‘NEW ORIGINALISM’ AND STATUTORY INTERPRETATION

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ART´ICULO

Abstract

This article discusses the possible application of the methodology used by the so-called ‘New Originalism’ for constitutional analysis in the statutory context. In particular, if and how the basic tenets of this model used for constitutional interpretation can and should be deployed when analyzing statutes. The result of this exercise is a form of ‘statutory originalism’ that both transcends and reconciles the historical views on statutory analysis organized around textualism, intentionalism and purposivism. This Article proposes that the adequate application of the basic tenets of the ‘New Originalism’ used in the constitutional context can bridge the divides between these three approaches and actually allow them to interact harmoniously.

The ‘New Originalism’ emerged as an answer to many of the objections non-originalists had to the first articulations of constitutional originalism, which included a determinative role for text, empirical and conceptual problems with collective intent, and the inability of this model to account for other important analytical tools. Specifically, the ‘New Originalism’ is based on four basic propositions: (1) the interpretation-construction distinction (which distinguishes between communicative meaning and legal meaning), (2) the fixation thesis (the notion that the semantic content of an utterance is fixed at the time it is adopted in a legal text), (3) the contribution thesis (the notion that there must be, at least, minimal compatibility between semantic meaning and legal effect), and (4) the notion that originalism is a theory of interpretation, not of construction. When properly applied, these tenets allow text, intent, purpose and other analytical devices to co-exist quite harmoniously.

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The question that remained was: are these four basic tenets exclusive to constitutional analysis, or can they be used in the statutory context as well? This Article proposes that, with minimal modifications, these tenets can be used adequately in the statutory realm, allowing text, intent and purpose to interact effectively.

Resumen

Este Artículo discute la posible aplicación de la metodología utilizada por el llamado 'Nuevo Originalismo' para el análisis constitucional al contexto estatutario. En particular, si y cómo los principios básicos de este modelo, utilizados para la interpretación constitucional, se pueden aplicar al analizar estatutos. El resultado de este ejercicio es un tipo de 'originalismo estatutario' que simultáneamente trasciende y reconcilia las visiones históricas sobre el análisis estatutario organizadas a partir del textualismo, el intencionalismo y el acercamiento teleológico. Este Artículo propone que una aplicación adecuada de los principios básicos del 'Nuevo Originalismo' usados en el contexto constitucional puede acortar las distancias entre estos tres acercamientos e incluso les permitiría interactuar de forma armoniosa.

El 'Nuevo Originalismo' surgió como una respuesta a muchas de las objeciones hechas por no-originalistas en cuanto a las primeras articulaciones del originalismo constitucional, que incluía el rol determinante del texto, los problemas empíricos y conceptuales relacionados a la intención colectiva, y la inhabilidad de este modelo para tomar en consideración otras herramientas analíticas importantes. Específicamente, el 'Nuevo Originalismo' está basado en cuatro propuestas básicas: (1) la distinción entre la interpretación y la construcción (la que separa el significado comunicativo del significado jurídico), (2) la tesis de la fijación (la idea de que el contenido semántico de una expresión está fijada a momento de su adopción en un texto jurídico), (3) la tesis de la contribución (la idea de que debe haber, en el peor de los casos, una compatibilidad mínima entre significado semántico y el efecto jurídico), y (4) la idea de que el originalismo es una teoría de interpretación, mas no de construcción. Al aplicarse apropiadamente, estos principios permiten que el texto, la intención, el propósito y las demás herramientas analíticas puedan coexistir armoniosamente.

La pregunta restante era: ¿son estos cuatro principios básicos exclusivos del análisis constitucional o pueden utilizarse en el contexto estatutario también? Este Artículo propone que, con modificaciones mínimas, estos principios pueden utilizarse adecuadamente en el ejercicio estatutario, permitiendo al texto, la intención y el propósito interactuar efectivamente.

I. Introduction

For many years, the conventional wisdom has been that (1) constitutional and statutory interpretation are, inherently, distinct methodological endeavors,[1] (2) that originalists in the constitutional realm are textualists in the statutory sphere,[2] while living constitutionalists in the former are purposivists in the latter, and (3) that 'originalism' is a uniquely constitutional phenomenon. This Article wishes to challenge these assertions.

In particular, I wish to demonstrate, at least from a descriptive point of view, that the recent conceptual developments made by constitutional 'originalism' –especially by what has been characterized as the 'New Originalism'-, are wholly applicable to the statutory context. In other words, that New Originalist methodologies, which include (1) the Interpretation-Construction distinction, (2) the Fixation Thesis, (3) the Contribution Thesis, and (4) the proposal that 'originalism' is a theory of communicative interpretation and not of normative construction, can be used in the statutory realm.

Also, I wish to show that this methodological approach would make the textualist-purposivist dichotomy anachronistic, generating what can be described as a *new statutory originalism* that allows text, intent and purpose to co-exist harmoniously. If so, maybe we can assert that the statement that "we are all originalists now" is true, not just in the constitutional context,[3] but in statutory interpretation as well.

It should be added that this conceptual possibility has started to take practical shape in the Supreme Court of the United States, particularly in recent Opinions penned by Associate Justice Neil Gorsuch.[4] Although the model that will be

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1 *See* Kevin M. Stack, *The Divergence of Constitutional and Statutory Interpretation*, 75 U. Colo. L. Rev. 1 (2004).

2 *See* J.T. Hutchens, *A New New Textualism: Why Textualists Should not be Originalists*, 16 Kan. J. L. & Pub. Pol'y 108 (2007).

3 *See* Lawrence B. Solum, *We Are All Originalists Now* in Robert Bennett & Lawrence B. Solum, Constitutional Originalism 75 (Cornell University Press 2011).

4 *See, for example*, New Prime Inc. v. Oliveira, 139 S. Ct. 532 (2019); Wisconsin Central Ltd. v. U.S., 138 S. Ct. 2067 (2018).

discussed in this Article is not quite the same as Justice Gorsuch's approach to statutory interpretation, these Opinions hint that, instead of –or parallel to- a hard textualist stance, a statutory originalism based on 'New Originalism' can (1) work in the statutory context, (2) generate common ground between textualists, intentionalists, and purposivists, and (3) signal a new model of statutory interpretation in general that can transcend current approaches.

This Article will dissect the methodological components of the 'New Originalism' in the constitutional context and see if they can be transplanted to the statutory realm. It also will analyze how a model of statutory interpretation based on 'New Originalism' methodologies would look like, particularly as to the uses of text, purpose, intent and history. As such, this Article has the following structure. Part I is this Introduction. Part II will identify the methodological moving parts of the 'New Originalism', particularly (1) the Interpretation-Construction Distinction, (2) the Fixation Thesis, (3) the Contribution Thesis and (4) the notion that originalism is a theory of interpretation and not construction. Part III will propose a model of statutory interpretation based on these tools, dubbed *statutory originalism*, and attempt to distinguish it from ordinary textualism. In particular, I will address the interaction between the communicative meaning of a legal text and its intent, purpose and history in the so-called 'construction zone', where normative content is identified. Part IV will offer a few final observations.

II. The Basic Tenets of the 'New Originalism'

After years of wandering in the academic wilderness, originalism found its internal conceptual coherence in the proposals of the so-called 'New Originalism'.[5] Such was the success of this new approach to constitutional interpretation that it became a common model for a wide range of scholars, including those that previously had not signed on to the originalist label.[6] That success is based on the universal acceptability of the main tenets of the 'New Originalism': (1) the Interpretation-Distinction, (2) the Fixation Thesis, (3) the Contribution Thesis, and (4) the proposal that originalism is a theory of constitutional interpretation and not of normative construction.

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5 *See* Keith E. Whittington, *The New Originalism*, 2 GEO. J. L. & PUB. POL'Y 599 (2004).

6 *See* Jack Balkin, *The New Originalism and the Uses of History*, 82 FORDHAM L. REV. 641 (2013); Steven G. Calabresi & Livia Fine, *Two Cheers for Professor Balkin's Originalism*, 103 NW. U. L. REV. 663 (2009).

A. The Interpretation-Construction Distinction

One of the main revolutionary proposals of the 'New Originalism' is the notion that there are, in fact, *two separate enterprises* when attempting to extract 'meaning' from a legal text. First, *interpretation* and, subsequently, *construction*.[7]

As for interpretation, it refers to the identification of the *communicative content* of a particular utterance, in this instance, a legal text.[8] Communicative content is made up of semantic meaning, the rules of grammar and syntax, as well as contextual enrichment. The main goal of interpretation is to address textual ambiguities and other forms of communicative insufficiencies. In other words, to identify the correct 'meaning' of a legal text from a purely communicative perspective, particularly when the text suffers from some sort of communicative insufficiency.

For example, if a particular statute gives 'the Secretary' the power to adopt rules or regulations in furtherance of the Act, we need to identify who is the Secretary, since it can refer to any number of agency heads. Here, the word 'Secretary' is ambiguous, since it can have more than one meaning, yet only one can be correct. Interpretation is the tool that will allow us to solve that ambiguity. In this case, context can do the trick: if the statute is entitled "An Act to Establish a Department of Agriculture", we can safely conclude that the use of the term 'Secretary' refers to the head of the Department of Agriculture.

Another important question related to communicative interpretation has to do with *sources*, particularly *extra-textual* ones. This has several implications.

First, as to pure semantics, the use of extra-textual sources is inevitable. The semantic meaning of an utterance is hardly ever found in the utterance itself.[9] As a result, we must look to other sources, such as dictionaries and other contemporaneous publications that shed light on an utterance's semantic meaning.

Second, that there are different types of communicative insufficiencies. The example we just saw refers to an *ambiguity*; that is, utterances that can have more than one communicative meaning, but only one can be correct.[10] Sometimes, like

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[7] *See* Lawrence B. Solum, *The Interpretation-Construction Distinction*, 27 Const. Comment. 95 (2010).

[8] Jorge M. Farinacci-Fernós, *Looking for the Correct Tool for the Job: Methodological Models of Constitutional Interpretation and Construction*, 52 Rev. Jur. UIPR 213, 220 (2018); Balkin, *The New Originalism and the Uses of History, supra* note 6 at fn. 3.

[9] As we will see, unlike most constitutions, statutes do tend to adopt formal definitions to their terms. When this happens, text can be used to address communicative meaning.

[10] Farinacci-Fernós, *supra* note 8, at 225; Solum, *The Interpretation-Construction Distinction*, *supra* note 7, at 97.

in the previous example, ambiguities can be resolved by context and other textual clues. But sometimes ambiguities require extra-textual sources to solve them.

But there are also *vague* utterances; that is, they evade precise communicative precision, allowing more than one meaning to be correct.[11] In these instances, the ordinary tools of interpretation, particularly textual ones, will be wholly insufficient. Almost by definition, extra-textual sources will be required to solve vagueness.

As for construction, it refers to the identification of a legal text's *legal content or effect*.[12] In turn, legal content is generated from the interaction between the text's communicative meaning and other factors, such as subjective intent, purpose, and history, among others. This interaction takes place within the s0-called *construction zone*.

In order to avoid conceptual confusion, I offer simple definitions to the terms intent, purpose, and history.[13] As to *intent*, it refers to *what* the drafters of a particular legal text *attempted to do* when adopting it. That is, what they set out to accomplish when they wrote the text. As to *purpose*, it refers to *why* the drafters wanted to adopt a particular legal norm. That is, the reasons that motivated them to adopt it. As to *history*, it refers to either a text's formal and informal adoption history, as well as the general historical context of its adoption and its subsequent developments.

But as we just saw with interpretation, the tools that are normally used in the *construction zone* are not *just* for normative construction. They can also be used when dealing with radical ambiguities that cannot be solved though purely text-based interpretation. The same applies to vagueness.

In other words, we can also use intent, purpose, history, and other extra-textual tools *as interpretive devices* when ordinary textual tools fail to identify semantic or communicative meaning. However, New Originalists propose that this enterprise, although mostly communicative in nature, should still take place in the construction zone. I will return to this issue in greater detail in Part III.

From the previous discussion we can conclude that interpretation comes first, followed by construction. In other words, the first thing we must do when analyzing any legal text, or any non-legal utterance for that matter, is identify its *communicative meaning* and then proceed to identify its *normative effects*. This brings us to the multiple uses of the word *meaning*.

When we say, "what does that mean?", we can mean, no pun intended, different things. First, we can express our ignorance at the use of some words or

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[11] *Id*.

[12] Farinacci-Fernós, *supra* note 8, at 220; Solum, *The Interpretation-Construction Distinction*, *supra* note 7, at 103.

[13] *See, in general,* Farinacci-Fernós, *supra* note 8, at 227-230.

phrases. For example, if I ask you to "pop open the bonnet", and you've never heard of the word 'bonnet' before, it is perfectly natural for you to ask me "what does that mean?". This type of inquiry is clearly semantic or communicative.

Now, if I tell you "if you don't do what I say, you'll be sorry", you probably know the semantic meaning of each one of those utterances. What you may not know are what the *consequences* of those words will be. So, when you ask me "what does that mean?", you don't refer to the semantic meaning of the words, but of their desired effect. While there is also communicative content to be interpreted here, in terms of the idea or message you are trying to convey, I will not be able to fully identify it by just using the words you uttered. Also, you are attempting to produce behavioral consequences. That transcends mere communication and takes on normative dimensions. This exemplifies the important differences, and interactions, between interpretation and construction.

For purposes of this Article, and in order to avoid conceptual confusion, I shall use the terms *communicative interpretation* and *normative construction* when referring to each of these analytical endeavors.

B. The Fixation Thesis

The second main methodological proposal of the 'New Originalism' is the notion that the communicative meaning of a particular legal text is *fixed* at the time of its adoption. The purpose of this proposal is to avoid semantic anachronisms due to the unpredictable and changing nature of language. Because legislators cannot know what the future semantic development of a particular word or utterance will be, the Fixation Thesis stresses that its correct communicative meaning is the one it had when it was formally adopted in a legal text.[14]

A classic example of this phenomenon is the Domestic Violence Clause of the U.S. Constitution. The obvious problem that comes up is that the communicative content of the phrase 'domestic violence' has changed dramatically from 1789 to 2020. While current usage treats this concept as describing a violent altercation within an intimate setting, when the term was entrenched in the U.S. Constitution, it meant civil disorder or insurrection.[15]

The Fixation Thesis settles this problem by requiring interpreters to focus on how a particular word or utterance was used when it was formally adopted in a

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[14] Farinacci-Fernós, *supra* note 8, at 221 ("[T]he semantic meaning of words is fixed at the moment they are adopted").

[15] Jack M. Balkin, *Framework Originalism and the Living Constitution*, 103 Nw.U. L. Rev. 549, 552 (2009).

legal text. In this example, there should be no doubt that the communicative content of 'domestic violence' refers to its 1789 semantic meaning.

But the Fixation Thesis can only go so far; there are some words, phrases, and other utterances that, by their very nature, are semantically *unfixable*, even from a purely communicative point of view. These are permanently contested utterances that, while subject to a basic general meaning, they evade universal semantic precision. When a legislative body decides to use this type of word or term, it waives fixation. As a result, when an interpreter concludes that the text under analysis belongs to this group of unfixable utterances, he or she should go directly to the construction stage. Examples of this phenomenon are terms like *justice* and *reasonable*. We will come back to this issue when addressing the differences between rules, standards, and principles.

Finally, and related to this last point, it is important to stress that the Fixation Thesis *only applies to communicative content*. In other words, it does *not* propose that *legal content* is also fixed at the time of adoption.

This brings us to the phenomenon of *terms of art*. Since terms of art are used because of their legal-technical content, their semantic meaning is irremediably linked to their normative content. In that sense, their legal-technical content is only partially fixed. On the one hand, their legal-technical content *is* their semantic meaning. That much is fixed. On the other hand, because of their technical nature, much of the work done by terms of art will be in the construction zone.

C. The Contribution Thesis

Now we turn to the third, and probably more contentious and less precise, tenet of the 'New Originalism': the role communicative meaning will have during the construction stage. In particular, the extent to which a text's eventual legal content will be dependent on its communicative meaning.[16]

At its strongest, the Contribution Thesis states that the communicative content identified during the interpretation stage will *directly control* the construction enterprise.[17] This substantially reduces the space of the construction zone. At its weakest, the Contribution Thesis states that normative content can never *directly contradict* communicative meaning.[18] As long as the normative content is minimally compatible with communicative meaning, the former will be valid. This

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[16] Farinacci-Fernós, *supra* note 8, at 221 ("[T]he effect, if any, that semantic meaning has on the legal content of the text").

[17] *Id*, at 252; *see also* Solum, *The Interpretation-Construction Distinction*, *supra* note 7, at 107.

[18] Farinacci-Fernós, *supra* note 8, at 252; *see also* Solum, *The Interpretation-Construction Distinction, supra* note 7, at 108.

substantially increases the space of the construction zone. For purposes of this Article, and in order to adopt the most inclusive model possible, I will adopt the weak version of the Contribution Thesis.

This leads us to another contentious proposal of the 'New Originalism' related to the interpretation-construction distinction. Some New Originalists propose that normative construction –where purpose, intent, and history interact with the communicative meaning of the text- should only take place when said communicative meaning is *under-determinate*.[19] In other words, if the correctly identified communicative meaning of a text is enough to solve a legal question, then additional normative construction is unnecessary.

As we will see, this proposal is only mostly applicable when dealing with textual *rules*, unlike when dealing with standards and principles which are, almost by definition, always under-determinate in terms of addressing a particular legal question.[20] But even in the context of clear rules, I believe there is always room for additional normative construction.

There are multiple reasons why I chose to mention the under-determinacy factor here, and not when analyzing the interpretation-construction distinction.

First, because the under-determinacy factor is a very particular normative claim than can be separated from the mechanics of the interpretation-construction distinction. In other words, that we can accept the distinction without adopting the under-determinacy claim. They are not inherently linked. For purposes of this Article, I will downplay considerably the under-determinacy claim, while maintaining the benefits of the interpretation-construction distinction.

And second, because the concept of under-determinacy itself is problematic. If communicative meaning and normative content are *separate* phenomena, then there is no logical requirement that communicative meaning should, by itself, always provide normative answers. Because it does not follow that clear communicative meaning necessarily generates clear normative content, I propose that the under-determinacy factor as a necessary pre-condition for construction should be abandoned as a distinct normative claim.

The under-determinacy claim is, in the end, a well-hidden *textualist* argument that should not compromise our acceptance of the interpretation-construction distinction. The Contribution Thesis is better equipped to properly handle the relation between communicative interpretation and normative construction, including the use of extra-textual sources and tools.

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[19] *See* Solum, *The Interpretation-Construction Distinction, supra* note 7, at 108.

[20] Farinacci-Fernós, *supra* note 8, at 223 ("We do not interpret rules the same way we do standards and principles, even when searching for semantic and communicative content").

Of course, the *clearer and more precise* the communicative meaning of a text is, the *easier* it will be to engage in normative construction. In these cases, there should be little tension between the two, since clear text *tends* to generate equally clear normative consequence. However, that communicative clarity should still go through the construction zone, in order to analyze its interaction with intent, purpose, and history. Only then will we correctly identify a legal text's *complete normative content*.

D. Originalism as a Theory of Interpretation

As Lawrence Solum explains, originalism is a theory of interpretation and not construction.[21] This explains why the Fixation Thesis is inapplicable to normative content, and why there are multiple approaches or acceptable versions of the Contribution Thesis. When we add the interpretation-construction distinction to the mix, we can see the limited –yet important- work that originalism carries out as a tool of communicative interpretation.

This description of originalism has generated important effects. First, it has reconciled previously warring sides. As we saw, many scholars previously identified as non-originalists can actually embrace the basic tenets of the 'New Originalism'. Second, it has allowed previously apparent, mutually exclusive elements, such as text, intent, purpose, and history to interact productively in the construction zone. Finally, and most important here, it has considerably narrowed the gap between constitutional and statutory interpretation.

With that in mind, I now proceed to analyze whether the previously identified basic tenets of the 'New Originalism' can be applied coherently to the statutory realm, and how such a model would look like.

III. A Model for Statutory Originalism

A. Introduction

The potential application of the interpretation-construction distinction to statutory sources requires careful adjustments but can produce beneficial effects. In this Part, I will propose how to customize constitutional 'New Originalism' to the statutory context.

Originalism has not been wholly foreign to statutory interpretation. Some scholars have noticed the use of tools normally associated with constitutional

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[21] BENNETT & SOLUM, *supra* note 3.

originalism during exercises of statutory interpretation.[22] For example, Jane S. Schacter suggests that the originalist-based imperative of legislative supremacy "is deeply imprinted on the traditional approach to statutory interpretation, which focus judicial attention on the dispositive 'legislative intent'."[23]

But those instances have used older versions of originalism that predate the normative developments made by the 'New Originalism'. They include, for example, multiple references to "original intent" and similar centerpieces of outdated originalist models.[24] While scholars have attempted to analyze statutory interpretation through the lens of so-called 'Original Public Meaning' originalism,[25] no thorough attempt has been made to fully integrate the tenets of the more comprehensive 'New Originalism' model. Moreover, as Eyer suggests, 'Original Public Meaning' originalism is "a term of art that has virtually no pedigree in federal statutory interpretation."[26] The applications of the basic tenets of the 'New Originalism' to statutory analysis should not be confused with a "textualist originalist approach."[27]

B. The Interpretation-Construction Distinction in the Statutory Context

i. Introduction

The interpretation-construction distinction is wholly applicable to the statutory context. There is nothing in the distinction that is exclusive to constitutional text. On the contrary, it can be used to analyze a wide variety of utterances, particularly of a legal nature, whatever the specific textual articulation.

ii. Communicative Interpretation

As we saw, the first task when analyzing any legal text is to correctly identify its semantic or communicative meaning. Communicative interpretation is the proper tool for this endeavor.

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[22] *See, for example*, Katie R. Eyer, *Statutory Originalism and LGBT Rights*, 54 Wake Forest L. Rev. 63 (2019); Stack, *The Divergence of Constitutional and Statutory Interpretation, supra* note 1, at 4 and 24.

[23] Jane S. Schacter, *Metademocracy: The Changing Structure of Legitimacy in Statutory Interpretation*, 108 Harv. L. Rev. 593, 594 (1995).

[24] Eyer, *supra* note 22, at 65-67.

[25] *Id*, at 67-68.

[26] *Id*, at 68. Although, the author explains that "enactment era history undoubtedly plays a significant role in federal statutory interpretation." *Id*.

[27] Stack, *The Divergence of Constitutional and Statutory Interpretation, supra* note 1, at 4.

This proposal applies equally to constitutions and statutes.[28] In fact, some of the differences between these types of legal texts actually reinforce the idea that the interpretation-construction distinction is adequate for statutory analysis. Of course, as we are about to see, some adjustments are warranted, particularly when we take into consideration that statutes tend to be written differently than constitutions.

1. Statutes vs. Constitutions

As previewed, some have questioned whether interpretive models used in the constitutional context can also be used when it comes to statutes.[29] Yet the differences between constitutions and statutes, in terms of their texts, are of degree and not kind. In the particular context of the basic tenets of the 'New Originalism', I have yet to encounter a convincing argument as to why they should be limited to the constitutional context.

Of course, as just mentioned, there are some practical differences of degree, not kind, that require adjustments when applying these tenets to statutes. But these adjustments can be made within the basic structure of the 'New Originalism' approach.

First, statutes, unlike most constitutions, include entire sections dedicated to offering statutory definitions for several words, phrases, or terms. These definitions tend to be semantic and communicative, thus facilitating the task of interpretation.

Second, statutes, unlike most constitutions, tend to be mostly written more clearly and precise, which reduces the risk, or scope, of ambiguities, vagueness, or other communicative insufficiencies.

This brings us to an important issue: the choice of words included in legal texts,[30] which includes the issue of the level of generality at which we should attribute meaning.[31] We must keep in mind that not all types of legal texts are written the same way. This is purely intentional, though wholly contingent.

While many modern constitutions tend to include many specific and precise provisions,[32] on the whole, statutes tend to do so more frequently.[33] The same

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28 *See* Kevin M. Stack, *The Enacted Purpose Canon*, 105 IOWA L. REV. 283, 316 (2019).

29 *See Id*; Hutchens, *supra* note 1, at 109.

30 *See* Farinacci-Fernós, *supra* note 8, at 222.

31 *Id*, at 224.

32 *Id*, at 223 ("[M]ore recent constitutions tend to have more rule-like provisions").

33 *See* Stack, *The Enacted Purpose Canon*, *supra* note 28, at 306.

could be said about the contrast between statutes and legislative rules adopted by administrative agencies. These rules tend to be even more specific and precise than their statutory counterparts.

Although there are others, there are three textual devices that stand out in the legal context: rules, standards, and principles. While they diverge as to the distribution between these three devices, constitutions and statutes tend to include all three in one way or another. Of course, constitutions *tend* to incorporate more standards and principles, while statutes are usually written as rules.

A *rule* refers to instances where a specific normative outcome is automatic once a particular fact pattern is present. In other words, if A is true, then X follows. Rules substantially limit an adjudicator's discretion. Once the fact pattern outlined by the general rule is present, then a pre-determined normative effect follows. Of course, *rules are not immune to normative analysis*, which can result in the identification of unforeseen scenarios where the rule could be deemed inapplicable. As a result, while there is less room for normative construction, there is still work to be done in the construction zone.

A *standard* refers to instances where multiple fact patterns are compatible with a general legal parameter. Here, there is an analytical space that can include different facts and alternative normative outcomes. In other words, an adjudicator must determine whether a particular factual scenario, out of potentially many other ones, falls within normative parameters. Because there are multiple parameters, and not a rigid preordained outcome, the adjudicator exercises a healthy degree of discretion.

An example of a standard is the legal phrase 'in the best interest of the minor' or the term 'reasonableness'. These terms create an analytical space that permits more than one normative outcome where a rule would prescribe a singular one.

A *principle* refers to general legal concepts that may apply to an unlimited set of fact patterns and that guide an adjudicator's analysis, but do not mandate a specific normative outcome. An example of a principle is 'separation of powers' or 'no man can be a judge in his own case'. While not outcome dispositive, they serve as important analytical tools. As such, when it comes to principles, an adjudicator exercises substantial discretion.

This articulation is not mutually exclusive. Sometimes rules, standards, and principles interact to the point where a rule can generate a standard or principle, while a rule can be extracted from a standard or a principle. For example, the Free Speech Clause of the First Amendment is written in rule-like language ("Congress shall make no law . . . abridging the freedom of speech"). Yet, this clause is hardly ever treated like a rule. Instead, it is used as a standard by which to measure the validity of speech limitations. The point being that just because

something is articulated as a rule does not mean it is barred from also functioning as a standard or a principle, and vice versa.

Finally, there's the matter of the articulation of purpose and intent *as operative legal text*. Stack refers to this phenomenon as stated or enacted purpose.[34] In other words, instances where a legislative body incorporates its purposes "as part of the enacted text of the statute."[35]

For many years, textualized purpose has been the main bridge used in an attempt to reconcile textualists and purposivists.[36] When purpose is only articulated in extra-textual sources, textualists and purposivists tend to bump heads.[37] And while enacted purpose may not be enough for some textualists to allow purpose to defeat the so-called plain language of a legal text's operative language,[38] enacted purpose provisions should, at least, "exclude interpretations inconsistent with them."[39] In other words, it can *limit* particular instances of literal applications of the operative text.

Enacted purpose has several uses. First, as a limiting principle. That is, while not necessarily requiring a particular reading of the statute, it can *exclude* readings that, while could plausibly be within the literal meaning of the text, would be *incompatible* with the stated purpose. Second, as a tiebreaker between different plausible readings of a text. Third, *as a privileged communicative tool*, whereby the enacted purpose can actually change "the meaning of the rule or statute."[40] And fourth, as a thumb in the scale in terms of the general role of purpose in both communicative interpretation and normative construction.[41]

In any event, enacted purpose is part of the statutory text itself, thus subject to interpretation and construction in itself and as part of the statute as a whole.[42]

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[34] *Id*, at 285 ("Many federal statutes include an enacted statement of the statute's purpose").

[35] *Id*.

[36] *Id*. The author refers to enacted purpose as "a point of common ground between textualist and purposivist approaches to statutory interpretation."

[37] *See* David M. Driesen, *Purposeless Construction*, 48 WAKE FOREST L. REV. 97 (2019).

[38] *See* District of Columbia v. Heller, 554 U.S. 270 (2008).

[39] Stack, *The Enacted Purpose Canon*, *supra* note 28, at 285. Stack tends to give enacted purpose a little more weight than what Justice Scalia hinted in *Heller*. He does not treat them as mere preambles, since they are enacted as part of text itself. *Id*, at 286-287. Stack offers several examples of enacted purpose. *Id*, at 289.

[40] *Id*, at 305.

[41] Driesen, *supra* note 37, at 98 ("Statutory goals, especially those set out in the legislative text or frequently proclaimed in public, tend to reflect public values to a greater extent than other statutory provisions"). Driesen also states that "when courts construe statutes to effectuate their stated purposes, they act democratically." *Id*, at 126.

[42] *See Id*, at 100.

Also, it eases the tension between textualists and puposivists, since one of the main concerns of textualists is that a court will identify purpose out of whole cloth. Enacted purpose limits the "judges' tendency to read their favored goals into a statute."[43]

As relevant here, enacted purpose eases the tension between textualists and purposivits by giving purpose a dual role in both communicative interpretation and normative construction without much controversy. This is particularly true in the statutory realm where enacted purpose is a more widely known practice than in the constitutional sphere.

2. Communicative Insufficiencies: Identification and Resolution

As we saw in Part I, the main goal of interpretation is to address communicative insufficiencies, such as ambiguities or vague text. Sometimes, text-based tools or context will be sufficient to solve these problems, particularly in the case of ambiguous words, terms, or phrases.[44] But there are certain ambiguities that cannot be solved with these types of tools.

The same thing goes when addressing vagueness. The main challenge with vague text is identifying the breadth of its scope or reach. In other words, how broad or narrow to articulate its communicative content. This is related to the issue regarding choice of words we discussed previously. Almost by definition, vagueness cannot be solved by recourse to text-based tools or context. There are other types of communicative insufficiencies that also cannot be solved by text alone.

Other examples of problematic texts are instances of errors and mistakes which the text can hide. Sometimes, errors and mistakes can be easy to identify: "There shall be a two percent (3%) tax imposed on luxury goods." The text includes an obvious mistake: two does not equal 3. There, text *identified* the mistake. And sometimes text can be used to solve it. For example, if there are other references to the tax in the same provision or source, and only one of the two options is consistently used, then we know how to fix the mistake. But sometimes text cannot solve the problem. For example, suppose that this is the only time where the tax is mentioned. By definition, recourse to *extra-textual* sources will be needed to *solve* the error or mistake originally identified by the text itself.

But sometimes the situation may be even more challenging. I refer to instances where the error or mistake is *hidden* by the text, which *appears* to be clear and error-free.[45] For example, a scrivener's error that, from the face of the text,

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[43] *Id*, at 137.

[44] *See* Hutchens, *supra* note 2, at 108.

[45] *See* Stack, *The Divergence of Constitutional and Statutory Interpretation, supra* note 1, at 17.

is not obvious. The same can happen with an improper use of language. In these instances, recourse to extra-textual sources will be warranted both to identify *and* solve the error or mistake. Adoption history is one possible articulation of this type of extra-textual tool.[46]

These tools are wholly consistent with communicative interpretation. Let's not forget that the goal of interpretation is to identify a legal text's *correct* communicative meaning. This includes, naturally, weeding out clerical or legislative errors and mistakes. Errors and mistakes come in many shapes, like unintentional legislative omissions, as well as incorrect use of language.

The point here is that the interpretation-construction distinction is *not* an absolute obstacle to the use of *extra-textual* sources and tools as part of interpretation. Nothing in the interpretation-construction distinction requires that only textual tools should be used during communicative interpretation. While text is the *object of analysis* during interpretation, it does not follow that it shall be the exclusive *analytical tool* used. One way of reconciling this with a stricter view of the interpretation-construction distinction is that the 'construction zone' has *dual roles*: as a supplement in communicative interpretation and as the main event during normative construction.

This approach could also help in solving the 'textualist-purposivist-intentionalist' divide. First, because it gives text a *central* role during the communicative enterprise. Second, because purpose and intent, as well as history, would serve an *auxiliary* role with the sole goal of correctly identifying the text's communicative meaning. As we saw, there are certain types of *communicative* insufficiencies and problems that can never be solved by text alone. Hopefully, all would agree that, in these instances, the use of extra-legal sources and tools is justified, without forgetting that the main focus of our analysis will still be the text itself.

I will return to the first issue –the construction zone as a supplemental tool of communicative interpretation– when discussing the interaction between statutory analysis and the construction zone. As to the second issue –the proper interaction between communicative meaning and the extra-textual tools such as purpose, intent, and history–, I will address it when discussing the application of the Contribution Thesis to the statutory context. There I will address another way in which the application of the interpretation-construction distinction can help bridge the remaining 'textualist-purposivist-intentionalist' divides.

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[46] *See id*, at 19. *See also* Driesen, *supra* note 37, at 137; Farinacci-Fernós, *supra* note 8, at 255.

iii. Normative Construction

Normative construction is also suitable to the statutory context. Because legal text is meant to have normative consequences, construction is probably the most essential aspect of statutory analysis. Unlike ordinary utterances, when reading a legal text, we are more interested in its normative meaning than pure communicative information. In terms of the question "what does that mean?", when it comes to a statutory provision, we are ultimately asking what *effects* should follow its enforcement.

When analyzing the application of the Contribution Thesis to the statutory context, I will discuss what should be the role of a text's clear communicative meaning when determining normative content. Regardless of our view of the Contribution Thesis, or which articulation of that proposal we adopt, the notion that there should be a separate stage that follows interpretation and attempts to identify normative content is consistent with, and even beneficial for, statutory analysis. This is so because statutory text is meant to be *enforced*, not just interpreted for semantic or communicative purposes.

As we saw previously, the task of identifying normative content is carried out in the construction zone. It is here where the communicative meaning of a text interacts with its purpose, the intent of its authors and historical considerations, whether general or specific to adoption, among other analytical tools. The extent and level of this interaction will depend, of course, on the specific articulation of the Contribution Thesis we eventually adopt and our views on enacted purpose. I will propose a particular model of normative construction for statutes when addressing the application of the Contribution Thesis to the statutory context. For now, the point is that statutory analysis is compatible with the particular task of normative construction as separate from communicative interpretation.

However, before dealing with the Contribution issue, we should address the *second* use for the construction zone in legal analysis: as a tool for dealing with radically ambiguous or generally vague text from a purely communicative point of view. As we saw, in these instances, the ordinary tools of communicative interpretation fall short in their goal to identify precise and correct communicative meaning. Radically ambiguous or generally vague text requires *extra-textual* devices which, according to the interpretation-construction distinction, are normally to be found in the construction zone.

As I hinted earlier, there are two ways of conceptualizing this scenario. First, that communicative interpretation *borrows* extra-textual tools –such as intent, purpose, and history, among others- which are normally used in the construction zone in terms of normative analysis, to identify *communicative* content during

the interpretation stage. Second, that once we conclude that a text is radically ambiguous or generally vague, we go directly to the construction zone.

While both will end up in the same place, I prefer the former approach as more compatible with the nature of interpretation-construction distinction. The use of extra-textual tools such as intent, purpose and history *are still being used here for communicative analysis*. As Schacter explains, "if the words used by the legislature are open to more than one interpretation. . . . the court must also look harder and longer and consider the legislative purpose behind the statute, the legislative history, and perhaps the canons of construction."[47] In other words, they will be used *twice*. First, to identify communicative meaning where textual sources could not. Second, to identify normative content once the communicative meaning has been correctly identified.

Either because we correctly identified a statutory text's correct communicative meaning while engaging in interpretation, or because we were unable to do so due to some radical form of communicative insufficiency, the next step is to engage in normative construction. Here, a text's communicative meaning, extracted through interpretation, will interact with the text's purpose, intent, and history, among other tools and factors. In terms of the *proper* weight we should give each factor while in the construction zone, I will address that issue when analyzing the role of the Contribution Thesis during statutory analysis.

In the end, since the difference between constitutional and statutory text is one of degree, not kind –since, to some extent, both include rules, standards, and principles-, there is no normative reason to apply the interpretation-construction distinction exclusively to a constitution. In fact, it would follow only inevitably that *all* positivized legal text, including administrative rules and city ordinances, is susceptible to this conceptual and practical division of labor. For now, I focus on the statutory sphere.

C. Fixation

The notion of communicative or semantic fixation is the easiest tenet of the 'New Originalism' to apply to the statutory context. When limited to the communicative dimension, fixation should be quite uncontroversial and universal. It is simply sound linguistics. The history of language is full of words that remain unaltered but their definitions and uses change substantially over time and place. As a result, a statutory text's communicative meaning will be the one "at the time legislators enacted the law."[48]

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[47] Schacter, *supra* note 23, at 594-595.

[48] Hutchens, *supra* note 2, at 108.

Fixation is the proper tool used to avoid semantic anachronisms. A good example of how the Supreme Court of the United States used a fixation-like approach to statutory interpretation was *New Prime Inc. v. Oliveira*.[49] In this case, the Court was called upon to determine whether independent contractors were considered 'employees' for purpose of the Federal Arbitration Act's exemption to transportation workers.

In modern employment law, there are important conceptual and legal differences between an independent contractor and an employee. Each term defines a distinct labor relationship. The FAA made reference to 'employees' and not 'independent contractors'. As such, independent contractors were not subject to the FAA's exemption and, thus, covered by the statute.

But fixation came to the workers' rescue. The problem was that the particular statutory language at issue was adopted in 1925. In turns out that the term 'employee', as used at that time, included *all* manner of employment relations, including what we now know as an 'independent contractor'. Ergo, when the FAA made reference to 'employee', it meant employee as was known at that time, not what it may mean today.

D. Contribution

As previewed, the Contribution Thesis is probably the most contentious tenet of the 'New Originalism'. Also, we saw that there are *multiple* possible articulations of this thesis, which adds to the potential for disagreement.

In the statutory context, there is an additional source of possible tension. As we saw, some New Originalists believe that normative construction starts where communicative interpretation stops. Specifically, they propose that if the communicative meaning of a legal text provides a legal answer to a particular question or problem, then the analysis ends. In other words, that we should *only* proceed to the construction zone when the interpretation stage produces *normatively underdeterminate* communicative meaning; that is, that the communicative content of the text will not be enough to settle the legal question before us. This is a recipe for a clash between textualists and non-textualists, such as those who privilege purpose, intent, or history.

As a practical matter, this clash has been somewhat avoided in the federal constitutional context. Since many of the more litigated aspects of the U.S. Constitution are written as standards and principles, instead of clear rules, the result of interpretation will more than likely produce normative under-determinacy. As a result, much of the leg work will be done in the construction zone.

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[49] *Id.*

Statutes, as we saw, tend to incorporate more rule-like and precise language than constitutions. This would lead one to believe that it would result in *less* under-determinacy, relegating the construction zone.

When discussing the interpretation-construction distinction, I purposefully avoided fully addressing the under-determinacy question. I did so because I believe the distinction itself is valid, regardless of where we stand on the under-determinacy issue. I believe it is better to address this issue as part of an analysis of the Contribution Thesis and its potential application in statutory analysis.

The strong version of the Contribution Thesis and the issue of under-determinacy as a pre-condition for separate normative construction are very much linked. They are the covert last stand of textualism.[50] But there are approaches to both the Contribution Thesis and the under-determinacy question that *maintain* the basic premises of the 'New Originalism' while *rejecting* unnecessary textualist commitments.

First, there is no conceptual, logical, or normative reason that under-determinacy should be a pre-condition for normative construction. The interpretation-construction distinction is the result of an empirical and conceptual reality: *that communicative content and normative effect are different and separate things*. And because they are different, one should not be subordinated to the other. The only justified operative distinction is one of *temporal sequence*: interpretation should come first, followed by construction. But no matter what happens during communicative interpretation, normative construction should *always* follow. As such, under-determinacy should not be a categorical obstacle to engaging in normative construction.

This means that there are *multiple* roles for text to play in statutory analysis. First, as the main object of interpretation, as well as its main analytical tool. Of course, as we are about to see, this is only possible when the text is relatively ambiguous or unclear. Second, text –and its communicative meaning- as the basic, *but not dispositive*, ingredient of the construction zone. In fact, we can foresee scenarios in which the other ingredients used in the construction zone can actually *outweigh* communicative meaning.

This leads us back to the *dual* role of the construction zone: (1) as the source for complementary tools in instances of unsurmountable communicative insufficiencies, and (2) as a separate space used to analyze the *interaction* between determinate communicative content and other tools such as purpose, intent, and history, among others. In both instances, there is a case for the benefits of using the construction zone or its tools. In the former, it is indispensable since interpre-

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[50] *See* Hutchens, *supra* note 2, at 110 ("The fundamental basis for textualism is that the words of a statute are the only clear indication of what the law is").

tation failed to provide adequate communicative content or meaning. In the latter, because it takes into account that communicative meaning and normative effects are conceptually different categories.

Second, because there are *other* significant ways in which text can, in fact, serve a central role in normative construction, without resorting to some variant of strong textualism. In other words, we can reject under-determinacy as a pre-condition for engaging in normative construction without sacrificing a leading role for text during the construction stage. It's just a matter of adopting a balanced version of the Contribution Thesis.

I propose that the communicative meaning of a statutory provision should play a pivotal, but not categorically dispositive, role in the construction zone. This includes adopting the weak version of the Contribution Thesis, that is, that the normative content of a legal text should never *contradict* its communicative meaning. But no more. Communicative meaning is the foundation of our analysis, but not its end.

Of course, this is a *relative* proposition.[51] The clearer and more precise the communicative content is, the relatively narrower the space within the construction zone will be. So, instead of adopting a *categorical* position on under-determinacy, we can adopt a *relative* one, where there will always be *some type* of work done in the construction zone. In the end, under-determinacy should not be a necessary pre-condition of engaging in construction zone analysis.

Finally, when dealing with radically ambiguous or generally vague text, then the scope of the construction zone increases significantly, to the point of totally overshadowing interpretation. In these cases, almost all of the work, both communicative and normative, will be carried out in the construction zone. In summary, when text is radically ambiguous, generally vague or its communicative meaning relatively under-determinate, the chances that purpose, intent, and history will be the main analytical tools employed, whether to extract communicative meaning or to identify normative content, are greater.

If we accept that: (1) under-determinacy is not a necessary pre-condition for advancing to the construction stage; (2) the more proper articulation of the Contribution Thesis is the incompatibility standard (3) in cases of radical ambiguity and general vagueness, the construction zone will deal with both issues of communicative and normative content, and (4) communicative meaning will be central, but not outcome-dispositive, then we can adopt an analytical model that adequately takes into consideration text, purpose, intent, and history.

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[51] Farinacci-Fernós, *supra* note 8, at 222 ("The role of text is a matter of degree").

This approach would allow a text's communicative meaning to interact harmoniously with intent, purpose, and history in the construction zone. In some instances, particularly when a text's communicative meaning is considerably clear and precise, it can have near dispositive effects. In other instances, particularly when there is a greater clash between pure communicative meaning and a statute's purpose, intent, and history, there is greater room for the latter to, if not trump, considerably limit the former.

After all, legal analysis is a normative enterprise, not a purely communicative one. And, as we saw, text is the central –if not exclusive- object of analysis in communicative interpretation, but plays a relative role –sometimes central, sometimes secondary- in normative construction. In the end, if properly undertaken, I firmly believe that this approach can reconcile the old textualist-intentionalist-purposivist divide.

IV. Final Thoughts

This Article set out to demonstrate, from a purely descriptive point of view, that the basic tenets of the 'New Originalism' are wholly applicable to the statutory context.

First, as we saw, the interpretation-construction distinction, which treats communicative meaning and normative content as related, but conceptually separate, elements, is both applicable and useful for statutory analysis. This allows adjudicators to correctly identify the nature of the analytical problem –whether if it's communicative or normative- and, therefore, the proper tools for the resolution of said problem. And while text will be the central focus of interpretation, it will be an important, but not necessarily dispositive, factor in the construction zone. This distinction helps textualists and purposivists find common analytical ground. We also saw that the differences between constitutions and statutes are of degree, not kind, which allows the distinction to apply to statutory analysis.

Second, that semantic fixation is absolutely necessary, as a matter of sound linguistics, in statutory analysis. This allows us to avoid anachronisms. And since fixation only applies to communicative, instead of normative, content, it also helps bridge the textualist-intentionalist-purposivist divide.

Third, that a balanced approach to the Contribution Thesis can identify the proper roles for textual and extra-textual sources in both communicative interpretation and normative construction, particularly when we limit, but not wholly reject, the notion of under-determinacy. As we saw, normative content should not directly contradict correct communicative meaning, and normative construction always takes place –even in instances of clear communicative meaning.

Finally, since originalism is only a theory of interpretation and not construction, then the final obstacles to a textualist-intentionalist-purposivist rapprochement can be eliminated, so that, in the end, we can all state that we are all 'statutory originalists' now.