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Originalism and Non-Originalism as Legal Hermeneutics

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ABSTRACT

One of the hermeneutic elements that are decisive in the development of legislative acts and judicial decisions is the interpretation of the Constitution, the pillar of the legal system. In the United States, the debate on the interpretation of the Constitution by the Supreme Court has become a classic of constitutional law and, therefore, affects reflection on legal hermeneutics. This paper examines originalist and non-originalist approaches to constitutional interpretation and explores how political positions shape hermeneutic analysis, even in continental European legal systems, and specifically in the Spanish one.

KEYWORDS

Legal Hermeneutics; Originalism; Non-Originalism; American Constitutionalism; Constitutional Interpretation

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INTRODUCTION

With the appointment in 2018 by President Trump of three conservative Justices to the Supreme Court of the United States (U.S.) (Neil Gorsuch in 2017, Brett Kavanaugh in 2018 and Amy Coney Barrett in 2020), the American constitutional legal debate centered on the method of constitutional interpretation in the U.S. reached the non-specialist public, with those who defend the originalist hermeneutic method and those who, on the contrary, opt for a non-originalist approach when interpreting the Constitution. The three Justices cited joined Justices Samuel Alito and Clarence Thomas, both supporters of the originalist doctrine, thus reinforcing their presence on the highest court in the U.S.

The method of constitutional interpretation in the Supreme Court is significant since this Court is in charge of reviewing the constitutionality of federal laws and, therefore, of reviewing the constitutionality of laws adopted by the legislature. It should be recalled that the Supreme Court was established as the guarantor of the Federal Constitution in *Marbury v. Madison* in 1803. Since then, it has been the supreme instance of the federal judiciary.[1] It is composed of nine Justices, nominated for life by the President of the United States with the approval of the Senate. Federal judges can only be removed from office by impeachment in the House of Representatives and conviction in the Senate. This assumes that the U.S. Supreme Court currently has a majority of originalist justices and that this interpretation will dominate for years and even decades.

1. THE HERMENEUTIC CHARACTER OF THE U.S. CONSTITUTIONAL TEXT

The Constitution is a set of rules and principles expressed in legal texts that establish the foundations and limits of power, define the various institutions that make up the state and organise its relations.

Regardless of its presentation and content, the constitution is considered the top-ranking rule of any country's legal system. It has been the supreme rule since its publication. Its purpose justifies the authority attributed to its provisions. However, being the supreme norm does not mean it is untouchable; it can be amended by the mechanisms established in the norm itself.

[1] *See* Francisco Fernández, *La sentencia Marbury v. Madison* [*The Marbury v. Madison Ruling*], 83 Revista de las Cortes Generales 7 (2011).

A written constitution is usually organised into several parts called titles, which are further divided into articles and paragraphs. It may also include a Charter of Fundamental Rights.

Some states, such as the United Kingdom, do not have a written constitution. The custom prevails in the organisation of relations between institutions. Other states, such as the U.S., have a constitution in the form of a single text, which contains both a list of the fundamental rights granted to citizens and a definition of the various powers. The U.S. Constitution is short, and most of its provisions are general. This characteristic of a text over two hundred years old is a solid invitation to interpretation and what it means, which leads to a vast literature on its techniques and limits, especially from the rulings of the Supreme Court, as we are about to see.

Indeed, despite the different forms of state and legal organisation, the constitution appears as a fundamental text. This means that its drafting and interpretation have a special significance, which is why the analysis of the constitution, both in its constituent and judicial phases, requires special attention: a hermeneutic interpretation. Its very nature, its relevance, calls for hermeneutical interest. It is not just any legal text. Indeed, the constitution is a script written on the government's authority and the people's rights. This is why hermeneutic reflection is necessary. This is how the former President of the Supreme Court of Israel, Aharon Barak, put it:

> I am a judge. For me, a constitution is an operational document. I decide cases by extracting meaning from its text. . . . In order to know how to read a constitution I must have a better understanding of interpretation. . . . By now it is clear to me: I need a theory of interpretation. Not a meta-theory – a theory about theories – but a workable theory of how to read a legal text generally and a constitutional text in particular.[2]

The nature of the constitutional text, its hierarchical importance, its normative force and its character as the backbone of the legal, political and social order invite legal reflection. In this way, constitutional law goes beyond the constitutional text and jurisprudence. Constitutional law invites reflection on the foundations of the supreme law and its principles. Yale professor Bruce A. Ackerman emphasises this:

> There is more to law than rules. But this is a very uncontroversial notion in jurisprudence. Every thoughtful lawyer, I would hope, recognises that law includes the study of principles and precedents

[2] Aharon Barak, *Hermeneutics and Constitutional Interpretation*, 14 Cardozo L. Rev. 767, 767–68 (1993).

> no less than rules - and that he or she must try to state the law in a way that takes all three into account.[3]

There is an initial moment of hermeneutic reflection on the origin and source of the constitutional text that internally affects the text itself and which has as its axis the powers of the state and its political and social significance. Once the constitution has been drafted and sanctioned, its legal authority serves as a guarantee of institutional balance. The constitution protects the separation of powers; it presents itself as its custodian, maintaining this balance if those participating in it endanger it. [4] However, by virtue of this evaluative function of political action, fundamentally in its legislative work, the question arises as to its solidity and the durability of its dogmatic force. The question lies in knowing to what extent its jurisdictional interpretation by the competent judicial body (the Supreme Court in the U.S. case or the Constitutional Court, depending on the legal tradition) should allow it to be updated. On the one hand, the constitution has a vocation for stability and solidity; otherwise, it would hardly be the guarantor and guardian of the separation of powers and the custodian of fundamental rights. On the other hand, the constitution, written and promulgated in specific historical and socio-political circumstances, is not immune to the passage of time and to the evolution of the forms of cultural, social, political and legal representation inherent in human life. A tension arises between permanence and social reality.

This tension has repercussions on how to approach the interpretation of the constitution. Sometimes, the constitution is understood as a foundational text of the state itself and of the nation itself, so the tension is reflected in a theoretical struggle between the universality of the norm and the particularity of the cases (as in the case of the U.S.). On other occasions, the constitution is born of a change in the foundational perspective of the state. So, tensions can lead not only to interpretative divergence but also to constitutional instability, which is the opening of constituent processes that weaken the guaranteeing force of the constitutional text. The weakness and fragility of the succession of constituent processes diminishes constitutional law. Suppose the interpretative struggle has as its background the danger of distorting the Constitution by making it too rigid or malleable. The danger of constitutional rupture is the reduction of the constitution and constitutional law itself to a foundational appendix of political law, and thus to the disappearance *in fieri* of the rule of law.

[3] Bruce A. Ackerman, We the People: Transformations Vol. 2 30 (1998).
[4] *See* Benjamin Constant, *Principes de politique* [*Principles of Politics*], *in* Écrits Politiques 329 (Marcel Gauchet ed., 1997).

Thus, although the existence of constitutional interpretation is inevitable since it is necessary in the exercise of law to interpret constitutional principles, it is also necessary not to go beyond certain limits since, without admitting absolute validity, it is also unthinkable that interpretation should be subject to the political orientation of the moment. Constitutional hermeneutics must seek an adjustment between the two positions, which must be based on knowledge of the social reality (contextual criterion). The constitution is not a dogmatic body closed in on itself which imposes itself as a revealed and unique truth on all legal operators, but is the result of a process of conciliation of interests which is developed and extended in order to constantly renew this conciliation and social pacification,[5] as well as to guarantee the rule of law.

In 1986, on the eve of the celebration of the bicentenary of the U.S. Constitution, Robert A. Goldwin and Art Kaufman, in a volume somewhat scattered in its eight contributions, asked in the title[6] whether the separation of powers still functioned in a country where some analysts and jurists perceived a battle for institutional reform. This conflict mainly affected the relationship between the legislature and the executive, which led to a debate on constitutional reform and its role, which was perhaps not as important as government action itself, as James L. Sundquist (senior fellow emeritus in the Government Studies programme at the Brookings Institution) pointed out from another point of view and coinciding in time and the debate.[7] The substantive question went beyond the parliamentary discussion to the question of how the Constitution could contribute to the process of institutionalisation and, thus, the particular form of constitutional interpretation that would guarantee the rule of law and its stability. As Richard H. Fallon points out, the agreement between all the theories is established in the recognition that:

> [T]he choice among theories should be based on which theory will best advance shared, though vague and sometimes competing goals of: (i) satisfying the requirements of the rule of law, (ii) preserving fair opportunity for majority rule under a scheme of political democracy, and (iii) promoting substantive justice by protecting a morally and politically acceptable set of individual rights.[8]

[5] *See* María L. Balaguer Callejón, Interpretación de la Constitución y Ordenamiento Jurídico [Interpretation of the Constitution and Legal System] 24 (1997).
[6] American Enterprise Institute for Public Research, Separation of Powers: Does It Still Work? (Robert A. Goldwin & Art Kaufman eds., 1986).
[7] James L. Sundquist, Constitutional Reform and Effective Government (1986).
[8] Richard H. Fallon, Jr., *How to Choose a Constitutional Theory*, 87 Calif. L. Rev. 535, 539 (1999).

We should not engage in simplistic reasoning to equate non-originalism with the claim that the U.S. Constitution is hermeneutical, as opposed to non-originalists who would deny any interpretation. We want to make a different point. Originalism and non-originalism employ hermeneutic methods but with different criteria and approaches. That is the discussion we want to present. Both consider diachronic and synchronic aspects when interpreting the Constitution for current jurisdictional and jurisprudential situations.

2. HERMENEUTIC APPROACHES IN AMERICAN CONSTITUTIONAL THEORY: ORIGINALISM AND NON-ORIGINALISM

In American literature, a great debate[9] has become central to contemporary constitutional theory as to the essential elements that should prevail when dealing with the interpretation of the Constitution. The question is whether or not when judges and interpreters of the Constitution invoke the original intention of the first legislators, they should take into account the 'original intention' or whether it should be irrelevant in today's interpretation. Extensive literature contains different hermeneutical positions since the discussion revolves around theoretical and methodological positions on constitutional interpretation. However, this interpretative multiplicity is grouped around two large hermeneutical nuclei or circles, differentiating between originalism and non-originalism or living constitutionalism.[10] This practical-theoretical classification is not uniform. In both classificatory groups, there is room for various theories and approaches.

2.1. ORIGINALISM

In 1980, Paul Brest noted: "[B]y 'originalism' I mean the familiar approach to constitutional adjudication that accords binding authority to the text of the Constitution or the intentions of its adopters."[11] The author used a neologism, which had its roots in constitutional literature since the beginning of the twentieth century. Edwin Borchard

[9] *See* Lawrence B. Solum, *Originalism Versus Living Constitutionalism: The Conceptual Structure of the Great Debate*, 113 Nw. U. L. Rev. 1243 (2019).

[10] While originalism is also opposed to the moral reading of the Constitution. *See* Ronald Dworkin, Freedom's Law: The Moral Reading of the American Constitution 1–12 (1996).

[11] Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B. U. L. Rev. 204 (1980).

had already used 'original meaning' in an article on due process in 1938,[12] and Howard Jay Graham used 'original intentions' in the legal field of due process. However, it was not until 1966 that the Supreme Court used the expression 'original' about the Constitution in a text.

In *Harper v. Virginia State Bd. of Elections*, in which the appellants, residents of Virginia, challenged the unconstitutionality of Virginia's poll tax because the Fourteenth Amendment prohibits states from requiring citizens to pay a fee or tax for access to the polls, the Court ruled that the rule was unconstitutional. It argued that no new meanings can be given to concepts inherent in the constitutional text, as the Virginia Court had done. The text is enlightening on the two hermeneutic methodologies at stake and initiates the question we are presenting using an 'originalist' argument:

> The Court's justification for consulting its own notions, rather than following *the original meaning of the Constitution*, as I would, apparently is based on the belief of the majority of the Court that for this Court to be bound by the *original meaning of the Constitution* is an intolerable and debilitating evil; that our Constitution should not be "shackled to the political theory of a particular era," and that, to save the country from the original Constitution, the Court must have constant power to renew it and keep it abreast of this Court's more enlightened theories of what is best for our society.[13]

Constitutional originalism has, therefore, a long history which has taken on new forms.[14] Although originalism is presented as a method applied to the Constitution, it is a theory of the interpretation of legal texts.[15] If we had to define its fundamental thesis succinctly, it states that interpreting the Constitution means defining its original meaning.[16] However, as we have pointed out, there are several approaches to legal interpretation, among which, as Lawrence B. Solum points out, 'originalism' is a theory of interpretation of legal texts.[17] In support, Solum further points out, "'originalism' is just a name for a theory or a set of theories"[18] which attempts to show the original meaning of the Constitution as a fundamental hermeneutical criterion. In this sense, from the descriptive thesis of originalism, which affirms that the truthfulness of the

[12] Edwin Borchard, *The Supreme Court and Private Rights*, 47 Yale L. J. 1051 (1938).
[13] Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966).
[14] *See* Keith E. Whittington, *The New Originalism*, 2 Geo. J. L. & Pub. Pol'y 599 (2004).
[15] *See* Johnathan G. O'Neill, Originalism in American Law and Politics 112 (2007).
[16] *See* Michael J. Perry, *Why Constitutional Theory Matters to Constitutional Practice (and Vice Versa)*, 6 Const. Comment. 231, 236 (1989).
[17] Solum, *supra* note 9.
[18] *Id.*, at 1247.

meaning of the Constitution rests on its original meaning, it is possible to derive the normative thesis according to which the interpreter must always refer to this true meaning and not, for example, change it at will.[19]

Originalism limits judicial activism by interpreting the Constitution in a way that is faithful to its original meaning. The problem lies in discerning what 'the original meaning of the Constitution' consists of. In a more restricted approach, this task assumes that the meaning of the text is invariable, does not change, and does not follow the interpreter's intention. The meaning of the originalist paradigm in contemporary constitutional theory stresses that the purpose of the Constitution is to secure the future so that it remains grounded in the fundamental norms included in the text of the Constitution.

Insofar as originalism is not a univocal term, the family of contemporary originalist-constitutional theories contains a temporal and substantial diversity (old and new originalism), and there is no single thesis on which all self-styled originalists agree.[20] Indeed, it is expected to oppose old and new originalism, and many contributions refer to this evolution of originalist doctrine.[21] Thus, as Berman points out, we could distinguish between hard and soft constitutionalists. Indeed, some present themselves as being close to progressivism.[22]

Most originalists agree that the Constitution's original meaning should strongly limit the content of constitutional doctrine. Following Primus, we can define originalism as a family of ideas and practices that assign the authority of the content of legal provisions in the original directions that have prevailed since the constitutional text was enacted.[23] Constitutional hermeneutics results in amendments to the text of the Constitution. Despite the differences in nuances, not a few authors claim, in turn, that originalism maintains a line of continuity. Two central ideas serve as the focal point or core of contemporary originalism.

The first idea or thesis is that the linguistic meaning of each constitutional provision, i.e., of the constitutional text, was fixed at the time each provision was framed, adopted, and ratified (fixity thesis). This assumes that the meaning of the Constitution is determined by the intentions of its authors, its ratifiers, or both (original

[19] *See generally* Randy Barnett, Restoring the Lost Constitution: The Presumption of Liberty 427 (2004).
[20] *See* Andrew Coan, *Living Constitutional Theory*, 66 Duke L. J. Online 99 (2017).
[21] *See* James E. Fleming, Fidelity to Our Imperfect Constitution: For Moral Readings and Against Originalisms 433–37, 446–52 (2015).
[22] *See* Keith E. Whittington, *Is Originalism too Conservative?*, 34 Harv. J. L. Pub. Pol'y 29, 38 (2010).
[23] Richard A. Primus, *When Should Original Meanings Matter?*, 107, 2 Mich. L. Rev. 165, 186 (2008).

intentions). The meaning of the text is determined by the meaning of the words and phrases existing at the time the Constitution was adopted (original public meaning).[24]

Despite evolution and continued disagreement, however, contemporary originalist theory has a core of agreement on two propositions. First, almost all originalists agree that the inguistic meaning of each constitutional provision was fixed at the time that provision was adopted. Second, originalists agree that our constitutional practice both is (albeit imperfectly) and should be committed to the principle that the original meaning of the Constitution constrains judicial practice.[25] Says Robert Clinton: "[T]he Constitution or any amendment thereto should be interpreted as its spirit and language were understood when the relevant provision was drafted rather than in the light of new and different meanings that later generations have created and supplied."[26]

If the first originalism was a reaction to a line of argument of the Court (the Warren era), the new originalism, which originated in the nineties of the last century, has a more propositional character. The emphasis is not so much on the Court's self-limitation and respect for the legislative act but rather on the fact that the Court is a guarantor of the Constitution and, therefore, has a responsibility to defend it. This leads to a constitutional reading that considers the historical context of significance at the enactment, those above 'original public meaning'.

According to originalism, hermeneutics must follow the original meaning of the source if it is discernible. Thus, originalist interpretation uses textual and contextual hermeneutics, taking into account objective criteria. It will consider the original meaning of constitutional texts, studying their semantic and syntactic content,[27] their legal doctrinal sources, the underlying legal events and the public debate that led to the constitutional provision. Starting from the 'genetic' reading, it operates with the logic of the common sense of the civic man, applying situationism.

[24] *See* Michael D. Ramsey, *Beyond the Text: Justice Scalia's Originalism in Practice*, 92 Notre Dame L. Rev. 1945 (2017).
[25] *See* Lawrence B. Solum, *What is Originalism? The Evolution of Contemporary Originalist Theory, in* The Challenge of Originalism: Theories of Constitutional Interpretation 12 (Grant Huscroft & Bradley W. Miller eds., 2011).
[26] Robert N. Clinton, *Original Understanding, Legal Realism, and the Interpretation of 'This Constitution'*, 72 Iowa L. Rev. 1177, 1180 (1987).
[27] *See* Robert H. Bork, A Time To Speak: Selected Writings and Documents 167 (2008).

2.2. NEO-ORIGINALISM OR LIVING CONSTITUTIONALISM

In contrast to the originalist position, there is a group of theories called non-originalists. As in the case of originalism, this group is made up of a heterogeneous group of versions,[28] among which the supporters of living constitutionalism stand out. They feel progressive and affirm non-originalist positions.[29] They deny the original force of the text as a criterion of interpretative fixity, "the proponents of constitutional interpretation labeled as the *living constitution* are of the opinion that the Constitution should be treated as a legal act with a dynamic meaning depending on the time of interpretation."[30] Authors who defend this position see themselves as more pragmatic, instrumentalist and progressive in their approaches to the Constitution and, as such, tend to be averse to fidelity as an interpretative value, i.e., to assert that the text changes from time to time according to the interpreter's perspectives and interests. This leads to a denial of the originalist thesis, some authors even forcefully, such as the article by Mitchell N. Berman: "*Originalism Is Bunk*".[31] Indeed, according to this hermeneutic current, it is difficult to establish an 'original' (fixed) meaning of the primary source (Constitution).

The question arises from the fact that the U.S. Constitution has more than two centuries of history, and while it remains, the world it regulates is changing very rapidly and profoundly, not only territorially and in terms of population but also in its social, economic and, now, technological forms. The system of interpretative renewal based on amendments does not seem sufficient to keep up with these changes, and the solution of immutability does not seem reasonable to many since the speed of social transformation was not in the legislator's mind.[32] In the face of these facts, non-originalists argue for the inevitability of a constitutional change that also accompanies the perception of its validity in society. According to the non-originalists, interpretative fixism and the legislator's intentionality lead to a dependence on history, which makes the jurist a historian or a specialist in philosophical hermeneutics since he should be able to guess the original intention and understand it in the interpretative context of the eighteenth

[28] *See* Cynthia Vroom, *États-Unis* [*The United States*], 33 Annuaire International de Justice Constitutionnelle 265, 272 (2017) (Fr).
[29] *See generally* Jack M. Balkin, *Framework Originalism and the Living Constitution*, 103 Nw. U. L. Rev. 549 (2009) [hereinafter Balkin, Framework Originalism]; Jack M. Balkin, Living Originalism (2011) [hereinafter Balkin, Living Originalism].
[30] Edyta Sokalska, *Interpretations of the 'Living Constitution' in the American Legal and Political Discourse. Selected Problems*, 69 Zbornik Pravnog Fakulteta u Zagreb [Collected Papers of Zagreb Law Faculty] 433, 437 (2019).
[31] Mitchell N. Berman, *Originalism Is Bunk*, 84 N. Y. U. L. Rev. 1 (2009).
[32] *See* David A. Strauss, *The Irrelevance of Constitutional Amendments*, 114 Harv. L. Rev. 1457 (2001).

century, as well as knowing how to bring it into the modern world. This is an almost impossible task for a jurist.

Given the above, other hermeneutical solutions have to be introduced. This means that interpretation must be done based on the objectives to be achieved by the interpreter. The interpreter evaluating a written constitution cannot anticipate all events occurring in the future, so the necessary interpretation aims to answer the Constitution's problems. The original understanding is an essential source of the meaning of the Constitution, but so are other sources, namely the evolution of community norms and traditions.

'Interpretation' is a dynamic process that enables people to keep faith in the Constitution from generation to generation. In the eyes of living constitutionalism, it is precisely this interpretative life that is intended by the constitutional text, insofar as the legislator (the drafter) of the constitutional text intended that the Constitution should not be interpreted in an originalist sense. The text is not fixist in its original sense, but it is a text that is full of meaning since the meaning of the text is not unique. One meaning of the constitutional text is the original meaning, but it is only one meaning of the text and not the meaning of the text.[33] The core of the debate lies in the presence of an existence (the original constitutional text) and an interpreter. The constitutional text invites interpretation since it responds to a text and a fact. According to the non-originalist approach, the U.S. Constitution was for the Founders not just a text but a fact "a *constituting*", writes Amar.[34] The meaning of the constitutional text changes over time as social attitudes change. Thus, only some interpretative factors can be taken into account. Some theorists of living constitutionalism, such as Kramer, argue for the relevance of citizens' control over the application and interpretation of constitutional law in deliberative democracy: "[T]he power of the Constitution will always be in the hands of the people."[35]

Faced with the criticism of originalism, 'living constitutionalism' is too vague and manipulable. Given that society is changing, some American constitutionalists, such as David Strauss, propose common law as a non-originalist solution, nuancing living constitutionalism.[36] Especially in the standard law system, common law has existed for centuries. Common law is presented as a source of law that limits judges' discretion and guides individuals' behaviour. Moreover, while the common law does not always provide clear answers, advocates of this constitutional interpretation deny that imprecision is

[33] *See* Perry, *supra* note 16, at 246.
[34] "Thus the Founders' 'Constitution' was nor merely a text but a deed–a *constituting*". Akhil R. Amar, America's Constitution: A Biography 5 (2005).
[35] Larry Kramer, The People Themselves: Popular Constitutionalism and Judicial Review 173 (2004).
[36] *See* David A. Strauss, The Living Constitution (2010).

tantamount to or leads to manipulation. In this sense, rather than defending the Living Constitution, they defend the evolutionary character of the Constitution, which takes into account the sources prior to the text. In this sense, intergenerational interpretative incorporation frees each generation from the obligation to follow the mandates of the deceased Founders. In this way, repeated practice is understood as a source of constitutional law, i.e., when democratically accountable institutions, both state and federal, act over many years based on a particular interpretation of the constitutional principle, that interpretation becomes an authority.[37] One fact that would demonstrate this common law-based interpretive wisdom and show generational relevance would lie in the discovery of various legal and political milestones such as the end of racial segregation, the expansion of women's rights and freedom of expression.

3. THE ROLE OF POLITICS IN CONSTITUTIONAL INTERPRETATION

The debate arising from the very silence of the U.S. Constitution on interpretative mechanisms is overcoming its combative and polemical nature over time. No one doubts the life of the constitutional text, its permanent and stable character. The discussion as to whether its vitality emanates from the text itself towards society, orienting it axiologically and legally, or whether its vitality is reinforced in dialogue with the multiple historical-social factors does not tarnish a positive view of the constitutional text. In this sense, we can understand Balkin's words when he states that the text of the Constitution serves as a framework and an essential blueprint for politics.[38] Indeed, the Supreme Court has to interpret the Constitution, which is essential since, among other things, it means carrying out an essential activity to protect fundamental rights through its constitutional interpretation. It also indicates that the President is crucial in determining what view of fundamental rights the Supreme Court adopts.

It is worth recalling the fire that fueled the originalism debate: the Warren era (the fifteenth Chief Justice of the United States from 1969 to 1986) and the Court's embrace of living constitutionalism. Various rulings by the Warren Court (such as the one that gave rise to the *Miranda* warning) imposed the idea that judges were substituting their judgement for the legislature, interpreting areas of penumbra arising

[37] "Longstanding practice is the idea that when democratically accountable institutions, state as well as federal, act for many years on the basis of a particular understanding of constitutional principle, that interpretation becomes authoritative". Michael McConnell, *Time, Institutions, and Interpretation*, 95 B. U. L. Rev. 1745, 1771 (2015).

[38] *See* Balkin, Framework Originalism, *supra* note 29, at 549-614.

from the constitutional text. In other words, constitutional interpretation (by the Court), characterised by unrestricted interpretative openness, threatened legislative majorities; they were capable of substituting legislative action itself, thus exercising an unlimited discretionary power of the judges. In this sense, originalism awoke as a self-limiting constraint based on text, history and constant practices taking shape in the Berger Court.[39] Judges should interpret the Constitution according to the will of the political majority and discern the Founding Fathers' original intentions, thus adding objective hermeneutical elements that can prevail over subjective preferences.[40] The critique of judicial activism underlined the tendency of judges to try to impose their own political and social values on constitutional issues. Originalism appears as a barrier to voluntarist and creative jurisprudence (paradigmatically represented in the Warren era in the Supreme Court). The danger of subjective deviation causes the originalist doctrine to be disdained in academic circles but to remain entrenched, if not augmented, in the judiciary. As Delahunty and Yoo emphasised: "Even liberal justices now speak in an originalist dialect."[41]

The fundamental theoretical question is that the need to make the founding text converge with the rapidly changing reality cannot break the founding reality. Indeed, the Constitution cannot be a relic, but neither can it be changeable, for then it would not be a constitution. This observation has led even constitutionalists of a non-originalist interpretation to abandon the theory of the 'living constitution' because it is indeed inherent in the concept of the Constitution that it should be firm and solid, that it should be presented as a source for the legal order and a rock that embodies the fundamental principles. Moreover, the principles cannot have a strongly contingent vocation, that is to say, be at the mercy of space and time, because if these principles are not essential, the Constitution will lose its *raison d'être* [reason for being]. An intrinsically dynamic reason would not only lose its meaning but would also be easy prey to manipulation: perspective would prevail over solidity, it would be an infiltration of politics, and all of this would break the legal character of the constitutional text itself, since it would be the interpreter (a group of judges) who would provide the valid meaning, at least for a time, of the Constitution. We must bear in mind that in politics, time and space are fundamental interpretative axes.[42]

[39] *See* O'Neill, *supra* note 15, at 111-32.
[40] *See* Whittington, *supra* note 14, at 602-03.
[41] Robert J. Delahunty & John Yoo, *Saving Originalism*, 113 Mich. L. Rev., 1081, 1088 (2015).
[42] "I have attempted to show that the principal methodologies logically arise from the intersections of two considerations: time and institutions. Each of the principal methodologies reflects a focus on how a particular set of institutions interpreted the constitutional principle within a particular time frame". McConnell, *supra* note 37, at 1790.

This temporal reality is imposed so there is no unrestricted view of originalist fixism. Originalism – or part of it – accepts that the meaning of the text may change over time.[43] What is proposed is not so much that the Constitution changes its original meaning but that it can be interpreted in the present time through instruments that allow the original meaning and intention to be interpreted through the mediation of judicial interpretations without this being a version of the pluralism of non-originalism. This would be the case of the 'Inclusive Originalism' of Professor William Baude, Director of the Constitutional Law Institute of the University of Chicago.[44] This implies a positive turn in the interpretation of the intersection between law and history (the institution and time) that respects the law of the Founders and the articulation of the founding law with the law in force. This method attempts to provide a structural solution to the interpretation of the law in the awareness that a method cannot resolve all casuistry by itself but must provide guidance in decision-making and that this method must take into account "the present force of the past law" which reinforces the confidence of the law in force in the law of the past. This means taking history into account but not living in history: "What was thought and said in the past are questions of history; which of the answers supply legal rules today is a matter for jurisprudence and substantive law."[45] As Primus points out, commenting on Baude's proposal, inclusive originalism has different virtues, among them "[i]t avoids the dead-hand problem because it grounds the authority of original meanings not in actions that occurred long ago but in the practices of the living",[46] it is a matter of observing what judges do in their legal practice.

History and tradition (a term not used in the Anglo-Saxon sphere but better understood in our mental universe) are presented by the originalists as a brake on the plurality of interpretations, which they call "insubstantial"[47] because they are born of political decision; however, the non-originalists also accuse originalism of interference

[43] Most modern originalists accept that the meaning of text can change over time. As a result, many are abandoning strict reliance on text and, in exchange, some are seeking structural measures of original intent. Easterbrook's lecture is an example of this shift. It offers a way to make substantive constitutional decisions based on the Framers' original view of the separation of powers as inferred from the text, rather than based on the original meaning of any specific constitutional provision.

Wyatt Sassman, *Applying Originalism*, 63 UCLA L. Disc. 154, 156 (2015).

[44] Originalism might incorporate other legal doctrines into itself, the same way that American law might choose to incorporate a foreign legal rule or an economic standard. Originalism might also simply permit a given actor to choose a rule governing some defined issue, the same way that a court might be allowed to choose rules governing its own proceedings.

William Baude, *Is Originalism our Law?*, 115 Colum. L. Rev. 2349, 2356 (2015).

[45] William Baude & Stephen E. Sachs, *Originalism and the Law of the Past*, 37 Law & Hist. Rev. 809, 820 (2019).

[46] Richard A. Primus, *Is Theocracy Our Politics? Thoughts on William Baude's 'Is Originalism Our Law?'*, 116 Colum. L. Rev. Sidebar 44, 45 (2016).

[47] Solum, *supra* note 9, at 1261.

by political practice. The attack by originalists (such as Bork and Berger) on the decisions of the Warren Court, which, as we have noted, is paradigmatic of a living constitutionalist Supreme Court in U.S. history,[48] would become "a central organizing principle for the Reagan Justice Department's assault on what it saw as a liberal federal judiciary."[49] This struggle makes it clear that politics and values play an essential role in all legal interpretative theories, especially constitutional ones. Moreover, it is true that, in this sense, originalist theories cannot escape the political sphere to which all regulation is oriented (which, in essence, organizes it). In that case, living constitutionalism provides a propitious (and, for them, solid) framework for understanding the Constitution and the role that (political) values should play in constitutional interpretation.

In this sense, since the Constitution is a written text ratified by the Founders without an established hermeneutic method, and since this text determines the American nation itself, the theoretical question is marked by political debate and the tension between the various political forces. However, this tension must be understood in the fact that the U.S. Constitution has a foundational background; it is a constitution that, as Sanford Levinson[50] points out and Stephen M. Griffin, among others, recalls, constitutes an "essential element of the American civil religion"[51] and is thus 'revered and venerated'. This element must be balanced in understanding its interpretation, even if we cannot address it now.[52]

Despite its foundational character, the Constitution is understood as the supreme law of the United States that provides a framework for government and a legitimate vehicle for granting and limiting the power of government officials. However, the truth is that human beings interpret it, and they have a personality and a political mind of their own. Constitutional lawyers also need several vital concepts that emanate from politics and are necessary to properly understand the meaning of the constitutional text, especially in a constitution such as the American one that "laid down a structure, and implicitly a philosophy, of government that for the better part of two centuries has fulfilled the needs of American public life."[53]

The interpretative battle has been played out theoretically and politically, identifying traditional republicanism with originalism and democratic liberalism with

[48] *See* Morton J. Horwitz, *The Warren Court and the Pursuit of Justice*, 50 Wash. & Lee L. Rev. 5 (1993).
[49] O'Neill, *supra* note 15, at 112.
[50] *See* Sanford Levinson, *'The Constitution' in American Civil Religion*, 1979 Sup. Ct. Rev., 1979, at 123.
[51] "The rhetoric of the bicentennial confirmed the judgement of Sanford Levinson and others that an essential element of the American civil religion is reverence and veneration of the Constitution". Stephen M. Griffin, *Constitutionalism in the United States: From Theory to Politics*, 10 Oxford J. Legal Stud. 200 (1990).
[52] *See* Thomas C. Grey, *The Constitution as Scripture*, 37 Stan. L. Rev. 1 (1984).
[53] Morton Keller, *Powers and Rights: Two Centuries of American Constitutionalism*, 74 J. Am. Hist. 625 (1987).

non-originalism in different versions and at different times. Thus, if conservative judges are originalists and use this hermeneutic weapon to cover controversial situations, the democratic courts are committed to living constitutionalism, introducing elements that skirt under the umbrella of democracy of the living people elements that escape the original spirit of the Constitution. In this sense, the banner of the ghost of the past that suffocates the living (the dead hand in American legal literature) is waved, as Baude underlines:

> This positive turn answers the dead-hand argument famously leveled against originalism: The earth belongs to the living, so why should constitutional law be controlled by the decisions of the dead? The original meaning of the Constitution continues to control precisely because we the living continue to treat it as law and use the legal institutions it makes, and we do so in official continuity with the document's past. So the decisions of the dead still govern, but only because we the living, for reasons of our own, receive them as law.[54]

[54] Baude, *supra* note 44, at 2408.

CONCLUSION

Jack Balkin explained in *Living Originalism*[55] the role of a constitution in a democratic state and, conversely, the role of the democratic process in the evolution of the constitution. The question is how the democratic state can develop in the present in the light of a text that is its foundation without betraying the very text that makes the democratic state possible and without disappointing the lives of those who make up the democratic state; how to bring decision-making (legal rulings) up to date in a way that does not delegitimise the text (in its formation and intention) that it is intended to defend. In the background, there is also the question of the legal training of judges, whether they have to be meta-legal technicians or whether they have to be able to understand the context of the formation of the legal text; the question of originalism and non-originalism is a theoretical problem that is part of American constitutional theory because it depends for its object on a text of a specific nature such as the constitutional text understood as the founding text of the United States, which has been in existence for more than two hundred years and which has been enriched in forms of interpretation (amendments) but not modified, and all of this within a tradition of great customary (Common Law) and jurisprudence. The quasi-sacred character of the constitutional text understood within the American civil religion helps to understand better the issues underlying the constitutional problem, which are very different from the central character of continental constitutions.

In this sense, it would be interesting to consider the need to introduce a hermeneutic capable of combining the strength of the full meaning with the need to respect, in the sense of not contradicting, the literal meaning of the original constitutional text. Legal hermeneutic reflections in the Anglo-Saxon field could take elements from other hermeneutics of original (non-legal) texts and consider not only the author's hermeneutics (whole meaning-literal meaning) but also the hermeneutics of the reader. The author does indeed influence the reader. However, this reader is, on the one hand, the implicit reader; by this expression, we mean the person or persons the author had in mind when he wrote and whom he wanted to influence (in this case, the constitutional text). Moreover, this means that it directly influences the author's or drafter's spirit. However, at the same time, we have to consider the explicit reader: the one who will continue to read over time and who will still be influenced by the original text. The question arises about the capacity of the explicit reader (the one who continues to read over time) to influence the author, in this case, those who must interpret the author's intention. The answer is not easy and, in any case, will require a

[55] *See* Balkin, Living Originalism, *supra* note 29.

commitment to objective research on the reader's part. This hermeneutic becomes more vivid in the case we have discussed of the U.S. Constitution. I want to end with a comparative reflection on the continental situation at crucial moments in various European countries, including Spain.

On the continental shore, the debate is different since the underlying question relates to the very nature of the constitution and responds to the difficulty of reconciling the justification of the power entrusted to judges with that of democracy. In the background, the polemic between Hans Kelsen and Carl Schmitt on the "guardian of the constitution" and constitutional justice, between the function of the Head of State and the judicial control of the constitution and the review of the constitutionality of the acts of the state, is felt. [56]

Both Schmitt and Kelsen agree that the fact that the constitutional court can interpret the constitution means that it can allow or prevent its development in a particular direction, which is a problem. The solution is, however, different. For Schmitt, the guardian must be a different body from the constitutional court. The Head of State should exercise the function of guardian of the constitution to control or limit judicial control of the constitutionality of laws. For Kelsen, the solution to the problem is determined by the drafting of a good constitution, an essential constitution.[57]

Indeed, suppose the constitution is attacked by the institutions themselves, from the perversion of the idea of legislative and judicial control and its interpretative and decision-making tools that perversely modulate constitutional law. In that case, the Head of State appears as the guarantor of the spirit of the constitution. If the Head of State modulates his power, especially in republics where he has executive powers and not only representative and sanctioning powers, a constitutional judiciary is necessary to safeguard the constitution. Today, the danger enunciated in the classic polemic is qualified as the constitutional courts do not possess sufficient effective political force and know procedural limitations. Hence, their decisions have an executive limit. However, they do have a directive power. On the other hand, the Head of State also has power limited to the functions assigned to him by the constitutional text itself.

[56] *See* Olivier Beaud & Pasquale Pasquino, La controverse sur " Le gardien de la constitution" et la justice constitutionnelle. Kelsen contre Schmitt [The Controversy on " The Guardian of the Constitution" and Constitutional Justice. Kelsen versus Schmitt] (2007) (Fr.).

[57] *See* Nicolò Zanon, *La polémique entre Hans Kelsen et Carl Schmitt sur la justice constitutionnelle* [*The Debate Between Hans Kelsen and Carl Schmitt on Constitutional Justice*], 5 Annuaire International de Justice Constitutionnelle [International Yearbook of Constitutional Justice] 177, 189 (1989) (Fr.).

In the case of Spain, Title II of the Constitution assigns to the King the office of Head of State as a "symbol of its unity and permanence, he arbitrates and moderates the regular functioning of the institutions, assumes the highest representation of the Spanish State in international relations . . . and exercises the functions expressly attributed to him by the Constitution and the laws."[58] It is not surprising that supporters of totalitarian regimes, in turn, seek to take legislative and judicial control, so that they can manipulate constitutional interpretation in its various phases, while at the same time seeking to politicise the Head of State under the political cover of the Republic in order to give it back more executive power, thus breaking its constitutional neutrality.

The solution to the constitutional interpretative problem takes work. However, it leads us to consider the need to ensure a constitutional hermeneutics that tries to ensure excellent constitutional drafting and an adequate interpretation that solves the issues we have pointed out, especially the tension between the original text and the adaptation to the social and political moment without the dissolution of the constitutional spirit, as pointed out in the American legal literature.

[58] Constitución Española, BOE n. 311, Dec. 29, 1978, art. 56.1.