A SURVEY OF COMPARATIVE METHODOLOGIES: THE CONSTANT PRESENCE AND SILENT RISE OF INTENT AND HISTORY IN CONSTITUTIONAL ADJUDICATION*

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Abstract

This article studies how different courts around the world have used intent-based methods of constitutional interpretation that privilege formal legislative history, similar to some versions of *originalism* in the United States. It also analyzes how these interpretive approaches have produced progressive results in many instances. This generates three lessons. First, that intent-based methods of constitutional interpretation are not an exclusive U.S. phenomenon. Two, that originalism is not inherently conservative nor reactionary. And third, that a comparative approach can yield important methodological lessons that may be useful for courts and scholars around the world. In particular, this article offers a survey of judicial experiences in countries with different constitutional experiences, such as Australia, Canada, India, Turkey, Malaysia, Singapore, Alaska, Chile and Germany.

Resumen

Este artículo analiza cómo distintos tribunales alrededor del mundo han usado métodos de interpretación constitucional basados en la intención que favorecen el uso del historial legislativo formal, similar a algunas versiones del originalismo estadounidense. A su vez, se analiza cómo estos enfoques interpretativos han producido resultados progresivos en múltiples instancias. Lo anterior establece tres enseñanzas importantes. Primero, que los métodos de interpretación constitucional basados en la intención no son un fenómeno

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exclusivo de los Estados Unidos. Segundo, que el originalismo no es inherentemente conservador ni reaccionario. Tercero, que un enfoque comparativo puede producir enseñanzas metodológicas importantes que podrían ser de utilidad para académicos alrededor del mundo. En particular, este artículo ofrece un estudio de las experiencias jurídicas en países con experiencias constitucionales distintas, como lo son Australia, Canadá, India, Turquía, Malasia, Singapur, Alaska, Chile y Alemania.

I. Introduction

For many years, comparative constitutionalism has focused on issues related to constitutional design and the resolution of specific questions related to doctrine. Methodological comparisons have been scant. The scholarly debate as to method that started in the United States (hereinafter, *U.S.*) several decades ago has slowly, but surely, resulted in a greater interest in comparative originalism. This is critical because methodology serves as the bridge between design and doctrinal content.

The current general wisdom is that originalism is mostly a U.S. phenomenon. But appearances can be deceiving. Another commonly held belief is that originalism is inherently conservative or reactionary. This view is not necessarily correct in the context of post-liberal teleological constitutions that were the result of transcendental social processes. In that sense, this article teaches us two things. First, that originalist methodologies, with particular focus on history and intent, have been more ubiquitous around the world than normally thought. Second, that depending on the content and history of each particular constitution, an originalist approach can actually generate progressive results. This is particularly true as it applies to post-liberal teleological constitutions that were the result of highly democratic and popular processes of creation.

Among the recent comparative works, several stand out. Chief among these is a collaborative study edited by Jeff Goldsworthy, titled *Interpreting Constitu-*

tions: A Comparative Study.[1] In the book, several scholars survey their respective national experiences as to methods of constitutional interpretation. I will complement this work with individual articles that have focused, specifically, on the use of originalist methodologies in particular countries. What may seem to be isolated exceptions actually start painting a broader picture, signaling the potential benefits of originalist methods as applied to post-liberal teleological constitutions.

Because comparative analyses of constitutional methodologies are scarce, for this survey, I will rely heavily on individual works for particular countries. Hopefully, more scholarly research will flourish in the years to come, which would allow a more comprehensive comparative analysis. For now, it is a useful starting point.

Mainly because of cultural and ideological biases,[2] many of the case studies used in comparative analysis are of the framework family, such as Australia (in its purest form), Canada, and Germany (of the liberal democratic version). There are few instances of analysis as to teleological constitutions. In fact, when this constitutional type is used for analysis, there seems to be an underscoring of their teleological or post-liberal persuasions, such as India.[3] Let us take a closer look.

II. Individual Cases: More than Meets the Eye

A. Australia

For this case study, we depend mostly on Jeffrey Goldsworthy's work.[4] Australia is a prime example of the pure framework constitutional type. As Goldsworthy explains, "[t]he Constitution was drafted in Australia by representatives of the six colonies at constitutional conventions during the 1890s and subsequently approved by voters in separate referenda in each colony."[5] Because of the colonial

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[1] INTERPRETING CONSTITUTIONS: A COMPARATIVE STUDY (Jeff Goldsworthy, ed., Oxford University Press, 2006).

[2] *See* Jorge M. Farinacci-Fernós, *Post-Liberal Constitutionalism*, 54 TULSA L. REV. 1 (2018).

[3] *See* Jorge M. Farinacci-Fernós, *South-Africa's Forward-Looking Constitutional Revolution and the Role of Courts in Achieving Substantive Constitutional Goals*, 53 REV. JUR. UIPR 531 (2019) (South Africa); Jorge M. Farinacci-Fernós, *When Social History Becomes a Constitution: The Bolivian Post-Liberal Experiment and the Central Role of History and Intent in Constitutional Adjudication*, 47 SW. L. REV. 101 (2017) (Bolivia); 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).

[4] Jeffrey Goldsworthy, *Australia: Devotion to Legalism*, *in* INTERPRETING CONSTITUTIONS: A COMPARATIVE STUDY (Jeffrey Goldsworthy ed., 2017). I will also make reference to Jamal Greene's article. Jamal Greene, *On the Origins of Originalism*, 88 TEX. L. REV. 1 (2009).

[5] Jeffrey Goldsworthy, *Australia: Devotion to Legalism*, *in* INTERPRETING CONSTITUTIONS: A COMPARATIVE STUDY 106 (Jeffrey Goldsworthy ed., 2017).

status of Australia at that time, the document was officially enacted by the British Parliament. As to the text itself, it is "not a lengthy document,"[6] since it has no Bill of Rights and "does not include grand declarations of national values or aspirations."[7]

The Australian Constitution was hardly the result of a popular-driven, dynamic democratic process. At the same time, and in line with the pure framework model, "the framers deemed it both unnecessary and unwise to fetter their legislatures," resting on the premise that "democratically elected parliaments seemed to them the best possible guardians of liberty."[8] The pure framework type rationale at full force.

Interestingly enough, the *original view* of the Australian framers tilted towards *a limited role for the constitution and its judicial development*: "[T]he framers feared that judicial interpretations of abstract rights could have unpredictable and undesirable consequences."[9] This corresponded to the elite nature of the constitutional creation process: "For one thing, they did not want to be prevented from discriminating against people of other races in order to protect the racial and cultural hegemony of their communities."[10] This is very different from the type of popular process that is applicable to some teleological constitutions.[11] As a result of this disconnect, and due to the relatively passive role of the constitution in everyday life, "Australians remain wary of constitutionally entrenched rights."[12]As we can start to tell, the Australian Constitution differs greatly from the type of constitution I am focusing on: it lacks clear text, authoritative history, or substantive content. But originalism has not been completely that far off.

As to its textual characteristics, "[m]any of the difficulties that have arisen in interpreting the Constitution were inevitable, in that they were inherent in the use of very general language to govern practical affairs over a long period of unpredictable social and technological advance."[13] Because of the relatively advanced age of the Constitution, many of its provisions have become anachronistic, and some of its provisions were premised on different circumstances.[14]

This combination of factors has led some to propose a more teleological approach to interpretation, in an attempt to give *relevance* to the words of the text

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6 *Id*. at 109.

7 *Id*.

8 *Id*.

9 *Id*.

10 *Id*. at 109-10.

11 *See* Farinacci-Fernós, *Post-Liberal Constitutionalism*, *supra* note 2.

12 Goldsworthy, *supra* note 5, at 110.

13 *Id*. at 114.

14 *Id*.

and overcome its lack of textual clarity or specificity. *But, because of the nature of the adoption history of the Constitution*, "[a]ttempts to resolve such problems by recourse to the purposes have sometimes been hampered *by those purposes themselves being obscure, ambiguous, vague, or arguable, outdated and inappropriate in the modern world*."[15] That is, it is a perfect storm of the empirical problem of original intent and a lack of continued fidelity to the original constitutional project that can haunt originalism. There also seems to be a lack of an original intent as to the role of judicial development of constitutional doctrine.[16]

When we combine textual and historical obscurity with substantive silence and elite roots, originalism in Australia is inherently *conservative* in nature. While this does allow for *progressive legislation* to be adopted without much constitutional limitation, there is little room for using constitutional interpretation and enforcement to produce progressive results as a matter of constitutional doctrine. According to Goldsworthy, the initial judicial interpretation of the Constitution accorded some role to the framers.[17] At the same time, keeping with the common law tradition, many tools of ordinary statutory interpretation were used in constitutional adjudication.[18]

What is the method currently used for constitutional interpretation in Australia? According to Jeff Goldsworthy, it combines several elements: (1) *semantic fixation* (words "continue to mean what they meant when they were first enacted");[19] (2) broad construction of ambiguous provisions; (3) plain meaning; (4) holistic and structural interpretation; and (5) *use of history*.[20] Some of these features warrant some additional comments.

In keeping with some practices from the common law tradition, Australian courts *do* use sources related to adoption history, including draft versions of the constitutional text. At the same time, they originally declined to use the *debates* associated with the creation process. *But that apparent rejection of adoption history debates has eroded*. As Goldsworthy explains, "[t]his rule against directly consulting the Convention Debates continued until 1988, *although it was occasionally breached before then*."[21] In other words, it seems that, in fact, sources associated with the adoption process, including the debates of the delegates themselves, have indeed found their way into constitutional adjudication. Goldsworthy

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15 *Id*. (emphasis added).

16 *Id*. at 115.

17 *Id*. at 116.

18 *Id*. at 117.

19 *Id*. at 121. (Goldsworthy also states that "the Court has frequently grubbed around the historical roots of a constitutional term in order to unearth its content.") *Id* 124.

20 *Id*. at 121-24.

21 *Id*. at 124 (emphasis added).

adds that, even before the 1988 shift, "paradoxically, the Court was willing to consult an authoritative text, *The Annotated Constitution of the Australian Commonwealth (1901)*, which analyzed the *meaning* and *purpose* of every provision of the Constitutional seriatim, by reference to historical antecedents, drafting history, and the Convention Debates."[22]

This is where it gets interesting. First, it would seem that, even before the 1988 shift, intent-based and historical evidence was present in constitutional adjudication in Australia. Of course, *other* forms of interpretation and adjudication were *also* used. Jamal Greene emphasizes other tools used by Australian courts that he associates with textualism and legalism.[23] But the mere fact that these originalist or subjective sources were used is quite telling. Second, and even more interesting, is the fact that the use of those historical sources has not been limited to deciphering *what* the framers did or say, *but why*. In other words, it destroys the false dichotomy of having to choose between teleological interpretation and originalism. *When originalist research leads to original purpose*, it is a *subjective* teleological methodology that is being employed.[24] More precisely, it appears that, in the Australian experience, the original *purposes* will prevail "whether or not individual framers intended, expected, or would have approved of, particular applications."[25] In other words, it rejects original expected applications but accepts original purposes. As Greene explains, "[t]he Great Divide in Australia is not between original meaning and current meaning but between original meaning and original intent."[26] In fact, as Greene points out, there could be a situation where original purpose can even have an effect on original semantic meaning.[27]

It is also interesting to note how Goldsworthy explains the view Australian courts have in terms of the importance of popular fidelity to the constitutional project: "Even if, as some judges have recently suggested, the authority of the Constitution now rests exclusively on its continued acceptance by the Australian people, who possess ultimate 'sovereignty,' it is hard to see why this would entail any change in the interpretive method."[28] But there seems to be, in fact, some cor-

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

[23] Jamal Greene, *On the Origins of Originalism*, 88 TEX. L. REV. 1, 40-41 (2009).

[24] For his part, Jamal Greene states that the Australia experience has been one of ascertaining intent through objective, instead of subjective methods; that is, intent is "to be found by an examination of the language*." Id.* at 40. (But he also acknowledges a shift in judicial practice in Australia, where the courts used the debates during the process of constitutional creation for a "purposive analysis.") *Id*. at 51.

[25] Goldsworthy, *supra* note 5, at 127.

[26] Greene, *supra* note 23, at 50.

[27] *Id*. at 61.

[28] Goldsworthy, *supra* note 5, at 124.

relation between *choice* of method and *the level of connection* to the constitutional project itself.

But, Goldsworthy makes an important qualification: "[T]he role of historical considerations should not be exaggerated."[29] In most cases, it appears, intent-based and historical sources play a very limited role.[30] Evidently, there are great potential problems with using originalist methods to a Constitution that was not the result of popular mobilization and which omits substantive provisions. Eroded fidelity requires the use of additional methodological tools outside of originalism.

In the end, "[a] majority of the Court is likely to maintain its moderately originalist methodology, which attempts to reconcile permanence with adaptability to changed circumstances by taking a purposive approach, and construing the Constitution's words in broad, general terms consistent with original understandings."[31] It would make a lot of sense for Australian courts to reject using originalism as the exclusive tool in constitutional adjudication.[32] As Greene states, the Australian approach tends to be "less reactionary and less historicist than American originalism."[33]

However, the Australian example has a lot to offer us. First, it serves as evidence that the story about U.S. exceptionalism when it comes to historical and intent-based approaches to constitutional interpretation is incorrect. Second, it supports the notion that, in fact, history and purpose, particularly adoption history, *do* have a role to play in constitutional adjudication, and will help the people decide whether to continue their support for their constitutional project or, instead, to engage in constitutional politics in order to come about change. And third, it also serves as evidence that originalism is not inherently opposed to purposivism.

For the purposes of this dissertation, Australia gives additional lessons. First, the importance of *changed underlying circumstances* that may make particular provisions of a constitution anachronistic or the original intent of its drafters no longer authoritative. Second, that making a choice as to adopting particular meth-

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[29] *Id*. at 125.

[30] For example, Goldsworthy states that, while there is a "substantial increase in judicial references to the framers' intentions, and to the Convention Debates, […] [n]evertheless, it must be acknowledged that on many, and possible most, contentious issues, historical evidence remains of little assistance, because either the framers did not discuss the issue, or what they said is itself unclear or divided." *Id*. at 127. I submit this is due to both the *age* of the constitution and the particular process of its creation, which differs from more modern experiences that tend to be considerably more deliberate.

[31] *Id*. at 152.

[32] This is not always the case. As Goldsworthy observes, "[i]t is unfortunate that the Court refused for so long to consult the Convention Debates, because doing so could have prevented some major interpretive errors that had unfortunate consequences." *Id*. at 125.

[33] Greene, *supra* note 23, at 41.

odological model is not fixed and can vary depending on the ongoing connection between the present and the original constitutional project. Third, the importance of semantic fixation. Finally, Australia serves as the perfect contrast to the post-liberal teleological constitutional type, in that it lacks popular or democratic participation, clear text, social fidelity, substantive content, and available sources of intent.

B. Canada

Canada's Constitution is also of the framework type. For this overview, I rely on the works by Peter W. Hogg and Jamal Greene.[34] As with the Australian case, the origins of Canada's constitutional system trace back to its association with the United Kingdom. Also, like Australia, the original 1867 Act contained no Bill of Rights because "the British model of parliamentary sovereignty appealed most to the framers."[35] In other words, Canada started out as a pure framework constitutional system.

That eventually changed with the adoption of the Charter of Rights in 1982, which included the classic catalogue of political rights, mostly articulated in vague terms: "Most of the litigation is caused by the vagueness of the statements of the rights, which for the most part follow traditional legal rights exemplified by the American Bill of Rights."[36] The decisions made by the framers have had an impact on the development of Canadian constitutional law.[37] This includes a *broad power of remedy* placed on courts.[38] In the end, Canada's current constitution can be described as belonging to the liberal democratic framework type.

As to the original 1867 Act, there are no *verbatim records* on which to rely,[39] which constitutes an empirical and conceptual hurdle for a subjective intent approach. Yet, "the Court now routinely refers to the *legislative history* of the Constitution Act 1867 as an aid to the interpretation of the Act."[40] And, *unlike the 1867 Act*, "there are *abundant* records of the legislative history of the Constitution Act 1982 (which includes the Charter of Rights)."[41] The relatively recent character of

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[34] Peter W. Hogg, *Canada: From Privy Council to Supreme Court*, *in* INTERPRETING CONSTITUTIONS: A COMPARATIVE STUDY (Jeffrey Goldsworthy ed., 2017); Greene, *supra* note 23.

[35] Peter W. Hogg, *Canada: From Privy Council to Supreme Court*, *in* INTERPRETING CONSTITUTIONS: A COMPARATIVE STUDY 56 (Jeffrey Goldsworthy ed., 2017).

[36] *Id*. at 69.

[37] For example, Hogg references that "[t]he framers of the Charter sought to avoid the troublesome 'state action' jurisprudence of the United States." *Id*. at 70.

[38] *Id.* at 71.

[39] *Id*. at 77-78.

[40] *Id*. at 78 (emphasis added).

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

the 1982 Act may explain that abundancy of empirical sources. These sources include draft versions, debates in the Canadian and UK parliaments, minutes of the different committees, and so on.[42] As a result, "*[t]his material is routinely referred to by the Supreme Court of Canada as an aid to the interpretation of the Act*."[43] However, the Court "*does not regard itself bound by even a clear indication of what the framers intended*."[44] In other words, while courts do look to the historical record for evidence of original intent, it is not determinative. In fact, Hogg argues that the Court "gives little weight to legislative history."[45]

As a result, it appears that the primary method of constitutional interpretation in Canada is reminiscent of the *objective teleological model*, as the Court gives "primary weight to its own interpretation of constitutional language."[46] But, it is still primarily a *purposive* approach to interpretation, which is somewhat different from the U.S. living constitutionalist model. As Jamal Greene explains, in Canada, the living tree analogy is firmly linked with the issue of purposes and objectives articulated broadly.[47]

When courts carry out their interpretive function, "legislative history is no more than a part of the context,"[48] which also reminds us of some of the non-originalist models in the U.S. That rejection of intent-based interpretation dates back to the Privy Council, which is part of a custom that refuses "even to look at any evidence of the intention of the framers of the Constitution Act of 1867….other than the actual text."[49] According to Hoggs, the debate was never about the binding nature of legislative history, which seemed to be out of the question altogether, but about the possibility of actually *using* legislative history at all.[50] He explains that "the debate has only recently been resolved by the full admissibility of legislative history as an aid to the interpretation of the Constitution of Canada."[51]

In the end, "the indifference to the original understanding lingers on in the modern Supreme Court of Canada."[52] But, it would appear that this rejection is

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42 *Id*.

43 *Id*. (emphasis added).

44 *Id*. at 78-79 (emphasis added).

45 *Id*. (As a result, he concludes, originalism "has never gained a foothold in the jurisprudence" of the Canadian Supreme Court.) *Id* 79; ("Originalism has never enjoyed any significant support in Canada.") *Id*. The question is: Why?

46 *Id*.

47 Greene, *supra* note 23, at 28.

48 Hogg*, supra* note 35, at 79.

49 *Id*. at 83.

50 *Id*.

51 *Id*.

52 *Id*.

both conceptual and empirical, as "[i]t is, of course, rare that the legislative history of a constitutional text provides a clear answer to the very question before a reviewing court."[53] As a result, history is not determinative in terms of the search for the framers intent but does give context to the constitutional text itself. Therefore, "the historical context of a constitutional provision *obviously places limits on the range of meanings* that the provision will bear."[54] It would seem that, in the end, history *does* play a role, just not one related to subjective intent. In fact, Hoggs recognizes, "it would be wrong to conclude that the principles of progressive interpretation is inconsistent with the intentions of the framers."[55] In other words, while it seems that Canada does favor an objective teleological approach over a subjective one, and non-originalist living constitutionalism to more classic originalism, the reality is that *these models are not inherently in tension with one another*. In the Canadian example, it appears that the original intent of the framers was, in fact, for courts to use non-originalist methods.[56] As a result, it is not the courts that unilaterally reject originalism but is it rather the result of the framer's designs

Jamal Greene suggests that "[a]s in much of Europe, Canadian constitutional interpretation is unapologetically, and for the most part uncontroversial, teleological."[57] Of course, it is not enough to state that a particular system employs a teleological approach, given the existence of and differences between the subjective and objective articulations. In the Canadian case, it is an objective teleological approach to constitutional interpretation. This brand of purposivism allows the court to ask, "the interest that a given provision is *meant* to protect."[58] The practice of the Court has been in favor of a maximalist or generous protection of rights.[59]

But that should not be seen as in opposition to either originalism or subjective intent, precisely because, as we saw, the objective teleological approach here is consistent with original intent. More importantly and independent of the specific method applied, it is telling that, for all its apparent anti-originalist practice, history and intent *do* play a role in constitutional adjudication in Canada. What is

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53 *Id*. (Also, "[t]he original purpose of a right (which is what is relevant) is usually *unknown*." *Id*. 89. (emphasis added)

54 *Id*. at 86 (emphasis added).

55 *Id*.

56 *Id*. (According to Hoggs, the records of the 1982 process indicate that the drafters "assured that the courts would not be bound by their views as to the meaning of the text and would interpret the text in ways that could not be predicted with certainty.") *Id* 87.

57 Greene, *supra* note 23, at 5.

58 *Id*. at 34 (emphasis added).

59 *Id*.

universally rejected is the binding nature of the framers' original expected applications.[60]

But the question remains: why the rejection to an intent-based model of interpretation, whether it be the subjective teleological model or any of the articulations of U.S. originalism? First, we have the framers' intent against such practice. Second, the vague nature of the constitutional text makes an originalist approach more difficult. Third, the lack of available empirical material, particularly as it relates to the 1867 Act, and the lack of *on-point* legislative history as to the 1982 Act. This last issue would seem consistent with the first in that it makes perfect sense for the framers, in their goal to avoid the court's use of subjective intent, to leave little evidence of their actual opinions as to the specifics of the constitutional text. Finally, one has to wonder if the *nature* of the constitutional creation process had any bearing on the secondary role given to the framers in constitutional adjudication.

In the end, like with Australia, we are dealing with a constitution with no clear text, little authoritative history, and almost no substantive content. In other words, very much the opposite of the teleological constitutions that we have focused on so far. But, even under these circumstances, it would seem incorrect to conclude that history and intent have played no role in Canadian constitutional development. And in post-liberal teleological constitutions, the case for their use is heightened.

C. Germany

Germany has a liberal democratic framework constitution, known as the Basic Law; its current articulation dates back from the Federal Republic. As such, very little of the German Democratic Republic's constitutional tradition remains. For this part, I rely on the work by Donald P. Kommers.[61] The creation of the German constitutional text was very peculiar since it was the result of the Allied occupation of that country after World War II.[62] In particular, the constituent assembly of the Federal Republic "received *instructions* to establish a federal form of government, to protect the rights of the states, and to provide for a central authority

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[60] "Among jurists, legal scholars, and (by all indications) the Canadian public, the notion that a court's conclusion as to the expectations of the ratifying generation should be sufficient to dispense of a present individual-rights case is nearly risible." *Id*. at 33.

[61] Donald P. Kommers, *Germany: Balancing Rights and Duties, in* Interpreting Constitutions: A Comparative Study (Jeffrey Goldsworthy ed., 2017).

[62] In reality, this refers to the constitutional text adopted for the Federal Republic of Germany (West Germany). There was a separate process for the creation of the German Democratic Republic (East Germany). But, after reunification, it was the Basic Law of the Federal Republic that serves as the constitution for the unified Germany.

capable of safeguarding individual rights and freedoms."[63] As Kommers explains, "[w]ithin these broad guidelines, Germans were free to craft a constitution of their own choosing, subject of course to Allied approval."[64]

The initial drafting of the Basic Law was entrusted to a 25-member committee that worked for only two weeks.[65] Eventually, the task fell upon 65 delegates selected among the different states and nominated by different political parties. There were 27 delegates from the center-right Christian Democratic Union, 27 from the center-left Social Democratic Party (S.P.D.), 5 from the conservative Free Democratic Party, 2 from the Centre party, 2 from the D.P., and 2 from the Communist Party of Germany.[66] The delegates were "mostly lawyers," although "teachers, journalists, and trade union leaders had a large presence within the SPD."[67] This body met for *10 months* and attempted to reach a consensus on many of the matters before its consideration, in order to achieve acceptance by the general public.[68] Ratification was done at the state level, and no national referendum was held. This was so, because the "framers were deeply suspicious of any form of direct democracy, a mistrust reflected in the Basic Law itself."[69] It would seem that direct popular participation in the constitution-making process was mostly absent. As such, its legitimacy lies, *not in the process of its creation, but in "its objective content and compatibility with the spirit of the German people*."[70] The stage is set for an objective teleological approach to constitutional interpretation. It is the text, not the framers or the process of creation, which commands assent.

Although Kommers makes reference to the "impressive list of guaranteed rights,"[71] the Basic Law lacks substantive provisions. While there is an important dignity clause that is absent in other framework constitutions, "[t]he remaining articles embrace most of the liberties associated with western constitutionalism."[72] Yet, "the Basic Law's guaranteed rights contain ingredients from Germany's socialist, liberal, and Christian intellectual traditions…To achieve consensus…[it] drew willingly from the humanistic content of each tradition to create a document that combines the important values of each in a seemingly workable, if not always

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63 Kommers, *supra* note 61, at 162 (emphasis added).

64 *Id*.

65 *Id*. at 163.

66 *Id*. at 164.

67 *Id*. at 164.

68 *Id*.

69 *Id*.

70 *Id*. (emphasis added).

71 *Id*. 169.

72 *Id*.

easy, alliance."[73] In other words, it is a *consensus* constitution which is, simultaneously, eclectic as to its ideology but, at the same time, able to find a specific identity: humanism. But the consensus was also bought at the price of vagueness and internal tension in the constitutional text, *and the task of working out that tension was given to the Constitutional Court*.[74] Part of the tension is the result of the competing liberal and social aspects of the constitution.

According to Kommers, constitutional adjudication in Germany has several sources of interpretation: (1) unwritten principles; (2) text; (3) custom; and (4) *historical materials*.[75] As to the latter, historical sources are occasionally used "to illuminate the *general purpose* behind a constitutionally ordained concept, value, or institution."[76] More importantly, Kommers states that "[t]his inquiry is *not always clearly differentiated from inquiry into original intent*."[77] In terms of sources, adoption history is preferred over other types of historical documents.[78] In particular, the "*most fertile source for examining the background and purposes of the Basic Law,* however, is the *daily stenographic record of the debates and decisions of the Parliamentary Council*."[79] Let us turn to the specifics of constitutional adjudication in Germany.

As to text, the consensus is that "words mean what they say;" that is, plain meaning is used, although this is "not the same as literal meaning."[80] Textualism is not literalism. As such, "[w]ords draw meaning from their location in the text *as well as from the passage of time*."[81] In the end, text yields to purpose, in accordance with the objective teleological method. Kommers explains that words are "regularly interpreted in the light of their putative purpose."[82] But, some of the characteristics of the *subjective teleological* method are also used, in that some provisions "are often interpreted in the light *of the legislative history behind their adoption*."[83]

As to adoption history, Kommers nonetheless downplays its role, stating that the intention of the framers "are clearly secondary."[84] Yet, adoption history is used

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[73] *Id*. at 171.

[74] *Id*.

[75] *Id*. at 190-91.

[76] *Id*. at 191 (emphasis added).

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

[78] *Id*.

[79] *Id*. at 192 (emphasis added).

[80] *Id*. at 197.

[81] *Id*. (emphasis added). This seems to run contrary to the fixation thesis.

[82] *Id*.

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

[84] *Id*.

"to support a decision arrived at by some other method of interpretation."[85] In other words, it serves a confirming role. Adoption history also serves as a fallback source and "is most often cited when neither text nor context provides a clear answer to an interpretative problem."[86] But, in the end, Kommers concludes that "[m]ore often than not, however, the Court ignores drafting history altogether."[87]

The picture as to Germany seems unclear, going back and forth about using and discarding adoption history sources that either reveal original purpose, framers' intent, or even context. Although it feels safe to say that German courts mostly stick to the objective teleological approach, history and intent are not totally ignored. The German model seeks "interpretive guidance from the *history* and spirit of the constitution as a whole."[88] While Germany seems to be a strong example of the objective teleological approach, one cannot help but notice the interesting role played by history, both general and in terms of constitutional adoption, and intent.

D. India

India represents murkier waters. It has elements of both liberal democratic and post-liberal teleological constitutions. As compared to the previously discussed countries, India is closest to the type of constitution we are focusing on here. For this section, I rely on the works by S.P. Sathe,[89] Sujit Choudry,[90] and W.H. Morris-Jones.[91]

India's Constitution was not the result of reformist politics or gradual movement towards independence. It is "inescapably an expression of the country's experience."[92] This is the stuff of teleological constitutions. As Sujit Choudry explains, "[i]t is sometimes said that the Indian Constitution institutionalized a national and social revolution."[93] That is, it simultaneously addressed issues related to a national democratic project and matters related to social transformation meant to revolutionize "a deeply hierarchical and unequal society."[94] As such, "[o]ne of

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85 *Id*.

86 *Id*. at 198.

87 *Id*.

88 *Id*. at 200 (emphasis added). (But, Kommers insists that the purpose of a particular provision is "not to be confused with historical intent," fortifying the objective teleological model). *Id.*

89 S.P. Sathe, *India: From Positivism to Structuralism, in* INTERPRETING CONSTITUTIONS: A COMPARATIVE STUDY (Jeffrey Goldsworthy ed., 2017).

90 Sujit Choudry, *Living Originalism in India? 'Our Law' and Comparative Constitutional Law*, 25 YALE J. L. & HUMAN. 1 (2013).

91 W.H. Morris-Jones *The Politics of the Indian Constitution* (1950) in CONSTITUTIONS IN DEMOCRATIC POLITICS (Vernon Bogdanor, ed.) (1988).

92 *Id.*

93 Choudry, *supra* note 90, at 9-10.

94 *Id*. at 10.

the basic objectives of the Indian independence movement was to harness the state to redress centuries of neglect, exploitation, and discrimination experienced by the Indian masses at the hands of the powerful."[95]

The Indian Constitution was the product of an elected Constituent Assembly. However, it must be noted that a limited franchise elected this body, because of property and education requirements, thus allowing only 28.5% of the population to participate.[96] Still, the Indian National Congress obtained 69% of the seats, which amounted to 82% after partition. The INC delegation "contained within itself the entire ideological spectrum, from the left to the right."[97]

The drafting work of the Constituent Assembly lasted from 1946 until 1949.[98] Its work was mostly channeled through internal committees.[99] According to S.P. Sathe, the "drafters drew heavily on the Government of India Act 1945."[100] The historical context of the constitutional process was evident: "Independence was the result of a mass movement, of which the Constitution was a *continuation*, to establish a modern, democratic, secular and humanist India."[101] As a result, "[t]he Constitution became a symbol of national consensus."[102]

In terms of content, some delegates "felt that eighteenth-century rights were good *but not enough*."[103] As a result, "the social revolution gave rise to two interrelated sets of constitutional provisions."[104] First, a list of justiciable fundamental rights "found in most liberal democratic constitutions."[105] But, it also added a "schedule of positive duties" that "set a blueprint for a redistributive and regulatory state of precisely the kind that the Lochner Court treated with constitutional suspicion, by mandating the Indian state to play a central role in the emancipation of the Indian masses."[106]

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95 *Id*.

96 Sathe, *supra* note 89, at 215.

97 *Id*. (According to Morris-Jones, the 300 members of the Constituent Assembly were not perfectly representative of the population and reflected varied ideological views); Morris-Jones, *supra* note 91, at 130.

98 *Sathe, supra* note 89, at 215. (This includes 165 days of full sessions); Morris-Jones 130, *supra* note 91, at 130.

99 Morris-Jones, *supra* note 91, at 130.

100 Sathe, *supra* note 89, at 215.

101 *Id*. at 215-16 (emphasis added).

102 *Id*. at 216.

103 Morris-Jones, *supra* note 91, at 132 (emphasis added). This is consistent with the post-liberal approach to constitutionalism. *See* Farinacci-Fernós, *Post-Liberal Constitutionalism, supra* note 2.

104 Choudry, *supra* note 90, at 10.

105 *Id*.

106 *Id*. Although these provisions were not designed to be judicially enforceable, they did serve as authority for re-distributive legislative action. Later on, we will discuss how the courts addressed the justiciability issue.

The result was a tension between classic property rights and the socially oriented and constitutionalized policies of the state. According to Morris-Jones, "[t]he task of reconciling the property rights of some with the Directive Principles of State Policy...which exhort the State to direct its policy towards distribution of the material resources of the community…to subsume the common good was never going to be a simple matter *–once those in the Constituent Assembly who wished the directive principles to have precedence over rights had been defeated*."[107]

The final balance was a conscientious design choice on the part of the framers. As Choudry explains, "[d]uring the Constituent Assembly debates, the concern was raised that the Fundamental Rights set out in Part III could be used to challenge policies enacted to implement the Directive Principles of State Policy entrenched in Part IV."[108] The latter was borrowed from Ireland and, while not meant to be judicially enforceable, were deemed "fundamental to the governance of the country."[109]According to Sathe, "[t]he Constitution clearly enunciates the philosophy of the welfare state…In particular, the State is directed to minimize inequalities in income, and eliminate inequalities in status, facilities, and opportunities."[110] In the final analysis, they "set a constitutional agenda for the future, which envisions the social, economic, and political transformation of Indian society."[111] Not precisely what a classic liberal constitution does.

Due to the importance of these policy choices, "[t]he debates over the drafting of the Indian Constitution were incredibly rich."[112] As Choudry explains, [t]he basic question was what kind of nation India should become, which these debates answered by reference to India's recent past and hoped-for-future."[113] Finally, India's constitutional text is full of "lengthy details and specificity," the result of the existence of "many interests that had to be accommodated."[114] It would seem that the main problem of Indian originalism is making sense of a highly complex ideological balancing act.

Now, let us dive into the method and the practices of the Indian courts. According to S.P. Sathe, there have been two dominant models: legal positivism and structuralism.[115] As to the legal positivist model, it "does not permit the use of

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[107] Morris-Jones, *supra* note 91, at 134 (emphasis added).

[108] Choudry, *supra* note 90*,* at 11.

[109] Sathe, *supra* note 89, at 220.

[110] *Id*.

[111] *Id*. at 221.

[112] Choudry, *supra* note 90, at 11.

[113] *Id*.

[114] Sathe, *supra* note 89, at 216.

[115] *Id*. at 226. (Sathe explains that the structuralist model "can also be called teleological, meaning that it understands the Constitution to be intended to achieve certain purposes.") *Id*. The question remains: which teleological model?

external aids, such as debates in Parliament or the Constituent Assembly, to find out what the founders intended."[116] But the Indian Supreme Court "has held that the external aids maybe used where the text of the Constitution is *unclear*."[117] This is reminiscent of the interpretation-construction distinction.[118] Sathe makes reference to the fact that, as we already saw, "[t]he debates in the Constituent Assembly are well documented in 12 volumes published by the Government of India, and these may be referred to when the text of the Constitution is not explicit."[119] Choudry offers some examples of this practice.[120] In other words, even the more non-teleological approach to constitutional adjudication allowed for intent-based history to play a significant role.

It seems that the early history of the Indian courts is full of instances in which the constitutional text, particularly property rights provisions, was used to strike down many of the re-distributive and interventionist policies of the state,[121] *which would seem to be in tension with the policy choices of the Constituent Assembly*. As a result, Sathe explains, "[t]he more the Court used its activism to save private property from social engineering, the greater was the loss of legitimacy suffered by the right to property."[122] Sathe goes on: "As interpreted by the Court, this right seemed to frustrate the socialist objectives reflected in the Directive Principles."[123] In other words, the Court was frustrating the progressive policy choices *of the Indian framers*, backed up by the legislative politics of the day: "The Court seemed determined to stall the march towards socialism."[124] It would seem that judicial activism and non-originalist tools of interpretation were being used to achieve *politically conservative results where a more intent-driven approach would have led to progressive outcomes*: "The Court plainly did not consider itself bound by the original intentions of the Constituent Assembly."[125]

It should be noted that one of the concerns held by some of the Indian framers was related to the improper use of judicial power to frustrate progressive social

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116 *Id*. at 232.

117 *Id*. (emphasis added).

118 *See* Lawrence B. Solum, *The Interpretation-Construction Distinction*, 27 CONST. COMMENT. 95 (2010).

119 Sathe, *supra* note 89, at 232.

120 *See* Choudry, *supra* note 90, at 9.

121 Sathe, *supra* note 89, at 240-41.

122 *Id*. at 241.

123 *Id*. *See* also Choudry, *supra* note 90, at 9. (In reference to the shared concern that the property rights provision "would be used to challenge the regulatory and redistributive legislation in the name of economic libertarianism").

124 Sathe, *supra* note 89, at 243.

125 *Id*. at 245.

transformation.[126] One of the purposes of the Directive Principles was to empower the legislature to carry out its interventionist and re-distributive policies without judicial impediments. In the end, the political events in the 1970s and 1980s resulted in a shift of the Court's approach to constitutional adjudication that distanced itself from the previous, aggressive anti-distributive stance. As a result, the more teleological, structuralist model was adopted.

According to Sathe, this model "requires courts to deal with politics more openly."[127] This generates a "substantial involvement in matters of social policy."[128] This should not be surprising, given the socially-oriented content of the Indian Constitution itself. In the end, originalism has not been a stranger to judicial practice in India,[129] in what Choudry describes as a *living originalism*.[130] Of course, due to the tumultuous history of judicial practice in India, current judicial practice is much more passive on economic matters, allowing ordinary politics to lead the way.[131]

The Indian experience is very interesting. Its text, but especially its adoption history, points towards the creation of a re-distributive society. It is the stuff of post-liberal teleological constitutionalism. It also tells us that, in these circumstances, intent-based interpretation, coupled with a robust enforcement of substantive constitutional provisions, can generate progressive results.

E. Turkey

I abstain from classifying Turkey's Constitution. For our discussion here, there is no need to. In particular, I focus on the concept of Turkish secularism, which is articulated in several constitutional provisions that are expressly *ideological*.[132] For this analysis, I rely mostly on the work by Ozan Varol.[133]

Turkey's brand of secularism can be traced back to its process of modernization during the early 20th century. Secularism has been a fundamental pillar of Turkish

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126 Morris-Jones, *supra* note 91, at 134.

127 Sathe, *supra* note 89, at 261.

128 *Id*.

129 Choudry, *supra* note 90, at 12.

130 *Id*. at 18 (emphasis added).

131 Sathe, *supra* note 89, at 262.

132 *See* Esin Orucu, *The Constitutional Court of Turkey: The Anayasa Mahkmesi as the Protector of the System* in CONSTITUTIONAL COURTS: A COMPARATIVE STUDY (Andrew Harding & Peter Leyland, eds. 2009). (Orucu characterizes the constitutional system as an "ideologically-based paradigm" in contrast to a "rights-based paradigm.").

133 Ozan O. Varol, *The Origins and Limits of Originalism: A Comparative Study*, 44 VAND. J. TRANSNAT'L L. 1239 (2011). *See* also, Orucu, *supra* note 132.

constitutionalism.[134] Turkey's constitutional ideology is linked to the views of its founder, Ataturk. There are as many as sixteen references to him, by name, in the constitutional text.[135] As a result, "Turkey's institutions, political and legal systems are captive to past and present political and social problems and live within the restraints imposed by these."[136]

The Turkish Constitution adopts certain principles as integral components; it characterizes the Republic as democratic, secular, social, and guided by the rule of law.[137] The Constitutional Court "was seen as a protector and guardian of the *basic ideology*…reflected in the provisions of the Constitution."[138] As to the educational system, the Constitution links it with the teaching of Ataturk, who was a leading proponent of secularism.[139]

In his article, Varol studies two cases decided by the Turkish Constitutional Court, which dealt with the clash of *current* political preferences and the *historically guided* constitutional text in the context of secular and religious education; in particular, the uses of heard-scarves in the schools. As stated, the constitutional text references the concept of secularism. But just what does that entail? What is the Court to do when faced with a clash between present politics and constitutional ideology? Varol makes an interesting observation: while "the Court *never expressly mentioned the phrase originalism,*" it did turn to original intent and original meaning in order to find outcome-determinative insight.[140] This is not an isolated phenomenon. Originalism has been used, but not named.

Turning back to the head-scarf controversy, the Constitutional Court embarked on an apparent hardline originalist approach, arriving at a categorical legal rule against their use.[141] That approach included historical research into the views of Ataturk in terms of his secularism. However, Varol is unsure what *model* of originalism was employed by the Constitutional Court. In the end, he believes that it makes no difference whether it was original intent, meaning or even expected applications because they would have all generated "the same result."[142] Still, he thinks that original intent was the most prevalent model used.[143]

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134 *Id*. at 1258.

135 *Id*. at 1259.

136 Orucu, *supra* note 132, at 196.

137 *Id*. at 197; Varol, *supra* note 133, at 1261.

138 Orucu, *supra* note 132, at 199 (emphasis added).

139 Varol, *supra* note 133, at 1261.

140 *Id*. at 1263 (emphasis added).

141 *Id*. at 1264.

142 *Id*. at 1277.

143 *Id*. at 1278.

Such was the power of the originalist road in this case that the *dissent* avoided employing non-originalist or so-called living constitutionalist methodologies. According to Varol, "[t]he dissent was perhaps concerned that an interpretive methodology that gave little attention to Ataturk's intentions *would have stripped the opinion of all legitimacy*."[144] This would suggest that the Ataturk references still command popular support and, thus, legitimacy; while an express rejection of his views, which have been constitutionalized, would be characterized as illegitimate. Such is the stuff of originalism: its force is premised on continued acceptance of and fidelity to the constitutional project, particularly when it has express ideological connotations.[145] This seems to be Turkey's *Heller* moment, but with the majority arriving at a politically progressive outcome. In that sense, Turkish headscarf cases reveal how the originalist approach generated a politically progressive result, allowing secularism to trump more conservative religious policies. This is an example of the proposition that originalism is not inherently conservative, but rather dependent on the substantive content of the constitutional text and history that is applied and its application in particular circumstances. In Turkey, progressive secularists have benefited from originalist methodologies.[146]

The Court's use of original intent originalism did not appear to generate methodological obstacles. First, there was no collective intent problem, since Ataturk was a single individual. Second, the fact that he was a relatively modern figure meant that there were readily available records of his views. And as to the legitimacy question, the constitutional text's direct command to use Ataturk's views as binding settled the question.[147]

As a result of these cases, Varol observes that "[c]ontrary to popular opinion, originalism is not only an American fascination and exists elsewhere in the world."[148] The other examples analyzed in this Article confirm that analysis. But, it also demonstrates that originalism is not an exclusive tool of legal conservatives and not hampered by normative or empirical objections to its use.

F. Singapore & Malaysia

Yvonne Tew's analysis of the uses of originalism in Singapore and Malaysia follows a similar line to the Turkish example. Like Varol, she references how

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144 *Id*. at 1273 (emphasis added).

145 *See Id*. at 1279-282. (Varol offers an alternative explanation on why the Turkish Constitutional Court used originalist methodologies in this context. I need not quarrel with it here since I don't find it inconsistent with mine).

146 *Id*. at 1278.

147 *Id*.

148 *Id*. at 1277.

"Americans obsess about originalism," while noticing that "[b]eyond American borders, originalist arguments thrive inside and around courts suggesting that fascination with originalism is not, after all, uniquely American."[149] Also like Turkey, she notices that some originalist practices actually generate more interventionist courts and even substantive progressive results.

In the Malaysian example, Tew explains that "originalist arguments are frequently invoked in debates about secularism and the establishment of Islam in the Constitution."[150] In contrast with Singapore, she believes that originalism has more popular appeal in Malaysia.[151] Let us take a closer look using Tew's analysis.

Malaysia's Constitution was produced in the "post-colonial climate of a nation at the cusp of independence."[152] The drafting of the Constitution was initially handled by five legal experts who took into account specific proposals made by local representatives. The legal experts' task was "one of translating into legal terms what had already been politically settled."[153] This bifurcation makes it harder to pinpoint where the popular connection to the constitutional project lies. According to Tew, among the purposes behind the constitutional project was accommodating the competing demands of a pluralistic society, particularly as to religious questions.[154]

The growing influence of Islamism in current politics in Malaysia generated important constitutional questions. In particular, questions arose as to what was the *original intent* behind several of the relevant constitutional religious provisions.[155] The interesting thing is that both secularists and Islamists *claimed the originalist label*, in a show of the legitimacy of this approach.[156] This, in turn, is part of a wider history of the uses of originalism in Malaysia.[157] As with Turkey, it seems that original framers' intent is a key ingredient of Malaysian originalism.

For reasons of space, I will not dive into the specifics of the originalist exercise in the Malaysian religious cases analyzed by Tew. I refer you to her most interesting article. For purposes of this article, I focus on specific takeaways from the ex-

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[149] Yvonne Tew, *Originalism at Home and Abroad*, 52 Colum. J. Transnat'l L. 780, 782-783 (2014). (She characterizes Malaysia and Singapore as two former British colonies with a common historical background that includes the common-law tradition, independent judiciaries with the power of judicial review, and written constitutions that include a Bill of Rights). *Id*. at 801.

[150] *Id*. at 800.

[151] *Id*.

[152] *Id*. at 801.

[153] *Id*. at 802.

[154] *Id*.

[155] *Id*. at 803.

[156] *Id*.

[157] *Id*.

perience of originalism in that country. First, its apparent universal acceptance as a legitimate tool of constitutional adjudication. Second, the fact that the originalist approach was actually the *least likely to produce judicial restraint on a policy matter*. Third, the interesting results generated by combining originalism with teleological provisions. And fourth, the progressive results that combination can create.

In contrast, the application of originalist methodologies in Singapore seems different from the Malaysian experience. There, Tew explains, originalism emerged from "more pragmatic circumstances."[158] Tew goes on to explain that "[t]he prevailing interpretive approach of Singapore's courts has been characterized by strict legalism and literalism."[159] As a result, originalism is combined with legalism to "curb judicial discretion."[160] These case studies confirm the importance that constitutional fidelity plays when determining *which* interpretive methodology to use in a particular system at a particular time.

G. Final Examples: Chile & Alaska

Finally, for the following reasons, I wish to *briefly* discuss some issues regarding originalism in Chile and Alaska,[161] for the following reasons. First, because it aids in creating a well-rounded survey in a field that has only recently started to be studied. Second, because Chile is an interesting example of a *conservative teleological constitution*. In fact, it is a very neo-liberal one. Teleological constitutions *tend* to be more progressive in their content and typically follow a post-liberal direction. Chile breaks the mold and helps to better understand, by way of contrast, the constitutional experiences in Bolivia and South Africa.[162] For its part, Alaska allows us to analyze a sub-unit of the United States. This is critical because too much of the U.S. scholarly research is devoted exclusively to the federal Constitution. Moreover, Alaska serves as a good counterexample to the Puerto Rican.[163]

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[158] *Id*. at 818.

[159] *Id*. at 821.

[160] *Id*. Of course, as we have seen throughout this dissertation, discretion is not synonymous with lack of intervention in policy matters.

[161] For the Chile example, I rely on the work by Druscilla L. Scribner, *Distributing Political Power: The Constitutional Tribunal in Post-Authoritarian Chile* in CONSEQUENTIAL COURTS: JUDICIAL ROLES IN GLOBAL PERSPECTIVE (Kaprszewski, Diana; Silverstein, Gordon & Kagan, Robert A., eds., Cambridge University Press 2013). For Alaska, I will use Michael Schwaiger, *Understanding the Unoriginal: Indeterminant Originalism and Independent Interpretation of the Alaska Constitution*, 22 ALASKA L. REV. 293 (2005).

[162] *See* Druscilla L. Scribner, *Distributing Political Power: The Constitutional Tribunal in Post-Authoritarian Chile* in CONSEQUENTIAL COURTS: JUDICIAL ROLES IN GLOBAL PERSPECTIVE (Kaprszewski, Diana; Silverstein, Gordon & Kagan, Robert A., eds., Cambridge University Press 2013).

[163] *See* 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).

Chile's present Constitution dates back to the Pinochet dictatorship; hardly an example of democratic or popular participation in the process of creation. Because of the ideological battles of the time, the Chilean Constitution is expressly *laissez-faire* and hostile to distributive policies. The transition to multi-party democracy has had an obvious impact on the constitutional structure. With the imminent election of a center-left government, the right-wing "turned to the courts as one of multiple political strategies to defend the *status quo* and promote their political agenda."[164] This was possible precisely because the constitutional content was aligned with the right wing's policy preferences. As Scribner explains, some of these *laissez-faire* provisions were "at the heart of Pinochet's neoliberal economic reforms –such as the right to property and to engage in an economic activity- from potential administrative discretion and state regulation."[165]

One of the main methodological tools used by conservatives in order to achieve their objectives was originalism, in particular, original intent. According to the some of the decisions of the early post-transition Court, "the original intent of the founders was to give the legislature the power to regulate economic activities and impose limitations on individual rights…[but those] limitations on the right to develop economic activity are justified *only* by reasons of public order, morality or national security."[166] The originalist model was facilitated "by the existence of tomes of documents from the *Comisión de Estudios de la Nueva Constitución*…as well as the *Consejo de Estado*, which makes it possible to discern (and legitimize) the original intent of the framers of the 1980 Constitution."[167] As a result, Scribner suggests that "[o]riginalism inform[ed] the majority opinions of the 1990-1997 law vs decrees cases."[168] As such, there was no empirical obstacle to originalism; *but there was a legitimacy problem, as the constitutional political winds were changing*.

Some reference to the issue of *change* is warranted here, using Chile as an example. Several events changed the Constitutional Court's approach to constitutional adjudication. First, nearly twenty years of successive electoral success by the center-left altered both the composition of the Court as well as the legal reality in which it operated. *Ordinary politics became constitutional politics*. Second, the lack of a popular consensus behind the Pinochet Constitution and the dwindling power of the backers of the former regime eroded the appeal and legitimacy of an originalist approach. As Scribner explains, "courts do not venture far from

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164 Scribner, *supra* note 162, at 114.

165 *Id*. at 122-23.

166 *Id*. (emphasis added).

167 *Id.* at 127 n. 21.

168 *Id.* 128.

majority political preferences."[169] This also is reminiscent of the ordinary versus constitutional politics.[170] As a result, there was a "shift in modes of constitutional reasoning from an interpretive model that is originalist, literal and rigid to a more structural model in which the Constitution is interpreted holistically and its text, inherent principles, and values seen as coherent, harmonious, and consistent."[171]

Because an originalist approach required courts to immerse themselves in substantial policy matters, due to the ideologically charged nature of the Constitution, it is to *non-originalist* practices that the Court had to look in order to adopt a more *restrained* approach to constitutional adjudication in areas of policy: "As the transition to democracy matured, the Court *rearticulated* the constitutional boundaries of power pragmatically and flexibly, recognizing collaborative leadership."[172] In other words, constitutional law changed because the *applied method of interpretation changed*. In turn, that shift in methodological preference was generated by the operation of constitutional politics, which reflected a lack of popular fidelity to the 1980 constitutional structure.

Let us now turn to Alaska. Elsewhere I have analyzed the experience in Puerto Rico as it pertains to constitutional adjudication. Puerto Rico has a Constitution that has clear text, authoritative history, and substantive content by way of policy provisions and socio-economic rights. In particular, the authoritative nature of the constitutional adoption history in Puerto Rico is the direct result of its highly participatory nature and direct link with popular mobilization.[173] In Alaska, we see a very different process. In the end, the wholly different processes of constitutional creation in both U.S. jurisdictions –Puerto Rico and Alaska- helps explain the strength of originalism in the former and its absence in the latter.

As Michael Schwaiger explains, "[d]espite its attractiveness as a method for interpreting the United States Constitution, originalism is much more intellectually frustrating when used to interpret *decidedly unoriginal constitutions*."[174] In other words, the lack of a popular process of constitutional creation that generates a connection between the people and the constitution that is to reign over them hinders the originalist approach. Because of this, the Alaska courts "rarely

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[169] *Id.* 127.

[170] *See* Farinacci-Fernós, *Post-Liberal Constitutionalism*, *supra* note 2.

[171] Scribner, *supra* note 162, at 120-21.

[172] *Id*. at 126. It should be noted that many of the constitutional questions before the Court were of a structural nature, in terms of reviewing the different statutes and administrative regulations adopted by the other branches.

[173] 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).

[174] Michael Schwaiger, *Understanding the Unoriginal: Indeterminant Originalism and Independent Interpretation of the Alaska Constitution*, 22 ALASKA L. REV. 293, 294 (2005) (emphasis added).

explicitly rely on an originalist interpretation. This is unusual among state courts, which often seem to ease their trepidation at departing from federal interpretations by resorting to determinant originalism."[175] In Alaska, "the major reason for the fidelity of the Alaska Constitution to outside models was the overwhelming desire for statehood."[176] The insinuation being that the constitutional process in Alaska was so influenced by the goal of achieving statehood that the constitution represents an instrument in that direction and not an organic product of deliberate self-government in such a way as to generate social cohesion behind it. As such, an originalist approach would seem artificial and foreign.

In relation to other states, Schwaiger observes that "[a]n additional theoretical complication arises from the knowledge of the framers of recent state constitutions *that the record of state constitutional conventions would likely be used to interpret the state constitution in the future*."[177] The implication appears to be that, in states where the constitutional process generated more empirical material, original intent-based methodologies have a leg up *in terms of verifiable evidence*: "[A] s the more recent founding state constitutions were being framed, delegates knew the importance of history when they undertook their tasks."[178] Of course, you still need the adequate levels of fidelity. It is only when that fidelity is achieved and maintained that the empirical availability becomes relevant.

However, Schwaiger sees a danger in the form of grand-standing and less-than-honest posturing by the delegates who will say what the public *expects* and not what they *really mean*.[179] But delegates are *delegates*. As such, what only matters is what they actually manifest to the public, not their secret desires. The problem with original intent is not intent itself, but *intent that is not externally manifested*.

In the end, Alaska's heavy borrowing of federal constitutional law -the result of its unequivocal goal of achieving statehood-, seems to have deflated any powerful notion of allegiance or fidelity to an autochthonous constitutional project. Hardly the stuff of originalism. But the lesson remains, although *in opposite form*: state constitutions in the U.S that are the product of authentic popular processes of self-government that generate fidelity, which, in turns, produces empirical data helpful in ascertaining the intent of the framers, seem to have a persuasive case in favor of some sort of intent-based methodology. The Puerto Rican experience confirms this proposal.

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175 *Id*. at 299.

176 *Id*. at 303-04.

177 *Id*. at 301 (emphasis added).

178 *Id*.

179 *Id*.

III. Some Initial Lessons From the Survey: Challenging the Common Wisdom

Many of the surveyed authors made reference to the general wisdom that originalism is a unique U.S. preoccupation, then adding that they have found an *exception* by way of the particular country they have researched. At some point, these individual findings start painting a picture that directly calls into question the accuracy of that general wisdom. In other words, more and more comparativists are finding out instances of originalist practices in countries outside the United States.[180] The common wisdom is changing. There are simply too many *exceptions*.

It is not true to state that "originalism is distinctly an American obsession,"[181] that is coupled with an interesting foreign exception or two. Too many exceptions are starting to pile up, and at some point, we should be ready to consider the possibility that intent-based methods of constitutional interpretation are becoming more commonplace. So, when Jamal Greene states that "[f]or all its proponents' claims of it necessity as a means of constraining judges, originalism is remarkably unpopular outside the United States,"[182] more elaboration is needed. It would seem that, on the contrary, many other constitutional systems outside the U.S. do, indeed, apply intent-based methods of interpretation in some form. Maybe it's just that, because of the substantive results that originalism generates in the United States, other systems abstain from labeling their practices as *originalism*. But, what is in a name? Actually, once we come to the realization that originalism is neither inherently conservative nor progressive, but that political variance is a reflection of the particular constitutional text and history that's being put into practice, then we can start to appreciate the growing uses of originalist methods throughout the world. More importantly, *the distinction between teleological interpretation and originalism disappears when applying different teleological constitutions*. There, purpose and intent need not be in inherent tension.[183]

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[180] *See* Goldsworthy, *supra* note 5 (examples of the use of originalism in Australia); Hogg, *supra* note 35 (examples of the use of original intent in Canada); Kommers, *supra* note 61 (Germany); Scribner, *supra* note 162. (originalist period in Chile); Choudry, *supra* note 90, at 2 ("[T]he issues that [Jack] Balkin grapples with are not peculiarly American"); Varol, *supra* note 133, at 1243 ("[O]riginalism has a foreign story").

[181] David Fontana, *Comparative Originalism*, 88 TEX. LAW REV 189, 190 (2010). *See also* András Jakab, *Judicial Reasoning in Constitutional Courts: A European Perspective*, 14 GERMAN L. J. 1215, 1274 (2013) ("Radical originalism is also rather an American phenomenon"); Tew, *supra* note 149, at 782 ("Americans obsess about originalism"); Varol, *supra* note 133, at 1241 ("Does any other nation share this American fascination with originalism? The prevailing view is no: originalism is primarily an American obsession").

[182] Greene, *supra* note 23, at 1.

[183] *See Id*. at 19; 52.

The realization that purposivism and originalism can find common ground in teleological constitutions has been hampered by the fact that many comparative analyses only focus on *framework* constitutions of the liberal tradition. But the initial findings we just saw -for example, India- signal a greater potential for analysis.

Method matters. So do constitutional types. Combining these two elements has a potential for creating interesting new chemistry. Teleological constitutions are the next challenge.