenile Justice Emerging Concepts Brief, *supra* note 216.

[235] MATZA, *supra* note 20, at 71.

[236] *Id.*

P.R.O.M.E.S.A's STAY IN CIVIL RIGHTS CASES: *IN PRAXIS* VIEW OF VIOLATIONS TO PUERTO RICANS' CONSTITUTIONAL FUNDAMENTAL RIGHTS

*José Enrico Valenzuela-Alvarado**

I. Introduction

Jean Baudrillard, in *Le Système des objets*[1] said: "[c]redit brings us back to a situation characteristic of feudalism, in which a portion of labor is owed in advance, as serf labor, to the feudal lord." Puerto Rican Government dependency in "credit over credit over credit" –and so on–, with unreal economic growth, all dependable of the United States imports and creditors, has led us to something worst; a new era of colonial-feudalism.

As regrettably Jean Baudrillard adds; there is a difference for our system, unlike feudalism, it reposes on complicity: modern consumers spontaneously embrace and accept the unending constraint that is imposed on them.[2] As such, our neoliberal

---

* *José Enrico Valenzuela-Alvarado*, founder of Valenzuela-Alvarado, LLC; J.D., Universidad Interamericana de Puerto Rico (2002); B.A. (Political Science), Universidad de Puerto Rico-Río Piedras (1999). For further information, visit www.valenzuelalaw.net. The Author appreciates Professor Carlos A. Del Valle-Cruz, for all his help in this Article.

[1] Jean Baudrillard, Le Système des objets 160, (Verso, ed., 1996) («The System Of Objects», English translation by James Benedict). *Originale,* Jean Baudrillard, Le Système des objets, (Gallimard ed., 1968).

[2] *Id.*

society is a growing cancer that gets bigger by the complicity of vulture creditors, together with the Puerto Rico and the U.S. Governments who have been perpetuating this economic and fiscal crisis. And, for a better understanding, this scenario: local government using debt "guaranteed by Puerto Rico's Constitution" to gain votes, with vulture "bonds" to finance said promises from the local government, with no regulations from the federal government –just like what happened in Wall Street with mortgages bubbles–, and one can see the result that is inevitable, an unpayable debt. Not from a county or a city like Detroit, but from a non-incorporated territory that had two recent referendums in which "statehood" won, but has never been granted although the current government is pro-statehood.

As such, a harsh colonial-feudalism example occurred on June 30, 2016, when Congress enacted the Puerto Rico Oversight, Management, and Economic Stability Act ("P.R.O.M.E.S.A.")[3], a bankruptcy-like statute designed to address the impending insolvency and the "humanitarian crisis" induced by it.[4] Surprisingly enough, a survey[5] at that time demonstrated that most residents in Puerto Rico supported the P.R.O.M.E.S.A. initiative. In sum, P.R.O.M.E.S.A. establishes a Financial Oversight and Management Board ("the Board") to "provide a method for the covered territory to achieve fiscal responsibility and access to the capital markets."[6] Title III creates a mechanism to allow the Board to restructure and adjust the Commonwealth's debt obligations.[7] In enacting P.R.O.M.E.S.A., Congress instituted a stay of all creditor litigation against the Commonwealth to allow a litigation free negotiation period.[8] While the P.R.O.M.E.S.A. stay is temporary but indefinite, its expiration is irrelevant, since then the automatic stay provisions of the Bankruptcy Code would get in.[9]

Now, what is happening with all civil rights cases brought forth, that can be filed under the Federal Civil Rights Act of 1964, 42 U.S.C. Section 1983? Believe it or not, P.R.O.M.E.S.A. allows the Commonwealth to automatically stay all civil rights litigation against it. One of the main reasons of P.R.O.M.E.S.A.'s creation is not only because of Puerto Rico's irresponsible Government transactions, it is also because the Bankruptcy Code does not allow a State to invoke Chapter 9 bankruptcy protection.

---

[3] Puerto Rico Oversight, Management, and Economic Stability Act, 48 U.S.C. §§ 2102–2241 (2016).

[4] *See* Brief for Appellant, at 6, Pabón Ortega v. Llompart Zeno, No. 16-1599 (1st Cir. Jan. 31, 2018). *See generally* Peaje Inv. LLC v. García–Padilla, 845 F.3d 505, 509 (1st Cir. 2017) (discussing the statute's purpose).

[5] Keila López Alicea, *Intriga El Apoyo De La Junta De Control Fiscal*, EL NUEVO DÍA, (Aug. 19, 2016), https://www.elnuevodia.com/noticias/locales/nota/intrigaelapoyoalajuntadecontrolfiscal-2232357/. *See also Noticentro TV (18 feb 2018) [Violación a Derechos Civiles por PROMESA],* YOUTUBE (Feb. 18, 2018), https://youtu.be/bDr_MtUWGHU.

[6] 48 U.S.C. § 2121. *See also* Brief for Appellant, *supra* note 4, at 6-7.

48 U.S.C §§ 2161–77. *See also* Brief for Appellant, *supra* note 4, at 7.

[8] *Id*. § 405(b). *See also* Brief for Appellant, *supra* note 4, at 7.

[9] *Id*. § 2161(a) (incorporating 11 U.S.C. §§ 361-62 into Title III proceedings).

P.R.O.M.E.S.A., on the other hand, treats the Commonwealth as a potential debtor eligible to participate in the formal debt restructuring process. In doing so, as Professor Carlos Del Valle-Cruz says; "Congress gave the Commonwealth a mutant power alien to any State: the capacity to automatically stay for indefinite periods of time all litigation that seeks to establish liabilities against the Commonwealth. The Court, however, exceeded its hermeneutical authority, when it included § 1983 actions within PROMESA's grasp".[10] Quite simple, like Honorable Judge Torruella has stated, this "territorial federalism" without political power, and as such, is not federalism.[11] Puerto Rico is back to the "insular cases", and our rights are not equal to the U.S. citizens who reside in the mainland.

II. Puerto Rico's exclusion from the Bankruptcy Code: P.R.O.M.E.S.A.

History tells us that from 1938 to 1984, Puerto Rico enjoyed the protections of the U.S. Bankruptcy Code. This safeguard was blatantly removed in 1984, eliminating the power that Puerto Rico once had been granted by Congress to authorize its municipalities (read, public utilities) to file for Chapter 9 relief.[12] As a matter of fact, First Circuit Court Judge Torruella in *Franklin Cal. Tax-Free Trust v. Commonwealth*,[13] in concurrence opinion held that said exclusion of Puerto Rico by reason of territorial status violates the equal protection clause.

Nevertheless, Congress has failed to enact proposed legislation reauthorizing Puerto Rico to approve municipal bankruptcies. This situation, in turn, sparked an astronomic spike in bondholder's liability, such that Puerto Rico's accumulated debts have long surpassed its capacity to pay. At present, Puerto Rico's present public debt is approximately seventy-two billion, not counting the approximately

---

[10] *See also* Brief for Appellant *supra* note 4, at 7.

[11] *See* Juan R. Torruella, *Why Puerto Rico Does Not Need Further Experimentation with Its Future: A Reply to the Notion of "Territorial Federalism"*, 131 HARV. L. REV. F. 65 (Jan. 26 2018) https://harvardlawreview.org/2018/01/a-reply-to-the-notion-of-territorial-federalism/ (P.R.O.M.E.S.A. represents a return to the Foraker era).

[12] *See,* Brief for Appellant, *supra* note 4, at 7. Pabón Ortega v. Llompart Zeno, No. 16-1599 (1st Cir. Jan. 31, 2018) (citing Commonwealth of P.R., Financial Information and Operating Data Report (2016)); *Congressional Task Force On Economic Growth in Puerto Rico*, U.S. SENATE (Dec. 20, 2016) https://www.finance.senate.gov/imo/media/doc/Bipartisan%20Congressional%20Task%20Force%20on%20Economic%20Growth%20in%20Puerto%20Rico%20Releases%20Final%20Report.pdf; Anne O. Krueger, Ranjit Teja & Andrew Wolfe, *Puerto Rico-– A Way Forward* (2015) DEVELOPMENT BANK OF PUERTO RICO, http://www.bgfpr.com/Documents/Puertoricoawayforward.Pdf; *Addressing Puerto Rico's Economic And Fiscal Crisis And Creating A Path To Recovery: Roadmap For Congressional Action* OBAMA WHITE HOUSE (Oct. 21, 2015), https://obamawhitehouse.archives.gov/sites/default/files/roadmap_for_congressional_action___puerto_rico_final.pdf; D. Andrew Austin, *Puerto Rico's Current Fiscal Challenges* FAS.ORG (June 3, 2016) https://fas.org/sgp/crs/row/R44095.pdf.

[13] 805 F.3d 322, 345-56 (1st Cir. 2015).

$164 billion that Puerto Rico's government has in deficits to its public health system and government employee pension plans.[14]

III. Pueblo v. Sánchez Valle:[15] the naked colonialism

In *Pueblo v. Sánchez Valle*, Luis Sánchez and Jaime Gómez each sold a gun to an undercover police officer and pled guilty to federal gun trafficking violations. Despite the federal conviction, the Commonwealth of Puerto Rico indicted them for selling a firearm without a permit in violation of the Puerto Rico Arms Act of 2000. They were later convicted of an analogous federal law based on the same conduct. Luis Sánchez and Jaime Gómez moved to dismiss the commonwealth charges on double jeopardy grounds. The trial court dismissed the charges, but the court of appeals reversed. The Puerto Rico Supreme Court[16] affirmed, holding that double jeopardy applied.[17]

The U.S. Supreme Court affirmed said holding, by finally concluding that dismissal of the pending Commonwealth charges was proper under the dual-sovereignty carve-out from the Double Jeopardy Clause, U.S. Const. amend. V, because the Double Jeopardy Clause barred both Puerto Rico and the United States from prosecuting a single person for the same conduct under equivalent criminal laws; and that the Commonwealth and the United States were not separate sovereigns because the ultimate source of Puerto Rico's prosecutorial power is the federal government.

Justice Breyer filed a dissenting opinion by which Justice Sotomayor joined.[18] Together:

> The dissenting justices took issue with the Court's sovereignty analysis and with its failure to consider the context of the 1952 Puerto Rico Constitution. First, under the Court's analysis, the source of power for the Indian tribes, the 37 states to join the Union after the constitution, or even the Philippines, likewise ultimately stems from Congress. Second, the context surrounding the creation and approval of the Puerto Rico Constitution illustrates that both Congress and Puerto Rico intended the grant of a right of self-government to Puerto Rico.[19]

---

[14] *See* Brief for Appellant, *supra* note 4, at 8; Pabón Ortega v. Llompart Zeno, No. 16-1599 (1st Cir. Jan. 31, 2018) (citing Torruella, *supra* note 11 at IV. (The Fourth Experiment: Puerto Rico's Financial Fiasco and Congress's PROMESA)).

[15] Pueblo v. Sánchez Valle, 136 S. Ct. 1863 (2016)

[16] Pueblo v. Sánchez Valle, 192 DPR 594 (2015).

[17] Cam Barker et al., *U.S. Supreme Court Update*, 28 APP. ADVOC. 451, 462-63 (2016).

[18] *Id*. at 463.

[19] *Id*.

This decision certainly broke the "in a nature of a compact" paradigm of two alleged "nations" that have a "special relationship" with economic growth and success that showed to Latin America that there was a "window of democracy" in Puerto Rico. This naked truth of colonialism, was only the beginning of the actual reality: a fiscal crisis with no economic growth that is totally dependable in imports and the worst happened thereafter: P.R.O.M.E.S.A.

IV. "Quiebra Criolla": unconstitutional?

Author Natasha Lycia Ora Bannan explains in sum that, days before Puerto Rico enacted its "*quiebra criolla"* law on June 28, 2014, which allowed its municipalities and agencies to access a debt restructuring regime identical to Chapter 9 of the federal Bankruptcy Code, a hedge fund filed suit challenging the constitutionality of the law and Puerto Rico's ability to implement its own domestic version of bankruptcy protections.[20] This "quiebra criolla" law caused the desperate move of other hedge funds to file and join the suit against Puerto Rico.[21]

The case finally went all the way up to the U.S. Supreme Court. In *Puerto Rico v. Franklin Cal. Tax-Free Trust*,[22] the U.S. Supreme Court concluded that Congress' use of "who may be a debtor" in 11 U.S.C.S. § 101(52) was interpreted to mean that Congress intended to exclude Puerto Rico from the gateway provision delineating who was eligible to be a debtor under Chapter 9, and thus, Puerto Rico was not a state for purposes of 11 U.S.C.S. § 109(c) and could not perform the single function of the states under that provision. In addition, the U.S. Supreme Court concluded that Puerto Rico remained a state for other purposes related to Chapter 9, including 11 U.S.C.S. § 903(1), and that provision barred Puerto Rico from enacting its own municipal bankruptcy scheme to restructure the debt of its insolvent public utilities companies. And, due to this decision, P.R.O.M.E.S.A. was enacted on June 30, 2016.

V. Are exceptions to P.R.O.M.E.S.A., real options?

A. In general

Section 404 of P.R.O.M.E.S.A. reads as follows:

> (b) IN GENERAL
>
> .—Except as provided in subsection (c) of this section, the establishment of an Oversight Board for Puerto Rico (i.e., the enactment

---

[20] Natasha Lycia Ora Bannan, *Puerto Rico Odious Debt: The Economic Crisis of Colonialism*, 19 CUNY L. REV. 287, 301 (2016) (citing Franklin Cal. Tax-Free Tr. v. Puerto Rico*,* 85 F. Supp. 3d 577 (D.P.R. 2015)).

[21] Bannan, *supra* note 20, at 301 (citing Franklin Cal. Tax-Free Tr., 85 F. Supp. 3d at 584-85, nn.1-2).

[22] 136 S. Ct. 1938, 195 L. Ed. 2d 298 (2016).

of this Act) in accordance with section 101 operates with respect to a Liability as a stay, applicable to all entities (as such term is defined in section 101 of title 11, United States Code), of—

(1) the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the Government of Puerto Rico that was or could have been commenced before the enactment of this Act, or to recover a Liability Claim against the Government of Puerto Rico that arose before the enactment of this Act;

(2) the enforcement, against the Government of Puerto Rico or against property of the Government of Puerto Rico,

of a judgment obtained before the enactment of this Act;

(3) any act to obtain possession of property of the Government of Puerto Rico or of property from the Government of Puerto Rico or to exercise control over property of the Government of Puerto Rico;

(4) any act to create, perfect, or enforce any lien against property of the Government of Puerto Rico;

(5) any act to create, perfect, or enforce against property of the Government of Puerto Rico any lien to the extent that such lien secures a Liability Claim that arose before the enactment of this Act;

(6) any act to collect, assess, or recover a Liability Claim against the Government of Puerto Rico that arose before the enactment of this Act; and

(7) the setoff of any debt owing to the Government of Puerto Rico that arose before the enactment of this Act against any Liability Claim against the Government of Puerto Rico.

(c) STAY NOT OPERABLE

.—The establishment of an Oversight Board for Puerto Rico in accordance with section 101 does not operate as a stay—

(1) solely under subsection (b)(1) of this section, of the continuation of, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the Government of Puerto Rico that was commenced on or before December 18, 2015; or

(2) of the commencement or continuation of an action or proceeding by a governmental unit to enforce such governmental unit's or organization's police and regulatory power, including the enforcement of a judgment other than a money judgment, obtained in an action or proceeding by the

> governmental unit to enforce such governmental unit's or organization's police or regulatory power.[23]

In several cases, the U.S. Supreme Court recognizes the police power of public services corporations like in the energy public corporations. For example, in *Arkansas Electric Cooperative Corp. v. Arkansas Public Service Commission,*[24] the U.S. Supreme Court held that; "[t]he regulation of utilities is one of the most important of the functions traditionally associated with the police power of the states." In *Pacific Gas & Electric Co. v. State Energy Resources Conservation & Development Commission*,[25] the U.S. Supreme Court adds that; "[n]eed for new power facilities, their economic feasibility, and rates and services, are areas that have been characteristically governed by the States."[26] At the same time, however, in *Arkansas Electric* the U.S. Supreme Court concluded that the "[p]roduction and transmission of energy is an activity particularly likely to affect more than one State, and its effect on interstate commerce is often significant enough that uncontrolled regulation by the States can patently interfere with broader national interests."[27]

B. "Cause" for relief from stay

Similar to Section 404 of P.R.O.M.E.S.A., Section 362 of the Bankruptcy Code provides that the court may grant relief from the automatic stay to a party in interest "for cause".[28] However, like P.R.O.M.E.S.A., Section 362 does not provide concrete guidance on how that term ought to be construed and applied in practice.[29] In reviewing motions to vacate the Bankruptcy Code's automatic stay pursuant to Section 362(d) the United States Courts of Appeals have consistently found that the decision to grant that relief is largely discretionary with the court.[30] To help guide

---

[23] 48 U.S.C. § 2194.

[24] 461 U.S. 375, 377 (1983).

[25] 461 U.S. 190, 205 (1983); *see also* Central Hudson Gas & Electric Corp. v. Public Service Commission, 447 U.S. 557, 569 (1980) ("The state's concern that rates be fair and efficient represents a clear and substantial governmental interest.").

[26] *Pacific Gas*, 461 U.S. at 205.

[27] *Arkansas Electric*, 461 U.S. at 377.

[28] United States Bankrupcty Code, 11 U.S.C. § 362(d)(1).

[29] Peaje Invs. LLC v. Garcia-Padilla, Civil No. 16-2365; Civil No. 16-2384; Civil No. 16-2696, 2016 U.S. Dist. LEXIS 153711 at *12 (DPR Nov. 2, 2016).

[30] *Id.* (citing In re Myers, 491 F.3d 120, 130 (3d Cir. 2007) (commenting on the "wide latitude accorded to the Bankruptcy Court to balance the equities when granting relief from the automatic stay.")); Brown v. Chesnut (*In re Chesnut*), 422 F.3d 298, 303-04 (5th Cir. 2005) (noting that 11 U.S.C. § 362 gives the bankruptcy court broad discretion to vacate the automatic stay and "flexibility to address specific exigencies on a case-by-case basis"); Claughton v. Mixson, 33 F.3d 4, 5 (4th Cir. 1994) (noting that Congress "has granted broad discretion to bankruptcy courts to lift the automatic stay" and that "the

their analysis of whether to enforce or vacate the stay, some courts, including those in this district, have relied upon a laundry list of assorted factors.[31] In the end, however, the process of evaluating whether there is sufficient "cause" to vacate the automatic stay in bankruptcy cases requires the court to engage in an equitable, case-by-case balancing of the various harms at stake.[32]

Suffice is to say that automatic stay imposed by section 405(b) of P.R.O.M.E.S.A. is not absolute in nature. No law or right can be absolute. Even tough Congress unambiguously unilaterally imposed their view that the stay is needed to "provide the Government of Puerto Rico with the resources and the tools it needs to address an immediate existing and imminent crisis," P.R.O.M.E.S.A. section 405(n)(1), it also appeared to anticipate that certain circumstances might justify relief from the stay's significant and static effects. It therefore included a form of safety zone in section 405(e) of P.R.O.M.E.S.A. to allow certain holders of "liability claims" against the Government of Puerto Rico to proceed with their actions, provided that they could effectively demonstrate "cause" for doing so. But, is claiming constitutional rights under the Federal Civil Rights Act by Puerto Rican residents sufficient to be a "cause" for not applying the stay?

P.R.O.M.E.S.A. does not successfully indicate what, exactly, a party in interest must do to establish "cause" for relief from the automatic stay. Nevertheless, it is the

---

courts must determine when discretionary relief is appropriate on a case-by-case basis."); Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 814 F.2d 844, 847 (1st Cir. 1987) (applying abuse of discretion standard to court's decision granting relief from the automatic stay); Matter of Holtkamp, 669 F.2d 505, 507 (7th Cir. 1982) (emphasizing that Section 362(d) "commits the decision of whether to lift the stay to the discretion of the bankruptcy judge.")

[31] Peaje Invs. LLC, 2016 U.S. Dist. LEXIS 153711, at *13 (citing Sonnax Industries, Inc. v. Tri Component Prods. Corp.). (*In re Sonnax Industries, Inc*.), 907 F.2d 1280, 1286 (2d Cir. 1990) (enumerating 12 different factors to be utilized in determining whether there is "cause" to vacate a bankruptcy stay, including the "impact of the stay on the parties and the balance of harms"); *see also* C&A, S.E. v. P.R. Solid Waste Mgmt. Auth., 369 B.R. 87, 94-95 (DPR 2007) (considering factors similar to those spelled out in *Sonnax*).

[32] Peaje Invs. LLC, 2016 U.S. Dist. LEXIS 153711, at *13-14, (citing Peerless Ins. Co. v. Rivera, 208 B.R. 313, 315 (D.R.I. 1997)). (Suggesting that cause generally exists "when the harm that would result from a continuation of the stay would outweigh any harm that might be suffered by the debtor . . . if the stay is lifted."); In re Robinson, 169 B.R. 356, 359 (E.D. Va. 1994) (noting that, "in deciding whether 'cause' has been shown, the bankruptcy court must balance the potential hardship that will be incurred by the party seeking relief if the automatic stay is not lifted, against the potential prejudice to the debtor" if it is.); In re Turner, 161 B.R. 1, 3 (Bankr. D. Me. 1993) ("Cause may exist for lifting the stay whenever the stay harms the creditor and lifting the stay will not unduly harm the debtor."); In re Harris, 85 B.R. 858, 860 (Bankr. D. Colo. 1988) (holding that vacating the automatic stay is appropriate where "no great prejudice will result to the debtor" and "the hardship to the creditor resulting by continuing the stay considerably outweighs the hardship to the debtor by modification of the stay."); In re Opelika Mfg. Corp., 66 B.R. 444, 448 (Bankr. N.D. Ill. 1986) ("Cause to lift the stay exists when the stay harms the creditor and lifting the stay will not unjustly harm the debtor or other creditors.").

author's position that a case under the Federal Civil Rights Act must not be stayed, since said civil action is against "state actors" in their individual capacities, not against the Commonwealth of Puerto Rico itself. Now, P.R.O.M.E.S.A. leaves the task of defining the boundaries of that specific term to the discretion of the courts. Thus, before it can proceed to review any arguments and evidence presented by the parties involved, the district court must first attempt to clarify the meaning and parameters of the governing principle of "for cause shown", within the meaning and purpose of the Federal Civil Rights Act to Puerto Rican residents.

As summarized above, Section 405 of P.R.O.M.E.S.A. was patterned on the automatic stay provision of the United States Bankruptcy Code in 11 U.S.C. § 362. Indeed, the two provisions are, in some respects, nearly identical. Similar to section 405 of P.R.O.M.E.S.A., section 362 of the United States Bankruptcy Code provides that courts may grant relief from the automatic stay to a party in interest "for cause."[33] Also like PROMESA, however, section 362 does not provide concrete guidance on how that term ought to be construed and applied in practice. As set forth in the following decisions, the United States courts of appeals reviewing motions to vacate the Bankruptcy Code's automatic stay pursuant to section 362(d) have consistently found that the decision to grant that relief is largely discretionary with the court.

For example, *In re Myers*,[34] the Third Circuit Court of Appeals used the term "wide latitude" according to the Bankruptcy Court to balance the equities when granting relief from the automatic stay. Likewise, in *Brown v. Chestnut* (*In re Chestnut*),[35] the Fifth Circuit noted that 11 U.S.C. § 362 gives the bankruptcy court broad discretion to vacate the automatic stay and "flexibility to address specific exigencies on a case-by-case basis". Similarily, in *Claughton v. Mixson,*[36] the Fourth Circuit concluded that Congress "has granted broad discretion to bankruptcy courts to lift the automatic stay" and that "the courts must determine when discretionary relief is appropriate on a case-by-case basis."

In the case of *In re Ulpiano Unanue-Casal*,[37]—a district court decision that the First Circuit affirmed—the court took guidance from the following factors:

> (1) Whether the relief will result in a partial or complete resolution of the issues; (2) The lack of any connection with or interference with the bankruptcy case; (3) Whether the non-bankruptcy proceeding involves the

---

[33] 11 U.S.C. § 362(d)(1).

[34] 491 F.3d 120, 130 (3d Cir. 2007).

[35] 422 F.3d 298, 303-04 (5th Cir. 2005).

[36] 33 F.3d 4, 5 (4th Cir. 1994). *See also* Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 814 F.2d 844, 847 (1st Cir. 1987).

[37] 159 B.R. 90, 95-96 (DPR 1993) *aff'd* by 23 F.3d 395 (1st Cir. 1994). The court also relied on two additional factors; namely, the misconduct of the debtor and whether the creditor has a probability of prevailing on the merits. *Id*. at 96.

> debtor as a fiduciary; (4) Whether a specialized tribunal has been established to hear the particular cause of action and that tribunal has the expertise to hear such cases; (5) Whether the debtor's insurance carrier has assumed full financial responsibility for defending the litigation; (6) Whether the action primarily involves third parties; (7) Whether litigation in another forum would prejudice the interests of other creditors, the creditors' committee or other interested parties; (8) Whether the judgment claim arising from the foreign action is subject to equitable subordination under Section 510(c); (9) Whether movant's success in the foreign proceeding would result in a judicial lien avoidable by the debtor under Section 522(f); (10) The interest of judicial economy and the expeditious and economical determination of litigation for the parties; (11) Whether the non-bankruptcy proceedings have progressed to the point where the parties are prepared for trial; and (12) The impact of the stay on the parties and the "balance of hurt."[38]

As can be noted, "courts must determine whether discretionary relief is appropriate on a case-by-case basis",[39] but regarding civil rights cases, the U.S. Constitution is way ahead of the "lift of stay" exception explained above in Section 405 of P.R.O.M.E.S.A.

VI. Recommendations

As it is known, the Civil Rights Act, specifically Section 1983 of Title 42, "is not itself a source of substantive rights," but merely provides "a method for vindicating federal rights elsewhere conferred." "The first step in any such claim is to identify the specific constitutional right allegedly infringed".[40] Authors *Ivan E. Bodensteiner* and *Rosalie Berger Levinson*,[41] explain that while preparing the caption and pleadings in a Section 1983 complaint, plaintiff should care to designate whether government officials are being sued in their official or individual capacity. When the plaintiff names an official in his individual capacity, she seeks "to impose personal liability upon a government official for actions he takes under the color of state law." When officials are sued in their personal capacity, they may raise qualified and/or absolute immunity as a defense. When a government official is sued in his official capacity,

---

[38] *Id.* at 95-6.

[39] In re Laguna Assocs. Ltd. P'ship, 30 F.3d 734, 737 (6th Cir. 1994).

[40] José Enrico Valenzuela-Alvarado, *Federal Civil Rights In Puerto Rico, General Pre Trial Theory And Praxis In The New Century*, 44 REV. JUR. UIPR 197, 200 (2010) (citing *Albright v. Oliver,* 510 U.S. 266, 271 (1994)).

[41] Valenzuela-Alvarado, *supra* note 40, at 200 (citing IVAN E. BODENSTEINER & ROSALIE BERGER LEVINSON, STATE AND LOCAL GOVERNMENT CIVIL RIGHTS LIABILITY § 1:8 (2009)).

this is the equivalent to naming the government entity itself as a defendant. Where that governmental entity is a state, the plaintiff poses an absolute barrier unless the official capacity suit seeks only prospective relief. Where the governmental entity is a local or county unit, the plaintiff must establish official policy or custom.[42]

Now, what about the argument that the Government of Puerto Rico will ultimately pay any judgment against government officials in their personal capacities? The response is very simple. Act No. 104 in no way waives the Commonwealth's Eleventh Amendment immunity in such suits; because said statute explicitly states that its provisions "shall not be construed . . . as a waiver of the sovereign immunity of the Commonwealth."[43] In ***Ortíz-Feliciano v. Toledo-Dávila***,[44] the First Circuit held that the indemnification provisions of Puerto Rico law certainly do not comprise such a waiver of the Eleven Amendment Immunity. Puerto Rico's Act. No. 104 provides that the Secretary of Justice shall decide in which cases the Commonwealth shall assume representation and "subsequently, after considering the findings of the court or which arise from the evidence presented," whether it is "in order" to pay the judgment.[45] Only limited standards are provided for granting or refusing indemnification, but they go to the merits of the Secretary of Justice's decision. Nonetheless, the Eleventh Amendment issue is addressed directly by section 3085 of Act No. 104, which permits the request for indemnification in civil rights actions; it says that its provisions "shall not be construed . . . as a waiver of the sovereign immunity of the Commonwealth." The only remedy provided for reviewing the refusal of the Secretary of Justice to order indemnification is by "petition for review" before "the Superior Court" limited solely to questions of law.[46]

Based on the above discussion, recently, the U.S. District Court for the District of Puerto Rico in *Colón-Colón v. Negrón Fernández*,[47], Honorable Judge Gustavo A. Gelpí explained in this decision our main argument. In said case, Plaintiff sued José Aponte-Caro, in his official capacity as acting Secretary of the Department of Corrections of Puerto Rico; José R. Negrón-Fernández, in his individual and official capacity as Secretary of the Department of Corrections of Puerto Rico; Dr. Alina Pradere, in her individual and official capacity as former Director of Clinical Services for the Bayamón Correctional Facility; Wanda Montañez, the Superintendent of the

---

[42] Valenzuela-Alvarado, *supra* note 40, at 201, (citing 1999 Laws P.R. 177, Act. No. 104 of June 29, 1955, as amended by Act No. 9 of November 26, 1977, and Act No. 12 of July 21, 1977 [hereinafter "Act No.104"]).

[43] Valenzuela-Alvarado, *supra* note 40, at 201 (citing U.S. CONST. amend. XI; CÓD. ENJ. CIV. PR arts. 12, 14, 32 LPRA §§ 3085, 3087 (2017)).

[44] 175 F.3d 37, 40 (1st Cir. 1999).

[45] Valenzuela-Alvarado, *supra* note 40, at 201 (citing CÓD. ENJ. CIV. PR art. 14, 32 LPRA § 3087 (2017)).

[46] *Id*.

[47] No. 14-1300, 2018 WL 2208053 (DPR May 14, 2018).

Bayamón Correctional Facility; Gladys S. Quiles-Santiago, the Medical Director of the Bayamón Health Clinical Services Facility; and Correctional Health Services Corp., a non-profit corporation. Plaintiff filed claims under the Eighth Amendment to the U.S. Constitution and Article 1802 of the Puerto Rico Civil Code seeking compensatory damages and prospective injunctive relief.[48] The Commonwealth assumed Defendants Aponte-Caro and Negrón-Fernández's representation under Law 9.[49] Dr. Pradere, the other official sued in her personal capacity, was never served with the complaint.[50] Montañez was served and defaulted.[51] Finally, Quiles-Santiago and Correctional Health Services Corporation were represented by the same counsel.[52] Hence, the only government official sued in his individual capacity that the Commonwealth represented was Defendant Negrón-Fernández.[53]

After almost three years, Plaintiff settled his claims.[54] On March 30, 2017, Plaintiff informed the Court that he had "accepted the $50,000.00 settlement offer tendered by the defendants."[55] He did not inform how Defendants split the amount or other settlement terms.[56] On April 19, the Court ordered Defendants to pay $50,000.00 within ninety days "as per the settlement terms."[57] Two weeks later, on May 3, 2017, Puerto Rico's Financial Oversight Board filed a petition on behalf of Puerto Rico under Title III of P.R.O.M.E.S.A.[58] After the Commonwealth filed for Title III protection, on May 31, Defendants Correctional Health Services, Corp. and Quiles-Santiago deposited $40,000, and stated in their motion that the Commonwealth had agreed to pay the remaining $10,000.[59] The Commonwealth did not object to this statement, but months passed and it did not deposit the remaining $10,000.[60]

After other procedural steps, as of the date of the Opinion and Order rendered on May 14, 2018, the remaining $10,000.00 have not been deposited. Due to that, Honorable Judge Gustavo A. Gelpí concluded the following:

> First, the Court disagrees that PROMESA contemplated the stay of suits against government officials in their personal capacity, much less the

---

[48] *Id.* at *2.
[49] *Id*. at *3.
[50] *Id*.
[51] *Id*.
[52] *Id*.
[53] *Id*.
[54] *Id*.
[55] *Id*.
[56] *Id*.
[57] *Id*.
[58] *Id*.
[59] *Id*. at *3-4.
[60] *Id*. at *4.

> enforcement of settlements against these officials entered before Title III. As discussed above, the "debtor" in a case between a plaintiff and a government official sued in his personal capacity is the government official. If the Commonwealth opts to represent the government official under Law 9, the Commonwealth is a "debtor" of the government official, not the plaintiff. Even if the practical arrangement has been for the Commonwealth to pay the plaintiff directly on the government official's behalf, the practical arrangement does not change the underlying structure. The party indebted to the plaintiff is the government official, not the Commonwealth representing the government official.
>
> Second, the Court understands the public policy concern regarding recruitment, but will not second-guess the Commonwealth's public policy decisions. Here, the Commonwealth settled the case five weeks before filing the Title III petition. Unless the left hand did not know what the right hand was doing, the Court has a hard time believing that the Commonwealth did not settle this case knowing that it would file a Title III petition shortly after. The Commonwealth chose not to pay Plaintiff on Defendant Negrón-Fernández's behalf before the stay came into effect. As a result, unless the Commonwealth pays, Defendant Negrón-Fernández is personally liable to Plaintiff, and must wait in line to recover his agreed-upon indemnification from the Commonwealth. Whatever effect this may have on the Commonwealth's recruitment efforts is a matter for the Commonwealth to consider when agreeing to represent officials under Law 9 and settling on their behalf—not the Court.[61]

The above decision is very important for civil rights cases for the following reason. In Puerto Rico, Author Guillermo A. Baralt in his book, History of the Federal Court in Puerto Rico, 1899-1999,[62] explains that there was an increase in the number of cases that came before the federal court during the first half of the seventies. There is no doubt that the actions filed under the 1964 Civil Rights Act explain part of this increase regarding public employees that have been removed from their jobs by their political affiliation. As such, staying civil rights cases make the situation much worse, since it gives *carte blanche* to Puerto Rico's officials in their personal capacities to discriminate and to act against the U.S. Constitution.

Based on the above, Professor Carlos A. Del Valle Cruz recommends that the automatic stay provisions at issue here must be read in light of Section 2106, which provides that P.R.O.M.E.S.A. "shall [not] be construed as impairing or in any

---

[61] *Id*. at *13-14.

[62] Valenzuela-Alvarado, *supra* note 40, at 197 (citing GUILLERMO A. BARALT, HISTORY OF THE FEDERAL COURT IN PUERTO RICO 1899-1999, 428-30 (2004)).

manner relieving a territorial government, or any territorial instrumentality thereof, from compliance with Federal laws ….”[63] He further adds that “[w]e read the reference to “compliance with Federal laws” to encompass the Constitution. Thus, neither the nature of a § 1983 action, which does not expose the Commonwealth to monetary liability, nor P.R.O.M.E.S.A.’s statutory language, warrant extending the stay provisions to § 1983 actions seeking to enforce fundamental constitutional rights […]”.[64]

The author agrees with said recommendation, and further adds that all attorneys handling civil rights cases under the Federal Civil Rights Act must be acting together as an army as one, with the core of the arguments set forth in this and other law review articles asking for the same remedy, to lift the stay as soon as possible, based on constitutional violations against U.S. citizens residing in Puerto Rico.

The author’s main concern is the following, the People of Puerto Rico cannot be treated as foreigners when we are U.S. citizens, not by choice, but by imposition. We, as Puerto Ricans, cannot tolerate that the federal judiciary validates the abuse of power of Congress and the executive branch’s creation and implementation of P.R.O.M.E.S.A. Courts must be independent, by being an apolitical branch of the government, that serves as a careful and determined check against the excesses of any Government. These are “my 2 cents”.

---

[63] 48 U.S.C. § 2106.

[64] *See,* Brief for Appellant, *supra* note 4, at 15.