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*

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* 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*

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[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

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[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

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[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

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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

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[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

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[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.

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[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]

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[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

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[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,

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[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

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[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

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[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.

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[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]

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[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

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[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.

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[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.

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[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.

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[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]

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[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

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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

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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]

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[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

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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

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[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

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[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

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[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

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[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.

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[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]

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[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.

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[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,

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[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*

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[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

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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.

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[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

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[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

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[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

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[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

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[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]

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[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]

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[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

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[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

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[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

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[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.

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[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]

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[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

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[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

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[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.

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[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]

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[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.

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[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

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[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

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[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]

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[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

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[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,

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[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

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[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

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[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

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[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

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[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

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[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

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[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.

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[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.