ORIGINALISM IN PUERTO RICO: ORIGINAL EXPLICATION AND ITS RELATION WITH CLEAR TEXT, BROAD PURPOSE AND PROGRESSIVE POLICY*

ARTICLE

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INTRODUCTION

MANY MYTHS SURROUND ORIGINALISM: IT IS EXCLUSIVE TO THE CONSTITUtion of the United States; it is inherently conservative; it is an enemy to constitutional change and relevance. In this article, I intend to challenge those assumptions by analyzing sixty years of originalist constitutional adjudication in Puerto Rico.

Originalism in Puerto Rico has never been formally adopted, but it has always been there. Three elements make Puerto Rican originalism different from the U.S. experience at the federal level: (1) clear and expansive text; (2) ascertainable original intent accompanied by a broad and encompassing purpose, and (3) a long list of justiciable socio-economic rights and progressive policy provisions; hardly what Bork and Scalia had in mind. These three elements are not exclusive to Puerto Rico; on the contrary, they are shared by many modern constitutional systems.

In Puerto Rico, bright-line rules are hardly conservative. Puerto Rican originalism is inherently progressive. The end result is a curious one: on the one

hand, courts are limited in their discretion as to *what* the text means and requires. This is achieved through clear and specific text. On the other hand, *the constraint placed upon judges is not synonymous with conservative values, narrow decisions, or judicial self-restraint on policy matters.* The text of the Puerto Rican Constitution, while limiting the choices available to judges as to *where to go*, also forces them to *go very far down the constitutionally prescribed road.* The constraint placed upon judges does not entail constraint as to the extent of their intervention. Quite the opposite: the text and history *require more and deeper judicial intervention into policy matters.* As such, the classic dichotomy between originalist restraint and living constitutionalist activism is destroyed: *the constitutional text forces judges to intervene.* In that sense, the "activist" approach would be to refrain from intervening. "Activism" is not synonymous with "interventionism."

That is the curious case of Puerto Rican originalism: it forces courts to intervene in the name of constraint. The more a constitution says, the broader the scope of a court's obligation to intervene; the clearer the text, the less room for maneuvering courts have; the greater the reach of the text, the deeper the extent of the judicial intervention.

In Part I, I analyze a recent case study in Puerto Rican case law that introduces Puerto Rican originalism. In Part II, I discuss the main ingredients of substantive constitutionalism with emphasis on clear text, authoritative history, and progressive policy provisions, and then I analyze the methodologies of the Supreme Court of Puerto Rico as to these matters. In Part III, I offer a few final thoughts.

I. STARTING AT THE END: A CASE STUDY

A. AAR's Misleading Siren Song and the Apparent Recent Discovery of Originalism in Puerto Rico

In 2013, the Supreme Court of Puerto Rico issued a 5-4 decision upholding the constitutionality of a statute that limited adoptions to opposite-sex, married couples, denying the claim of a woman who wanted to adopt her same-sex partner's daughter.[1] The plaintiffs argued that the classification was subject to strict scrutiny under the Constitution's *express* prohibition on discrimination on the basis of *sex*.[2] The question before the Court was: Are gender and sexual orientation protected under the sex discrimination prohibition provision? The Court split down the middle, with the more progressive justices answering *yes* and the more conservative justices holding the opposite view.

What is interesting about *AAR* is not the ideological split among the members of the Court as to the substantive issue of gay rights but the *apparent* differ-

1 AAR, *ex parte*, 187 DPR 835 (2013).

2 P.R. CONST. art. II, § 1. All classifications *expressly* identified in this provision are subject to strict scrutiny, including sex.

ences in their methodological approaches to constitutional adjudication. A U.S. audience might guess that the more right-wing justices adopted a textualist, originalist, and restrained approach to judging, while the more progressive judges appealed to modern values, living organism analogies, and text updating. And they would seem to be right, but even then only partially, for *AAR* is the *exception to the rule*; an anomaly, and a misleading one at that. In Puerto Rico, originalism has been used since the beginning of the constitutional era and it has a distinctively progressive, left-wing character.

The main thrust of the majority opinion in *AAR* was on classic separation of powers grounds: it is up to the democratically elected legislature to set public policy. The Court must acknowledge its *limited* role in democratic self-governance. Unless the Constitution requires a different result, it is up to the political branches to decide how best to govern.

After citing the constitutional text, the Court cited the official report issued by the Commission on the Bill of Rights of the Puerto Rican Constitutional Convention.[3] The Court stated that the report "*made clear that the purpose* of this constitutional provision is to recognize that women are now fully realized in the eyes of the law and that they have equal opportunities with respect to men."[4] The Court also cited from a book written by the President of the Constitutional Convention, Antonio Fernós-Isern, who was also the Resident Commissioner in Congress representing Puerto Rico. His book was a sort of report to Congress that detailed what the Constitutional Convention had done and why.[5] In *AAR*, the majority referenced the book as an authority on the meaning, purpose, and scope of the textual prohibition contained in Article II, Section 1. The Court stated that Fernós-Isern reached the "same conclusion" as the Bill of Rights Commission's Report as to the *purpose* behind the sex discrimination prohibition.[6]

The Court held that the purpose of the constitutional prohibition, *as revealed* by the aforementioned sources, was to eliminate discrimination against women. This purpose could be further elaborated to "avoid that our legal system creates classifications based on *incorrect, traditional and stereotypical subjective assumptions* that emanate from a male view that -consciously or unconsciously- is founded on a conception and characterization of women as the 'weaker sex.'"[7] In a final analysis, the objective of the provision was to "destroy . . . the foundations of patriarchy."[8]

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3 *AAR*, 187 DPR at 865.

4 *Id.* (emphasis added) (translation by the author).

5 ANTONIO FERNÓS-ISERN, ORIGINAL INTENT IN THE CONSTITUTION OF PUERTO RICO: NOTES AND COMMENTS SUBMITTED TO THE CONGRESS OF THE UNITED STATES (2nd ed. 2002).

6 *AAR*, 187 DPR at 866 (translation by the author).

7 *Id.* (emphasis added) (translation by the author).

8 *Id.* (translation by the author).

The Court characterized the plaintiffs' argument as proposing that it "turn 'sex' and 'gender' into synonyms."[9] As such, the Court needed to ascertain the semantic meaning of *sex*. It quoted a 1995 Report issued by the Judicial Branch that addressed gender and sex discrimination in the court system, which included distinct definitions of sex and gender.[10] As a result, the Court held that *sex and gender were not the same thing*, and applied this distinction to a text adopted in 1952. This was an obvious temporal misalignment that clashed with originalism.[11]

Since the Constitutional Convention had only prohibited discrimination on the basis of sex -not mentioning gender-, and since we now know that gender is not synonymous with sex -although a *modern* definition of the term was used-, that must mean that the prohibition established in the Constitution does not include gender. Relying on the previously identified *original purpose* of the clause, the Court held that the scope of the textual command did not extend to discrimination on account of sexual orientation:

> It is not an honest intellectual exercise to pretend that the clause that prohibits discrimination on account of sex, with its *clear history and its purpose to eliminate archaic notions on the role of women in our society*, includes, by osmosis, discrimination on the basis of sexual orientation. *History simply demonstrates* a different purpose of the clause.[12]

The majority opinion then focused its guns on the dissent, claiming that they had suggested that the "meaning of the word 'sex' in the Constitution had changed with the passage of time."[13] This is where it gets interesting. The dissenting justices attempted to sustain their positions *both* by engaging in originalist methodologies *and* by employing living constitutionalism rhetoric. But by emphasizing the latter over the former, they fell into the majority's trap: the Court is divided, the majority claimed, between those who are faithful to the constitutional text and history, including the original intent, purpose, and interpretation of the founders, and those who want to ignore those binding sources and substitute the Founders' will with their personal views on gay rights by hiding behind the liberal façade of living constitutionalism and claiming that the meaning of the words in the Constitution is subject to change.

Of course, the Court defended itself from the charge that it was favoring mummification of the Constitution:

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9 *Id.* (translation by the author).

10 *Id.* The Report defined sex as a biological term, while gender was a social-historical construction, which included expected behavior.

11 This seems inconsistent with original public meaning originalism, which looks to contemporaneous sources of meaning to ascertain the semantic content of words. By citing a 1995 report, the Court puts originalism on its head, using *current* meanings to identify *original* semantic content.

12 *Id.* at 869 (emphasis added) (translation by the author).

13 *Id.* at 870 (translation by the author).

> It is not that our Supreme Law is a "prisoner of time" like the dissenters claim, but the key to change the meaning of the text is not in the hands of the Justices of the Supreme Court . . . .
> [I]t is surprising that some members of this Court openly propose a theory of interpretation that would allow judges to decide that the meaning of the Constitution has undergone a metamorphosis with the passage of time. What *legitimacy* do nine lawyers who are privileged to wear robes in this honorable institution have to tell the People of Puerto Rico that the *meaning* of their *lex superior* has changed?[14]

The majority stressed the difference between interpreting the Constitution and changing the meaning of its text. Finally, the opinion ended where it began: *"[t]he Judicial Branch does not rule under our system."*[15]

It is difficult to maintain that the majority opinion actually engaged in originalist interpretation. It was the majority that engaged in metamorphosis when they used current sources to identify the communicative content of words used in 1952. By doing so, they failed to see that the actual semantic meaning of *sex* in 1952 probably included definitions that are now considered to be related to *gender*. Yet, they held on to the originalist label because of its powerful appeal.

The dissent attempted an originalist defense of its position, although it could have done so much more. It retreated to a seemingly exclusive living constitutionalist approach to meaning, when it was actually disguising *originalist arguments with living constitutionalist rhetoric*. In this sense, it would seem that the conservative justices *said* they were being originalists, when in fact they employed living constitutionalist tools while the progressive justices *said* they were living constitutionalists, when in fact they actually applied the originalist model. This mix-up can be attributed to the historical correlation made in the U.S. between originalism and conservatism.

Chief Justice Hernández Denton, one of the historic voices in favor of living constitutionalism, led the charge:

> In order for the constitutional command to be viable across the generations, we have to accommodate the legal system so that it corresponds with the extralegal, social reality.
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> . . . .
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> . . . I dissent from a judicial insularism based on the notion that our Constitution has to be interpreted in the context in which it was adopted more than sixty years ago, as if it was an ancient manuscript trapped in a glass urn.[16]

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14 *Id.* at 871 (emphasis added) (translation by the author).

15 *Id.* at 888 (translation by the author).

16 *Id.* at 964-65 (Hernández Denton, C.J., dissenting) (translation by the author). Hernández Denton still attempted an originalist defense, referencing the broad concepts employed by the Con-

Associate Justice Fiol Matta attempted a lukewarm originalist defense of the progressive position by focusing on the *general purpose* of the sex discrimination prohibition: "[i]n order to interpret what is meant by discrimination on the basis of sex, we must study the ways in which the different sexes, historically, have been treated unequally, as well as the motives and justifications used to sustain that unequal treatment."[17] Then she linked gender with sex: "it is evident that people have been discriminated against on account of sex because they have not conformed to traditionally and culturally established sexual categories. That's why we can conclude that discrimination on the basis of gender goes hand in hand with discrimination on the basis of sex."[18]

Finally, Associate Justice Rodríguez Rodríguez took on the originalist rhetoric by quoting from the official report issued by the School of Public Administration of the University of Puerto Rico, which was charged by the Constitutional Convention with recommending constitutional provisions.[19] According to that report, the original intent of the Framers was to interpret the Constitution using living constitutional tools: "[o]ur constitutional clauses are not prisoners of time."[20]

The dissenters in *AAR* seem to have surrendered the originalist argument as to the question before the Court. Still, they came back to the originalist road by quoting the delegates and the Convention reports which either supported a living constitutionalist approach or suggested that the original meaning of the text included the type of discrimination at issue. However, they chose not to confront the conservative originalism of the majority, contributing to the incorrect notion that Puerto Rican originalism is inherently conservative, restrictive, and limited, and, therefore, that progressive results may only be achieved through living constitutional notions of updating the text and artificially expanding the

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stitution that contain general principles. He quoted from the Framers saying that the constitutional text should be interpreted by courts as broad as possible, in order to fulfill its rights-protective purpose. *Id.* at 974. Yet his living constitutionalism rhetoric fought back:

> We must avoid expressions that fossilize [the Constitution] and turn it into a history museum piece . . . . [W]e must not allow our Constitution to become obsolete thanks to literal, restrictive and inflexible interpretations that hinder its application to future eventualities and that lead to results contrary to the fundamental values it enshrines.

Id. at 971-72 (translation by the author).

17 *Id.* at 997 (Fiol Matta, J., dissenting) (translation by the author).

18 *Id.* (translation by the author) ("Discrimination on account of sexual orientation is a manifestation of discrimination on the basis of gender which, in turn, is a component of discrimination on account of sex. These three modes of discrimination are prohibited by our Constitution." (translation by the author)).

19 Curiously, Justice Rodríguez Rodríguez identifies a contradiction in the original intent of the founders: while they included an express prohibition on discriminating on the basis of sex, some delegates to the Convention stated that some male-favoring institutions, like the male administration of community property, would still be allowed. *See id.* at 1001 n.2 (Rodríguez Rodríguez, J., dissenting).

20 *Id.* at 1037 (translation by the author).

scope of constitutional provisions. But in Puerto Rico, originalism and minimalism are not synonymous.

The majority opinion did not explicitly adopt an originalist ideology. That was done by Associate Justice Martínez Torres' concurring opinion, which included twelve references to Antonin Scalia.[21] He blasted the dissenters for their defense of living constitutionalism, labeling them as activists, and took advantage of their unwillingness to make a solid originalist defense of the controversy before the Court. His description of originalism is a mix of the different schools that make up that judicial philosophy. Yet, he hints at the mode of originalism to which he subscribes: constitutional interpretation "in harmony with the way in which the text was understood by the people who approved and ratified" the Constitution.[22] However, he failed to criticize the majority's use of a 1995 Report to give meaning to a concept used in 1952.

Martínez Torres then turned his attention to Article II, Section 19, of the Constitution which requires courts to reject restrictive theories of interpretation when it comes to constitutional rights:[23] "in every constitutional controversy we must interpret the words of our Supreme Law profoundly and broadly."[24] He recognized that Section 19 commands that the non-inclusion of rights "does not mean that everything which cannot be gauged literally from each and every one of the words used [in the Constitution] is, therefore, devoid of constitutional protection."[25] But, he stresses, this is not a *carte blanche* for judges to *redefine* concepts and add rights that do not exist. Linking originalism with separation of powers principles, Justice Martínez Torres concludes that "the Constitution of Puerto Rico does not mention the broader concept of 'gender' and even less so the subcategory of 'sexual orientation.' The document limited itself to prohibiting discrimination on the narrower category of 'sex,' that is, because one is a man or a woman."[26] I think Justice Martínez Torres confuses minimalism with originalism. Interestingly enough, his concurring opinion, like the opinion of the Court, appears to have made only superficial research as to the semantic meaning of *sex* as opposed to *gender*. It is very likely that the original purpose of the Framers was to adopt a broad definition of *sex* that included all forms of discriminations based on stereotypical views as to the conduct of the sexes, including sexual preferences.

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21 *Id.* at 889 (Martínez Torres, J., concurring) (quoting ANTONIN SCALIA & BRYAN A. GARNER, READING LAW 410 (2012)).

22 *Id.* at 891 (translation by the author). This seems to be more in tune with original public meaning originalism: "[The Constitution] should be interpreted in such a way as to give its words the meaning they had when it was adopted and ratified." *Id.* (translation by the author).

23 "The foregoing enumeration of rights shall not be construed restrictively nor does it contemplate the exclusion of other rights not specifically mentioned which belong to the people in a democracy." P.R. CONST. art. II, § 19.

24 *AAR*, 187 DPR at 896 (Martínez Torres, J., concurring) (translation by the author).

25 *Id.* (translation by the author).

26 *Id.* at 898-99 (translation by the author).

But the story of *AAR* is only the beginning.

B. Basic Elements of Puerto Rican Constitutional Adjudication in General and of Originalism in Particular

After sixty years of constitutional adjudication, *AAR* was the first time the concept of *originalism* was discussed, or even mentioned, in a Supreme Court opinion.[27] It would seem that, for the first time, lines had been drawn and sides were being chosen. From *AAR* on, the Court would split along this methodological line. Yet, appearances can be deceiving.

Since the adoption of the Constitution in 1952, *originalism has been at the forefront of constitutional adjudication in Puerto Rico*, years before it would become an object of debate in U.S. legal scholarship. Originalism has been used constantly and repeatedly by the Supreme Court. The thing is that our version of originalism has a distinct Puerto Rican flavor: its substance is progressive and its method is one of *original explication*, that is, how the Framers themselves interpreted and constructed their own words.[28] Our constitutional design and history has facilitated a progressive, originalist approach.

First, the *text* of the Puerto Rico Constitution contains multiple bright-line rules that remove much of the vagueness typically associated with constitutional provisions and are also accompanied by expansive language that, in combination with those same rules, produce strong, broad, and extensive protections of constitutional rights. Let's examine an example.

Does the U.S. Constitution's Eighth Amendment ban on cruel and unusual punishment require courts to declare the death penalty unconstitutional? The text of this provision is vague at best, for it only offers a subjective standard: no objective measurement, no specific rule. As a result, courts would need to embark on an interpretative analysis to discern the semantic meaning behind those words and then proceed to give them legal content through the process of constitutional construction that builds upon, but should not contradict, the text itself.

Puerto Rico has dealt with this issue differently. Indeed, its Constitution does have a general provision that prohibits cruel and unusual punishment.[29] It also has an absolute, textual ban on capital punishment: "[t]he death penalty shall not exist."[30] This bright-line rule, plus the general language model, produces several results.

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27 Luis M. Villaronga, *Derecho Constitutional*, 64 REV. JUR. UPR 765, 787-88 (1995).

28 Original public meaning originalism has not been the dominant approach used in Puerto Rico. On the contrary, it has been original intent and purpose in terms of the original meaning *as identified and explained by the Framers themselves*. I refer to this type of originalism as *original explication*. I thank Professor Larry Solum for his suggestion as to this terminology.

29 P.R. CONST. art. II, § 12.

30 *Id.* art. II, § 7.

On the one hand, it creates an unmistakable irreducible core. The vagueness and general nature of the text in the cruel and unusual provision cannot be used to justify a narrow construction that would allow the death penalty. The existence of a bright-line, categorical, clear, and absolute command washes away the possibility that a court might construe the general language too narrowly. The text speaks for itself.

On the other hand, there is a recognition among the drafters that it is not wise to only use bright-line rules. This would require an endless list of prohibitions that would, necessarily, be incomplete. So, by complementing the bright-line rule with a general language provision, the latter takes a life of its own. By fortifying and enlarging the core, the penumbra also grows and solidifies. As a result, the Puerto Rican provision banning cruel and unusual punishments, almost by definition, starts where the specific rule stops, with the end result that the protection is that much stronger and goes that much farther. This phenomenon permeates the entire Puerto Rican Constitution.

Second, the *history* behind the text is both clear and broad in its reach. Modern constitutions tend to differ from the U.S. experience in two crucial ways. First, they are not remote events in a distant past whose study is more in the realm of history than law. On the contrary, they are recent processes that created vast amounts of accessible and intelligible records full of detail, explanations and content. Second, their constitution-making process was a central aspect of national identity and social alignment. As such, all eyes of the polity were focused on the process itself, shifting the center of attention from the ratification process to the actual drafting. The people were not merely passive ratifiers of the work done by others; they were active participants in the drafting process, whether by (1) electing the delegates who, as part of their selection, publicized their constitutional proposals for popular analysis; (2) generating the political and social forces that gave life to the Constitution itself; (3) directly proposing specific provisions to the constitution-making body, or (4) actively engaging the process through a constant monitoring of the work done by the drafters. In such cases, the argument in favor of *We the People* is more compelling. As a result, the binding nature of the *history* of the Constitution becomes inescapable, thus furthering the case for some sort of originalist approach. Again, Puerto Rico is a good example of this phenomenon.

Because of the nature of the process that created the Constitution of Puerto Rico, there is a rich and comprehensive record within reach of constitutional adjudicators. The record is rich in detail, with much elaboration on the purpose, semantic meaning, and legal content of the adopted provisions. The creation of the Puerto Rican Constitution was hardly a secret, elusive, or discreet affair. On the contrary, it was the result of years of debate and consensus among the political and social forces on the island.

When Congress finally authorized the calling for a Constitutional Convention, most of the main political parties in Puerto Rico embarked on a process to select the candidates *and programs* they would take to the people. As such, the process of creating the Constitution began months before the first meeting of

the Convention took place. Political parties, labor unions, civic organizations, and other social movements made the Constitution their top priority and embarked on a prolonged national conversation about *what sort of constitution was wanted.* As a result, candidates and parties made specific, comprehensive, and public proposals as to the particular provisions they would take to the Convention, and scrutinized their political rivals' respective proposals. In other words, a popular and public debate emerged *which would culminate, not in the process of ratification, but in the drafting itself.* This explains why Puerto Rican originalism is based more on original intent than original public meaning, as well as focused on the drafters and not the ratifiers. The combination of these two factors –the richness of the record and focus on the Framers-, allows for the main articulation of originalism in Puerto Rico: original explication. For example, the work on the Convention floor generated 2,500 pages of debates among the delegates, who asked each other questions on what specific provisions meant, whether semantically or relating to their purpose, legal content, or possible future applications. Through the reports and the debates, the Framers were able to interpret their own work.

Finally, the work of the Convention was public in nature, through the physical presence of the people in the galleries of the Capitol, individuals and organizations proposing provisions directly to the Convention, and through the media's constant narration of daily events. In other words, there is clear, official, and universally accepted evidence of what the drafters did, why, and what it all meant. Ascertaining original meaning, intent, and purpose is hardly a difficult thing. This has resulted in a method in which the Supreme Court searches for the Framers' original explication of their own words and, after doing this, attempts to interpret that explication. In Puerto Rico, the Framers are the primary interpreters of the Constitution.

But the story does not end with the availability of sources as an empirical matter. The *nature and content* of those sources are also interesting and compelling: unequivocally, the consensus that emerged from the Convention, *which is palpable from the historical sources*, favors a progressive, rights-protective, expansive, broad, and socially oriented approach to the Constitution and its future interpretation and application. Not only can we ascertain intent, purpose, and meaning with ease, but also expressly reject a narrow, minimalist or conservative view of the Constitution.

Third, the Constitution not only has bright-line rules and broad language that result in a progressive text and clear, identifiable intent and purpose of an expansive nature, but it also contains *substantive elements* that force Courts to intervene in areas typically reserved exclusively for the elected branches. This substantive content comes in two modes. First, through the inclusion of a comprehensive and non-exhaustive list of justiciable socioeconomic rights, which can be either individual or collective, positive or negative, and opposable both to state action and private parties. This creates a seemingly endless source of constitutional adjudication that requires judicial intervention in many aspects of social life. Second, aside from rights protection, the Constitution also contains

provisions that convey binding public policy. That is, the Constitution itself adopts public policy provisions that are binding on the political branches and that, if they fail to follow or obey them, can be vindicated in the courts. These provisions cover a wide range of areas, like labor, environmental, and even economic preferences. These constitutionally entrenched public policy preferences, combined with rich socioeconomic rights, reveal a program and an ideology underneath the Constitution itself, which form an inherent part of it. Labor rights are a great example of this phenomenon.

Constitutionalized socioeconomic rights are different from the classic catalogue of political and civil rights in older constitutions. These rights are not just positive rights that create an obligation on behalf of the state, but are actually negative rights operational in the private economic sector. Finally, because of their structural organization, they form a constitutionally ranked *public policy* that cannot be ignored by courts in the process of adjudication. From statutory interpretation to evaluation of policy decisions made by the legislature, courts are called upon to implement these constitutional public policy provisions as part of their judicial role.

All of this creates a comprehensive role for courts in constitutional-democratic self-governance. By entrenching so many rights and policy choices in the Constitution, the People are governing themselves, refusing to settle for plain-old legislative self-governance through representative and ordinary politics. They are recruiting courts to help them in that endeavor by guaranteeing that the popular will expressed in the Constitution is not thwarted by the hijacking of the legislative process. This brings us to a critical distinction relating to the nature and types of modern Constitutions. I will now discuss what I consider to be the ideal constitutional types as to structure, content, and design that have direct bearing on issues concerning methods of interpretation and judicial application.

C. *Types of Constitutions: A Blueprint for Adjudication*

First, we have *framework constitutions*.[31] These tend to be older and associated with the British tradition of constitutional law related to government action and parliamentary sovereignty. Their goal is to create and kick-start the political process and leave everything else to it. Framework constitutions maximize self-government by limiting themselves to creating the structures of government and supplying them with tools to function effectively. Once these structures of political self-governance –especially those of a democratic nature- are set up, then constitutional law stops and ordinary politics start. The role of the Constitution is to kick-start politics, not direct it. Society is not to be organized by the Constitution, but through it. Framework constitutions create the organism of government and, once life has been given to it, the structural constitution takes a step

31 Also known as *statutory, organic* or *procedural.*

back. Commonwealth countries tend to have these types of constitutions, Australia being a prime example of a *pure framework constitution.*

Second, we have *liberal democratic framework constitutions.* The U.S. constitutional text fits this category, although it actually started out as a regular framework constitution. The adoption of the Bill of Rights in 1791 changed its nature, although some liberal democratic elements were already present in Article I. These constitutions *add* to the basic framework of government set up by the organic text, by including individual liberties and political rights. In turn, these rights have two relevant features: (1) they tend to focus on individual political rights, and (2) they are inherently related to the idea of a framework constitution. As political rights, they are lacking in substantive content and are directly related to the actual functioning of the political institutions. By creating individual political rights, democratic self-rule is fortified. Depending on their specific content and construction, liberal democratic constitutions can be *low intensity* (U.S.) or *high intensity* (Germany). This distinction focuses on *how and why* liberal democratic provisions are applied. If they are used mostly for their role in guaranteeing democratic self-governance, they are low intensity. However, if they acquire *independent substantive content and are combined to create binding constitutional principles and policy,* they are high intensity.

Third, we have *teleological constitutions.*[32] Their main articulation is the *substantive* model. These are associated with the so-called second wave of rights, which are socioeconomic in nature and the result of the Second World War. Recognizing the insufficiencies of merely letting loose the instruments of ordinary politics or complementing them with political rights, teleological constitutions build on the notion that some rights are necessary for the effective functioning of a democratic society. Social and economic inequalities are damaging to the democratic process: hungry, exploited, and/or illiterate individuals are not active citizens and are left out of true democratic self-rule. In that sense, they serve as distant relatives of framework constitutions: the inclusion of socioeconomic rights is part of a design to strengthen democracy. This would correspond to low intensity modes of this type of constitution, merely expanding the list of rights necessary to facilitate self-government.

Yet, a mutation has occurred: substantive rights are not adopted merely to strengthen democracy. A new role for the Constitution has been included: entrenchment of substantive rights serves as a model for the type of society the People want to build. Why leave certain important policy choices to ordinary politics, where they can be corrupted, weakened, or temporarily deprived? The success of entrenchment obtained by liberal democratic constitutions convinced people to entrench not just basic political rights, but other rights that directly improve the quality of life itself: substantive rights. These rights tend to be both individual and collective, social and economic, and opposable both to the state

32 Most of them are of a social democratic character. Surely, there can be constitutions that entrench reactionary commands or *laissez-faire* principles. Chile is a good example. Yet post-World War II constitutions that include substantive issues tend to be of a social democratic nature.

and to other private parties. This corresponds to high level substantive constitutions.

Unlike liberal democratic framework constitutions, teleological constitutions recognize that individuals are not just vulnerable to government abuse; they are also vulnerable to exploitation by private and economic forces, such as creditors, employers, landlords, and industrial interests. This is characteristic of high intensity constitutions like South Africa's. This brings us back to the democratic rationale of substantive rights: if citizens only have political rights in their constitutions and the rest are up to ordinary politics, powerful private interests can easily highjack ordinary politics. It is more difficult to highjack constitution-making processes where the people's interest are heightened. By ensuring these substantive rights, the people are able to: (1) better arm themselves for the democratic fight, and (2) remove from ordinary politics those rights that are so important as not to be trusted to ordinary politics, where economic forces are stronger.

Finally, we have *ideological constitutions*. Substantive constitutions are the natural offspring of liberal democratic constitutions. In their low intensity form, they seek the amplification of rights that strengthen democratic self-rule. In their high intensity form, they entrench socioeconomic rights because they possess independent substantive content beyond their relation to the political process. In both models, they continue where the liberal democratic constitutions left off. Ideological constitutions are, in turn, the natural offspring of substantive constitutions. Once you establish and entrench substantive rights, a picture of the *type* of society you want to create starts to emerge. Labor rights, environmental protection, right to health care access, and so on, are not just isolated rights: they make up a blueprint for society. At some point, the Constitution is not merely laying out rights or facilitating self-government; instead, *the Constitution is substantively organizing society*.

Through ideological constitutions, the way forward is not left primarily to ordinary politics or legislative judgment. The Constitution points the way, leaving to ordinary politics the details of that journey. These constitutions do not limit themselves to containing ordinary politics or recognizing more individual rights. On the contrary, they tend to: (1) be very specific, and (2) actively guide ordinary politics. Under this type of constitution, broad and general language is not vague or empty; on the contrary, they carry enormous ideological weight. Compare *equal protection of the laws* to the *dictatorship of the proletariat* or the teachings of Ataturk. All are equally open-ended and broad, but the latter two carry ideological content that reigns over a vast domain. These constitutions tend to be the result of a revolutionary process, be it independence (nationalism, religion, or identity), social transformation (a socialist revolution or capitalist restoration), or democratic transition (the end of apartheid or of colonialism). Aside from an ever-growing, detailed yet expansive array of individual and collective rights, ideological constitutions entrench within the text and structure of the Constitution itself public policy choices and preferences, as well as actual commands and principles relating to the economic system and social organiza-

tion. The new constitutions of Venezuela, Bolivia and Ecuador are manifestations of this trend in modern constitutionalism. The Portuguese Constitution of 1974 was crucial in the development of this trend.

This summary of my proposed typology is not meant to be either/or. The types of constitutions I have proposed are not closed-off from each other. On the contrary, I have emphasized their connections and interactions. Most modern constitutions are, for the most part, eclectic, yet can be analyzed so as to catalogue them within the suggested typology. Also, the notion of *low intensity* and *high intensity* versions of these types reinforce the idea that there are blurred lines between them. But, the typology is still useful, for it identifies the *nature and effect* of the theory of constitutional adjudication that is adopted in a particular place. An originalist in the U.S. hardly resembles an originalist in Chile or Bolivia. Yet, their methodological approaches are similar. But by recognizing the different types of constitutions, we can better understand the justifications, function, and repercussions of originalism around the world.

Framework constitutions tend to be free of major policy considerations, written in vague and open-ended ways, and are not accompanied by a publicly-empowered authoritative drafting history. Teleological constitutions, typically of a social-democratic, post-liberal or radical bent, tend to be, simultaneously, more specific and more expansive in their reach. I believe there is a common thread between constitutions that: (1) contain clear and expansive text; (2) bring with them an inseparable history of creation and explanation, and (3) purposefully entrench policy choices in the constitutional structure: *a modern distrust of ordinary politics, especially of representative democracy through legislative governance*. The logic behind the (1) use of vague, general, and open-ended provisions, (2) the secondary nature of the original process of making a constitution, and (3) the omission of substantive or policy issues in the constitution is that the political process kick-started by the adoption of the Constitution will adequately fill in the gaps. That is the basis of the distinction between constitutional entrenchment and ordinary politics. The more you entrench, whether through clear text, authoritative history, or through the inclusion of substantive content, the more you take away from ordinary politics. And while this definitely entails some risks and problems, like the disruption of democratic self-governance and the obstruction of democratic change through the ordinary political process, it is not the product of misinformed or misguided constitution makers.

The fact that many modern constitutions are of the new brand can be seen as evidence of a generalized *mistrust* of ordinary politics. These new types of constitutions serve two important and related purposes: (1) to guard against the failure of ordinary politics that may occur, particularly in socially unequal polities, and (2) to allow the people to govern themselves, not just through the election of representatives that will govern on their behalf, but through popular enactment of constitutional texts and structures that bypass the indirect aspect of representative democracy. As a result, *courts are invited, recruited, and even forced to transform their classic judicial function and actually become a third branch of government*. When legislative self-governance functions properly, the

role of the courts will, indeed, be limited. But when the institutions of ordinary politics fail and frustrate the popular will articulated in the Constitution, then courts are forced to intervene to restore the balance *in favor of popular self-governance*. When ordinary politics *fail*, the countermajoritarian issue becomes irrelevant, because, *if there is still popular adherence to the Constitution*, courts will, in fact, be restoring the popular will that was frustrated by the legislative malfunction. Thus, when implementing constitutional policy commands, courts are not acting in a countermajoritarian manner. How courts deal with these types of constitutions becomes critical, because their failure to live up to the potential of the new constitutions adopted by popular will makes them accomplices in the frustration of that will. If ordinary politics fail, and the courts stand by passively in the name of judicial restraint or because of separation of powers concerns, then the failure is complete and the popular will is totally destroyed. That would be a tragedy of historic proportions. That is why, among other things, the new trend in constitutionalism requires a re-evaluation of the entire separation of powers doctrine.

D. Setting the Stage for Originalism: The Effects of the Three Elements (Text, History, and Substance) in Constitutional Adjudication

Originalists have both a more compelling and, at the same time, challenging case in teleological constitutions that have these three characteristics (clear and expansive text; authoritative history that reflects broad purpose; entrenched socioeconomic rights and policy choices). "Compelling" because it is hard to ignore clear text and clear original purpose in the context of a constitution-making process that was crucial to the polity and in which strong social consensus emerged and was incorporated into the Constitution. A constitutional judge that ignores clear text and discards the rich history of the constitution-making process would be very vulnerable to charges of illegitimacy.[33]

Yet all of this comes at a price. Courts will constantly find themselves locking horns with legislatures and, in representative democracies, with temporal majorities. Sometimes, the people will support their courts because they are faithfully applying the Constitution that was popularly adopted against a disconnected legislature. But sometimes, the original consensus that made the Constitution may have indeed weakened, and a new consensus may be on the rise. In those cases, a pure originalist approach may break the constitutional consensus

33 Even the most ardent living constitutionalist cannot evade the two senator rule or the presidential age rule. Now imagine that the Constitution is full of these types of bright-line rules and that those rules are: (1) backed-up by strong evidence of purpose and design, and (2) related to controversial and every day issues like economic policy, labor disputes, abortion, the death penalty and income distribution.

and force people to amend or discard the Constitution itself to conform to present values, with all the instability that encompasses.[34]

In summary, clear text and history limit the discretion of courts but also legitimize their actions. And when that clear text and history is of a rights-expansive nature and is combined with an array of progressive socioeconomic rights and entrenched policy choices, the substantive result of constitutional adjudication through originalist vehicles will produce interventionist courts. But we could not affirm that courts were being "activist" in those situations. In these situations, it is the Constitution that is activist and the People who adopted it: *We the People's* will be done.

II. PUERTO RICO: A CASE STUDY

A. Introduction

Why Puerto Rico? After all, we are talking about a small island in the Caribbean that, as a territory of the U.S., has an almost non-existent role in the international arena. But actually, the Puerto Rican identity crisis exacerbated by colonialism may have something to offer.

First, the U.S. debate has focused for far too long on the federal Constitution. But the U.S. has fifty plus jurisdictions with their own state or local constitutions that, *precisely because of their clear text, expansive purpose, and policy entrenchments*, have a lot more to offer people than the bony federal Constitution. In that sense, the Puerto Rican experience can serve as a model for further development of state constitutional law in the U.S. that transcends the minimalist approach of simply fixing the mistakes of the federal Supreme Court by way of state constitutional adjudication. If states are really the laboratories of democracy, adequate developments in state constitutional adjudication may be socially beneficial. I fear that many state constitutions may be severely underutilized because of the influence of federal case law. Maybe an *originalist* approach to state constitutional law can have positive transformative consequences or, even in negative situations, force people to pay more attention to state constitution-making.[35]

Second, the Puerto Rican Constitution is not an isolated legal document. It was part of a world-wide revolution in constitution-making that may yield helpful insight into the development of theories and methods of constitutional adjudication in other countries that, for several reasons, may also be underutilizing their constitutional potential.

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34 *See* Jorge M. Farinacci Fernós, *The Dormant Commerce Clause and a Public Economy: Lessons for Puerto Rico*, 47 REV. JUR. UIPR 595 (2013).

35 Many state constitutions, particularly those that were drafted during the Progressive Era, are very similar to the type adopted in Puerto Rico. This suggests a vast array of research that could be done in that direction. *See* Michael Schwaiger, *Understanding the Unoriginal: Indeterminant Originalism and Independent Interpretation of the Alaska Constitution*, 22 ALASKA L. REV. 293 (2005).

Until recently, debates about originalism have focused exclusively on the Constitution of the U.S. The scholarship has slowly but surely begun to turn its attention towards comparative originalism.[36] Previously, the academic debate centered on U.S. originalism. When it came to comparative constitutional law, it focused mainly on particular issues and results, more than on theory and method. As stated, there has been a movement to dive deeper and analyze how courts in other countries actually go about the process of constitutional adjudication from a theoretical and methodological standpoint. The initial results have been interesting, promising, and potentially revolutionary. In that sense, Puerto Rican constitutional history and practice offer a bridge between state constitutional development and transnational comparative law.

After nearly 400 years of Spanish colonialism in Puerto Rico, the U.S. declared war on Spain and invaded the island on July 25, 1898. Spain formally ceded sovereignty over Puerto Rico to the U.S. by way of the Treaty of Paris. From 1898 to 1900, Puerto Rico was under U.S. military rule. In 1900, Congress passed the Foraker Organic Act that gave Puerto Rico a civilian Government that was mostly appointed by the President of the U.S. In 1917, Congress passed the Jones Organic Act that replaced the Foraker Act. For our purposes, the Jones Act served as the proxy for a local Constitution. Still, power rested with Congress and the President, who continued to appoint most of the Government. Congress granted Puerto Ricans U.S. citizenship that same year.

When Congress finally authorized Puerto Rico to enact its own Constitution, the main political parties in Puerto Rico had mixed reactions. On the one hand, this was an important opportunity to do away with the hated, nakedly colonialist Jones Organic Act and adopt a Constitution that really addressed the needs and preferences of the Puerto Rican people, particularly as to individual and collective rights and the setting-up of a locally elected Government. On the other hand, the move reeked of colonialism with Congress *authorizing* the People of Puerto Rico to exercise their sovereignty. Congress also included substantive conditions that the Constitution must meet, as well as a process of ratification that called for a supervising role on behalf of Congress.[37]

To some in Puerto Rico, the latter part was too much to bear. The second-strongest political party at that moment, the Puerto Rican Independence Party

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36 *See* Yvonne Tew, *Originalism at Home and Abroad*, 52 COLUM. J. TRANSNAT'L L. 780 (2014); Sujit Choudhry, *Living Originalism in India? "Our Law" and Comparative Constitutional Law*, 25 YALE J.L. & HUMAN. 1 (2013); Ozan O. Varol, *The Origins and Limits of Originalism: A Comparative Study*, 44 VAND. J. TRANSNAT'L L. 1239 (2011); David Fontana, *Comparative Originalism*, 88 TEX. L. REV. SEE ALSO 189 (2010); Jamal Greene, *On the Origins of Originalism*, 88 TEX. L. REV. 1 (2009); INTERPRETING CONSTITUTIONS: A COMPARATIVE STUDY (Jeffrey Goldsworthy ed., 2006).

37 For example, Congress required the adoption of a Bill of Rights. "Presumably, the *intent* of the Congress was that the Constitution contain guarantees of fundamental rights which are part of the American tradition." FERNÓS-ISERN, *supra* note 5, at 33 (emphasis added). As to its supervising role, there could be a theoretical argument that Congress was actually one of the main ratifiers of the Constitution. Yet, because of obvious political considerations and because of the inevitable charge of raw colonialism it would entail, no one has ever suggested to look to Congress' role as a "ratifier."

(P.I.P.), called for a boycott of the election to the Constitutional Convention due to its irremediable colonial texture. The other parties -the governing Popular Democratic Party (P.D.P., known in Spanish as *Partido Popular Democrático*), the Puerto Rican Statehood Party (P.S.P., known in Spanish as *Partido Estadista Puertorriqueño*), and the pro-annexation Socialist Party (S.P., known in Spanish as *Partido Socialista*)- supported the process. The campaign that preceded the election of the delegates centered on *what* type of Constitution would be adopted, particularly as to the content of the Bill of Rights, and issues pertaining to social and economic policy. Some of the main parties even approved electoral programs that spelled out their main proposals to the Convention for popular analysis. As such, *the election of the delegates would be seen as a popular mandate to write the Constitution in a particular way*. This would explain why, after the adoption of the Constitution in 1952, the Supreme Court of Puerto Rico would focus so heavily on the work of the drafters -including their intentions, purposes, specific examples, and opinions as to the communicative and legal content of the adopted provisions- instead of the understanding of the people as ratifiers. The nature of the constitution-making process made the people part of the *drafting* itself. The public debate about the content of the Constitution proceeded and continued during the sessions of the Constitutional Convention. It is worth noting that, from the get-go, the issue of socioeconomic rights and policy, particularly labor matters, were high up on the agenda.[38]

The governing P.D.P., an offspring of the progressive wing of the independence movement and linked with labor unions and the interests of landworkers at the time, won by a landslide in the election of the delegates to the Convention. Each one of their candidates was elected. The P.S.P., the conservative wing of the pro-annexation movement, came in second. The S.P., the leftist wing of the statehood cause with historic links to labor, and the most radical of all the parties, came in third. The makeup of the Convention itself is very revealing: there were thirty-two lawyers, thirteen farmers, nine labor leaders, six teachers, six merchants, five manufacturers, four physicians, and three journalists, among others.[39] Only one woman was elected. All three participating parties elected delegates from the labor movement, which guaranteed a prioritization of socioeconomic rights and labor policy. In that sense, the Constitution stands on a very particular ideological base of a distinctly progressive nature that is wholly relevant in the exercise of constitutional interpretation, construction, and adjudication. Puerto Rican originalism has a distinctly leftist tongue. Also, Puerto Rico's written Constitution extends beyond the text adopted by the Convention in 1952. As we will see, sometimes it feels like Puerto Rico has a 2,500 page Constitution when taking into account the supplemental historical material. Finally, we have mentioned the *textual* basis for a broad and expansive construction of constitutional rights laid out in Article II, Section 19.

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38 *Id.* at 24. *See also* JORGE M. FARINACCI FERNÓS, LA CONSTITUCIÓN OBRERA DE PUERTO RICO: EL PARTIDO SOCIALISTA Y LA CONVENCIÓN CONSTITUYENTE (2015).

39 FERNÓS-ISERN, *supra* note 5, at 25.

In summary, the Puerto Rico Constitution is: (1) an ideologically-based, substantive-laden, progressive document with; (2) clear and extensive text –which includes a command requiring liberal interpretation-, and (3) multiple, rich, detailed, broad and authoritative histories of intent, purpose and meaning. Let us now turn to what the Supreme Court of Puerto Rico has done with it.

B. Sixty-plus Years of Puerto Rican Originalism

Many cases are decided on clear text alone. Others are the pure result of original intent and purpose. Some are even the product of the substantive nature of the Constitution. The main focus of this article are cases in which all three elements are present. Still, for purposes of painting a complete and thorough picture of the Puerto Rican experience, cases that deal only with one or two of these factors will also be mentioned.[40]

Originalist adjudication has been the institutional default rule at the Supreme Court of Puerto Rico, but it has been an autochthonous version of originalism. Original public meaning has not hit it off in Puerto Rico. I previously stated the reasons for this, which focus mainly on the character and nature of the constitution-making process and the central role of the Constitutional Convention as the culmination of a public, political endeavor and the consolidation of strong social consensus as to many of the issues facing the drafters.

One of the main terms used by the Supreme Court has been the *intent* of the Convention or the drafters. In turn, it seems the concept of intent being used is a combination of purpose and design, as well as communicative and legal content. That is, it is a very complex and intricate conception of intent. Its interaction with text and substance is very interesting. We are left with a clear and expansive text with rich, detailed, and authoritative sources of original meaning, intent, and purpose from the perspective of the drafters (original explication); a rights-protective and expansive view adopted by these drafters; a clear textual command requiring broad interpretation and construction of constitutional provisions, and firmly entrenched policy choices about social and economic issues. As we are about to see, constitutional adjudication is not a rare instance of Puerto Rican legal reality; it is a constant feature of our democratic life.

i. The Role of Text

a. Clear Text

One of the main characteristics of Puerto Rican constitutionalism is the adoption of clear text that leaves very little room for vagueness. This makes the process of constitutional adjudication that much easier, as courts need not wrestle with what a particular provision means because, basically, the text speaks for

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40 For this article, I identified over 300 published cases decided by the Supreme Court that dealt, in one way or another, with constitutional matters. Of those 300 cases, 201 were analyzed in depth.

itself. As a result, courts are empowered, legitimized, and actually forced to arrive at very particular results, even about controversial political issues. In many of these cases, the Court makes direct reference to the textual clarity, in an effort to explain that its decisions are forced. In these cases there is barely any interpretation, almost no constitutional construction is necessary, and the Framers' commands are directly put into effect.

Sometimes, though not most of the time, clear text asks and answers a legal question.[41] That is why it was easy for the Supreme Court to hold that all discriminations based on the classifications explicitly spelled out in Article II, Section 1, were subject to strict scrutiny. This includes race, sex, color, birth, social origin or condition, and religious or political beliefs.[42] Quite a list, and yet so little judicial effort, thanks to clear and far-reaching text. The same can be said about instances in which the applicable textual provision is not only clear in terms of its communicative content, but in the absolute or near-absolute nature of the legal command articulated in the text.[43] In such cases, the Supreme Court cannot help but note that the relevant provision is "clear and strict" and "[i]ts text does not allow any distinction."[44]

Although the practice has been to always back up text with history, textual clarity has played an unequivocal part in our case law.[45] This role sometimes takes a seemingly inescapable direction: "[a]lthough every constitutional and statutory provision is subject to different interpretations . . . . [we are dealing] with language that is succinct and simple -but categorical- whose meaning is evident."[46] But even in these cases where text *was not enough* to settle the legal question, there can be little doubt that the existence of certain textual provisions greatly redirected the interpretation process.[47]

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41 *See* PAC v. Gobernador, 87 DPR 177, 182 (1963); Pueblo v. Álvarez Trinidad, 85 DPR 593, 598 (1962).

42 Wackenhut Corp. v. Rodríguez Aponte, 100 DPR 518, 531 (1972).

43 Tonos Florenzán v. Bernazard, 111 DPR 546 (1981); Mun. de Guaynabo v. Tribunal Superior, 97 DPR 545, 550 (1969).

44 Aponte Burgos v. Aponte Silva, 154 DPR 117, 133 (2001) (translation by the author).

45 Pueblo v. Tribunal Superior, 75 DPR 535, 541 (1953); Nogueras v. Hernández Colón I, 127 DPR 405, 410-11 (1990) ("[Our constitution is written] in clear and simple language . . . ." (translation by the author)); Nogueras v. Hernández Colón II, 127 DPR 638, 652 (1991) ("The constitutional command is crystal-clear . . . ." (translation by the author)); Zavala Vázquez v. Mun. de Ponce, 139 DPR 548, 555 (1995) (Negrón García, J., concurring) ("We cannot ignore the text." (translation by the author)).

46 Asoc. Fotoperiodistas v. Rivera Schatz, 180 DPR 920, 977 (2011) (Rodríguez Rodríguez, J., dissenting) (translation by the author).

47 *See* Fournier v. González, 80 DPR 262 (1958); P.R. Tel. Co. v. Martínez, 114 DPR 328 (1983); Toll v. Adorno Medina, 130 DPR 352 (1992); Rodríguez Rodríguez v. ELA, 130 DPR 562, 570 (1992); Rosario v. Toyota, 166 DPR 1 (2005) (Rebollo López, J., concurring); Suárez Cáceres v. Com. Estatal Elecciones, 176 DPR 31 (2009); Brau v. ELA, 190 DPR 315 (2014).

b. Ascertaining Semantic Meaning: Dictionaries and Other Sources

The characteristics of the Puerto Rican constitutional experience make it very difficult to distinguish between ascertaining original semantic meaning and giving legal content to the text of the Constitution. This is due to the central role the Record of the Constitution plays in constitutional adjudication. The Supreme Court of Puerto Rico constantly bases its interpretation and construction of the constitutional text on the information contained in the historical record. Puerto Rican originalism mixes and blurs the lines between original semantic meaning, original intent, original purpose, and original expected application. There is a little bit of each, and it is why I have employed the concept of *original explication*.

The search for *original explication*, particularly from a purposive viewpoint, is the main focus behind the Supreme Court's approach to constitutional interpretation and construction. There are simply too many instances of the Court's use of the Framers' *expressly stated* purposes, goals, explanations, understandings of semantic meaning and even plausible uses and applications of the constitutional content in the future.[48] It is almost impossible to separate the different tools the Court uses to ascertain meaning and legal content: "[i]n our search for the meaning of the cited provision, it is proper that we research what ideas and purposes the Framers had in mind when they drafted the provision and adopted it."[49]

In that sense, the Court's normal interpretative approach is that a particular provision's *meaning* is explained by the Framers.[50] That is, that the debates among the Framers are not evidence of meaning, but that they are the authoritative source of actual meaning. In those circumstances, the Court actually *interprets and applies the Framers' own interpretations*. The analysis to ascertain precise meaning is mostly done as to the words the Framers used *in the records of the Constitutional Convention* as if they were the constitutional text itself. The first crack at what the meaning of the text is belongs to the Framers through the historical record. If the record is clear, the interpretative process ends. If there is historical record ascribing meaning, but the words the Framers used during the workings of the Convention are not completely clear, then the Court embarks on a process of interpretation *as to those words*.

It is when there is no record to rely on that the Court actually engages in independent constitutional interpretation. When doing its own interpretation of

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48 It would be incorrect to simply catalogue this approach as original expected applications. There is a difference between what we *think* the Framers *would have done* in a particular controversy, and what they *actually and unambiguously said* during the debates in the floor of the Constitutional Convention. In the latter case, the Framers used examples to clarify meaning. As a result, if a particular case before the Supreme Court is related to one of those specific examples, the examples will be neatly applied.

49 A.D. Miranda, Inc. v. Falcón, 83 DPR 735, 739-40 (1961) (translation by the author).

50 Asoc. Maestros PR v. Srio. Educación, 137 DPR 528, 544 (1994).

meaning, the Supreme Court is all over the place.[51] But for now, it is worth exploring the times in which the Supreme Court *did not* exclusively use the historical record to determine semantic meaning, but instead employed other tools of interpretation in order to ascertain communicative content.[52]

First, there have been some expressions in favor of the fixation theory; that is, that the semantic meaning of a word is fixed from the moment of its adoption.[53] The same thing can be said about the importance and authoritativeness of the original semantic meaning of constitutional language.[54] Second, original legal content trumps original semantic meaning when a word or concept has different semantic and legal meanings.[55] The Supreme Court does not give much importance to semantic meaning of words as distinct from their legal effects.[56]

Probably the biggest originalist blind spot in the Supreme Court of Puerto Rico's case law is the use of modern dictionaries to ascertain the communicative meaning of words adopted in 1952. Even self-proclaimed originalists have incurred in this originalism *faux pas*. We saw this problem in *AAR*. In those circumstances, the Court states that it is bound by the original words of the Constitution and the original design of its Framers, but automatically, and without much thought, quotes current dictionaries. Examples abound.[57] This reinforces the proposal that Puerto Rican originalism is one of original explication, instead of original public meaning. The Framers also warned against limiting original analysis to semantic meaning. According to the Supreme Court, "[the Framers]

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51 Sometimes it focuses on debates as to grammatical implications. *See* Nogueras v. Rexach Benítez I, 141 DPR 470 (1996); Ramírez de Ferrer v. Mari Brás, 144 DPR 141 (1997).

52 This tends to happen when the historical record is not helpful or the words to be interpreted evade clarity. *See* Sostre Lacot v. Echlin of P.R., Inc., 126 DPR 781, 793 (1990) (Negrón García, J., dissenting).

53 Ramírez v. Registrador, 116 DPR 541, 546 (1985).

54 Academia San Jorge v. JRT, 110 DPR 193, 234 (1980) (Trías Monge, C.J., dissenting) (the Court split as to whether the word *employer* related to the right of workers to organize a labor union and bargain collectively included a private, religious high school).

55 Zavala Vázquez v. Mun. de Ponce, 139 DPR 548, 565 (1995) (Corrada del Río, J., dissenting) ("[W]e must discard mere technicalities of semantic linguistics and focus on the real purpose behind the constitutional [provision at issue]." (translation by the author)).

56 Viajes Lesana, Inc. v. Saavedra, 115 DPR 703 (1984); Estrella v. Mun. de Luquillo, 113 DPR 617, 618 (1982).

57 *See* García v. Aljoma, 162 DPR 572, 591 (2004) (using a 1988 and a 1991 dictionary to interpret and differentiate "health" and "personal integrity" in Article II, Section 16's guarantee to workers to protections as to their health and personal integrity in the workplace); Rosario v. Toyota, 166 DPR 1, 19 (2005) (Rebollo López, J., concurring) (using a 2001 dictionary to ascertain the meaning of "social" and "condition" in Article II, Section 1's prohibition on discrimination on account of social condition); Pueblo v. Guerrido López, 179 DPR 950, 957 n.5 (2010) (using a 2001 dictionary to ascertain the meaning of "confront" in the Bill of Right's confrontation clause); *In re* Aprob. Rs. y Com. Esp. Ind., 184 DPR 575, 584 (2012) (using a 2012 Royal Spanish Academy entry as to the meaning of *superintend* as used by the Framers *in an internal Report to the Convention* with relation to the division of powers between the Court and the Chief Justice as to rulemaking authority inside the Judicial Branch. This is another example of interpretation, not as to the words of the Constitution, but as to the words of the constitutional *Record*).

signaled their preference for an interpretation of language within its own *social and historic context* over an interpretation based on dictionaries, when the language is at odds with the legal sense of the concept."[58]

c. Broad Language

Constitutions cannot say everything specifically. In some instances, Framers will use general language in order to compensate the practical unfeasibility of articulating every conceivable rule or filling out all the details. In other words, general language substitutes clear text. In Puerto Rico, general language is not used as a substitute for clear text but as a supplement to it. This applies to the death penalty, cruel and unusual punishment clauses, as well as the specific prohibitions on discrimination and the more general equal protection clause.

The Puerto Rican Constitution has text that is expressly of an *aspirational* nature,[59] but which should not be dismissed as merely symbolic or even useless in the process of constitutional construction and adjudication. For example, it has a pivotal role to play in statutory interpretation. Sometimes the aspirational nature of language justifies restraint.[60] But then, sometimes, the Framers intercede and language that has the textual characteristics of mere aspiration become justiciable and binding provisions *because the Framers said so*. In those circumstances, the Court is able to say that "[these provisions] cannot be reduced to mere postulation of principles," and thus use them as binding law.[61]

A similar thing happens to constitutional *values* and *ideals*. They resemble policy in that they are substantive in nature, but are general enough to be associated more with aspirations and principles. Still, these values and ideals can be very ideologically-laden. For example, the Supreme Court has read the entirety of Article II, Section 16's catalogue of individual workers' rights as an articulated expression of a constitutional ideal of "the high dignity of human labor" and of the "basic rights of workers."[62] The dignity clause and the express prohibition of discrimination are also articulations of these values and ideals that have concrete and binding legal effect.[63] Constitutional values are also present when dealing with balancing acts in situations where rights collide.[64]

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58 A.D. Miranda, Inc. v. Falcón, 83 DPR 735, 745 (1961) (emphasis added) (translation by the author) (citation omitted).

59 *See, e.g.*, P.R. CONST. art VI, § 19. The Section conditions the right to rehabilitation on the availability of resources.

60 Asoc. Academias y Col. Cristianos v. ELA, 135 DPR 150, 169 (1994).

61 Paoli Méndez v. Rodríguez, 138 DPR 449, 460 (1995) (translation by the author). This case involved the environmental public policy provision and statutory interpretation.

62 *A.D. Miranda, Inc.*, 83 DPR at 741 (translation by the author).

63 *See* Ocasio v. Díaz, 88 DPR 676, 728 (1963); Zachry International v. Tribunal Superior, 104 DPR 267, 279 (1975).

64 *See* P.R. Tel. Co. v. Martínez, 114 DPR 328, 346 (1983).

Finally, we have constitutional *principles* or other *general language* provisions that, almost inherently, have different effects than clear text articulated in specific rules.[65] As we saw, the rule-broad language combination may create a gray area of disagreement and under-determinacy, but is premised on the existence of an irreducible core that has rule-like effects. An example of this is the cruel and unusual punishment provision, where the analytical emphasis is on the penumbra more than on the core, as a testament to the strength of the core and the potential of its penumbra.[66] The core is treated as a given and the penumbra is given a big head start. But a Court accustomed to clear and specific language can sometimes seem bothered by general language, for it makes interpretation that much harder.

ii. The Framers' Role: Intent, Purpose and Original Explication

a. Why the Framers?

Previously, I commented on the historical significance of the constitution-making process that culminated not with the popular referendum that ratified the Constitution, but with the Constitutional Convention that *created it*. Since 1952, there has been consensus that the relevant intent is that of the Framers because the process was based on the notion that the People constituted themselves through the Convention. That popular process also allows for the view that the creation of the Constitution was not an improvised, informal affair, but a careful, historic, and well thought-out event.[67]

This view of the Convention began early-on after the adoption of the Constitution in 1952. As early as 1954, a unanimous Supreme Court wrote: "The Constitution was *approved* by the elected representatives of the Puerto Rican People in a Constitutional Convention. This took place after *careful consideration of each clause by its commissions and the debates in the floor of the Convention*."[68] First, note the view that the Constitution was not approved by the People in the ratification referendum, but by the People through the delegates. This is not merely

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65 As to general language provisions, the Court will still look to the historical record as part of its process of interpretation. In many instances, this leads to interpretations that turn general language into very specific content.

66 *See* Pueblo v. Ortiz Pepín, 105 DPR 547, 586 (1977) (Negrón García, J., concurring). Negrón García stated that:

> The constitutional prohibition of "cruel and unusual punishments" . . . enshrines a dynamic concept whose nature overcomes the strict, historic focus that generated its adoption, in the sense that it only prohibits barbaric and inhumane punishments like burning someone at the stake, decapitation, corporal dismemberment, and other forms of torture that sadly fill up the annals of history.

Id. (translation by the author).

67 This includes the agenda and priorities of the Framers, for example, as to labor rights. Dolphin Int'l of P.R. v. Ryder Truck Lines, 127 DPR 869, 877 (1991).

68 Pueblo v. Figueroa, 77 DPR 188, 196 (1954) (emphasis added) (translation by the author).

based on a positive view of representative democracy, but due to the context of the process itself, where the People were active participants in the drafting of the Constitution. Second, note the emphasis on the work of the Convention by way of reference to the commission process, the role of floor debates, and the fact that the drafting work was one characterized by careful consideration of the text. As a result, the Framers are the main objects of historical research during the process of constitutional interpretation, construction, and adjudication. *We the People* found direct expression and articulation through the delegates.[69]

Still, the emphasis is on the Framers' interpretation of the *text*, not the views they may have had *outside* of the text. In that sense, their intent is only relevant as it is related to text: "*[w]hatever the opinions of the delegates to the Constitutional Convention were* as to the minimum statutory requirements for the inscription of new political parties, *the Convention ordered* in Section 6 that the applicable requirements would be those established by statutory law at the time the Constitution was adopted."[70] But what started out as "deference" to the views of the Framers in relation to the text,[71] became a methodology in which the Framers' interpretation of text became authoritative and determinative.

b. The Importance of the Historical Record and Its Central Role in Interpretation

The constitution-making process in Puerto Rico was a public, formal and transcendental event. The Framers were aware of this from the very beginning. The reports of the Commissions and the debates on the floor of the Convention were not directed exclusively at the delegates. The People, the courts, and posterity were also the object of recording the Framers' deliberations. At the heart of these deliberations is the Constitutional Convention's Record that incorporates both the Commission's reports and the debates on the floor. The importance the Supreme Court has given this Record since the very beginning of the constitutional era makes it the functional equivalent of an explanatory appendix to the main constitutional text. It is institutional practice of the Supreme Court, after citing the relevant constitutional provision, to immediately quote the corresponding Commission's Report explanation of that provision; text and Report become one.[72]

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69 *See* Rivera Figueroa v. The Fuller Brush Co., 180 DPR 894, 902-03 (2011).

70 PAC v. Gobernador, 87 DPR 177, 182 (1963) (emphasis added) (translation by the author); P.R. Tel. Co. v. Martínez, 114 DPR 328, 350 (1983) ("It is a document that transcends the personal preferences of its authors." (translation by the author)).

71 García Passalacqua v. Tribunal Electoral, 105 DPR 49, 69 (1976) ("[I]n view of the deference we owe to the expressions of the Constitutional Assembly . . . ." (translation by the author)).

72 I found over twenty constitutional cases where the routine method was to quote from the text of the relevant constitutional provision and, immediately after, quote from the corresponding Report by the relevant Commission. This practice spans all six decades of modern Puerto Rican constitutionalism. *See, e.g.*, *Figueroa*, 77 DPR at 188; ELA v. Hermandad de Empleados, 104 DPR 436, 440 (1975); Vélez v. Mun. de Toa Baja, 109 DPR 369, 373 n.1 (1980); *In re* Ríos, 112 DPR 353 (1982); San

The method of quoting from the Report offers many advantages. First, it exudes legitimacy. The framing generation and the constitution-making process still have strong support in Puerto Rico's collective memory. Tying the text to the Record puts the Court on firmer ground. Second, it makes interpretation safer by allowing a court that announces an unpopular result to point to the Record as evidence of its lack of options. They are merely applying the stated, clear, and uncontested will of the Founders. Third, it makes interpretation easier, because instead of looking for elusive collective intent, diving into old dictionaries and newspapers to ascertain original meaning, explanation, and purpose or even appearing to be making it up, the richness of the Record provides answers to many of the most difficult questions before the Court so that, once given, it need not look any further.

The Supreme Court has consistently expressed the central role of the Record in constitutional adjudication. Like the use of the Commissions' reports as an inseparable appendix to the constitutional text, reference to the authoritative nature of the Record has been constant in sixty years of adjudication. As early as 1955, the Court stated: "[t]he question presented before us makes it necessary for us, in our analysis of the legal scope of the constitutional provision at issue, to examine *the original records of its creation*."[73] This, of course, is inherently linked with the issue of original intent: "[i]n our search for *meaning* [of the constitutional provision at issue] it is proper for us to investigate which ideas and purposes the Framers had in mind when they wrote and approved [it]."[74] Over the years, the role of the official Record has only become stronger: "[i]t is improper to give such meaning [to the provision at issue], especially when the *only direct source that exists to interpret it, the Report [of the Commission on] the Bill of Rights, expressly limits* the prohibition [at issue]."[75] And the trend continues:

> Given that our constitutional document is of recent adoption, the task of researching its history *in order to interpret its different provisions* "is relatively *easy*, since we have preserved the memories and debates of the Constitutional Assem-

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Miguel Lorenzana v. ELA, 134 DPR 405, 426 (1993); Bonilla Medina v. PNP, 140 DPR 294, 299 (1996); Díaz v. Wyndham Hotel Corp., 155 DPR 364, 380 (2001); Pueblo v. Jaramillo Figueroa, 170 DPR 932, 937 (2007) (Rivera Pérez, J., concurring); Pueblo v. Guerrido López, 179 DPR 950 (2010).

73 Sánchez v. González, 78 DPR 849, 851 (1955) (Negrón Fernández, J., concurring) (emphasis added) (translation by the author).

74 A.D. Miranda, Inc. v. Falcón, 83 DPR 735, 739-740 (1961) (emphasis added) (translation by the author). *See also* Hernández Agosto v. Romero Barceló, 112 DPR 407, 421 (1982) ("It is of vital importance to look at the history of the Convention as it relates to the present issue, because it brilliantly illuminates the intent and purpose [of the provision under analysis]." (translation by the author)).

75 Srio. DACO v. Comunidad San José, Inc., 130 DPR 782, 815 (1992) (Fuster Berlingeri, J., dissenting) (translation by the author). *See also* Rodríguez Rodríguez v. ELA, 130 DPR 562, 570 (1992).

> bly" . . . . [T]he *par excellence* source used for this task is the *Record of the Constitutional Convention*.[76]

Slowly but surely, the Record has transcended being a source that helps interpretation to being the main source of interpretation.

We saw earlier how, rarely, clear text was the beginning and end of constitutional analysis. Even when the text is as clear as day, the Court routinely confirms its analysis of text with recourse to other sources, particularly the Record of the Convention. Once the Court is satisfied that the Record directly offers the necessary interpretation, and even construction, of the applicable constitutional text, it routinely ends the inquiry there and resolves the question. In other words, the Record is authoritative enough to dispend with other sources of interpretation and construction, *including the independent analysis of the Supreme Court itself.*

When the Record is clear as to the meaning, scope, legal effect or even application of the text, that is normally enough for the Supreme Court of Puerto Rico: "[t]he debates [in the Convention floor] *leave no room for doubt*;"[77] "[a] quick glimpse [of the text and the Record] convinces us that the plaintiffs are wrong . . . . The debates in the Convention illuminate the reach and purpose [of the provision at issue];"[78] "the record of the Constitutional Convention is clear;"[79] "[a]n analysis of the rich record of the Constitution *leaves no room for any doubt with respect to [what] the decisive and unanimous will of the Constitutional Convention was.*"[80] A clear and on-point Record is decisive and typically ends the constitutional inquiry.[81] Of course, the Court does feel it has some wiggle room when the Record is not on-point, and instead only addresses the issue generally.[82] But when the Record does provide an answer on-point, it resolves the issue.[83] It be-

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76 *In re* Aprob. Rs. y Com. Esp. Ind., 184 DPR 575, 582 (2012) (emphasis added) (translation by the author) (quoting LUIS MUÑIZ ARGÜELLES ET AL., LA INVESTIGACIÓN JURÍDICA EN EL DERECHO PUERTORRIQUEÑO: FUENTES PUERTORRIQUEÑAS, NORTEAMERICANAS Y ESPAÑOLAS 32 (4th ed. 2006)). *See also* Brau v. ELA, 190 DPR 315, 347 (2014) ("Just like in the federal jurisdiction they can count on *The Federalist Papers* to interpret the U.S. Constitution, our system relies on the Record of the Constitutional Convention in order to interpret our Supreme Law, with the advantage that ours was approved only a few decades ago, while its federal counterpart was adopted more than two centuries ago." (translation by the author)).

77 Petrovich v. Srio. de Hacienda, 79 DPR 250, 260-61 (1956) (emphasis added) (translation by the author).

78 Hernández Agosto v. Ortiz Montes, 115 DPR 564, 565-66 (1984) (translation by the author).

79 Nogueras v. Rexach Benítez I, 141 DPR 470, 472 (1966) (translation by the author).

80 PPD v. Peña Clós I, 140 DPR 779, 815 (1996) (Fuster Berlingeri, J., concurring in part and dissenting in part) (emphasis added) (translation by the author).

81 *See* Pueblo v. Quiles, 83 DPR 63 (1961); Mun. de Guaynabo v. Tribunal Superior, 97 DPR 545 (1969); Misión Ind. P.R. v. JP, 146 DPR 64 (1998).

82 Green Giant Co. v. Tribunal Superior, 104 DPR 489 (1975).

83 PIP v. ELA, 109 DPR 685, 696 (1980) (Negrón García, J., concurring). This is directly related to the issue of specific examples and applications stated by the Framers during the debate and to the

comes such "clear evidence" of meaning that it *becomes* meaning, for the Court rarely looks elsewhere as part of its task of interpreting the Constitution.[84]

At the lower level of the spectrum, the Record "confirms" the interpretation that can be derived directly from text.[85] At the higher level of deference, some have stated that when an issue has been addressed directly by the Convention in its debates, it is inappropriate to attempt to reach a different result by way of another constitutional provision.[86] Associate Justice Fuster Berlingeri has articulated the most intense position: "once we have explored and have found the intent of the Framers as to one particular issue, it should not be necessary to analyze separately other sources relating to the Constitution because the result would have to be the same."[87] The balance favors intent over text: "[w]e did not find anything that would lead us to conclude that the interpretation we have adopted today was not what the Framers of our Constitution ordered."[88] What is clear from the cases of the Supreme Court of Puerto Rico is that the main and authoritative source for interpretation in our constitutional system is the Record of the Constitutional Convention. *As a general rule,* if it's there, it's over. If it is not there, then normal interpretation can proceed.

c. The Intent of the Framers as the Ultimate Source of Constitutional Adjudication

The Supreme Court of Puerto Rico's constant reference to, or use of, the *intent* of the Constitutional Convention is too frequent to do a case by case analysis. The number of cases in which an affirmative claim about the intent of the Framers was made by the Court or one of its members is staggering: no less than 50 of the 201 cases analyzed for this article. Sometimes the Court makes direct use of the term *intent,* [89] while, in other cases, the intent of the founders was followed but the Court employed other, closely related terms. In other cases, the

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significance of defeated amendments in the Convention floor. *See infra* Part II.B.ii.f; Pueblo v. Santiago Feliciano, 139 DPR 361 (1995).

84 PSP v. Srio. de Hacienda, 110 DPR 313, 318 (1980); *In re* Colton Fontán II, 154 DPR 776, 778 (2001).

85 Vega v. Telefónica, 156 DPR 584, 601 (2002).

86 Defendini Collazo v. ELA, Cotto, 134 DPR 28 (1993).

87 *Id.* at 110 (Fuster Berlingeri, J., concurring) (translation by the author). This was the statement singled-out by Professor Villaronga in his law review article criticizing this apparent radical originalist approach. *See* Villaronga, *supra* note 27.

88 Suárez Cáceres v. Com. Estatal Elecciones, 176 DPR 31, at 77-78 (2009) (translation by the author).

89 *See, e.g.,* Pueblo v. Guzmán Vélez, 100 DPR 198, 201 (1971) (translation by the author); Green Giant Co. v. Tribunal Superior, 104 DPR 489, 543 (1975) (Trías Monge, C.J., dissenting); PIP v. ELA, 109 DPR 685, 691 (1980) (Dávila, J., concurring); Hernández Agosto v. Romero Barceló, 112 DPR 407, 421 (1982); Ramírez v. Registrador, 116 DPR 541, 545-46 (1985) ("On this issue, the intent of the Convention was clear . . . ." (translation by the author)); López, Fed. Coms. Unidos v. Mun. de San Juan, 121 DPR 75, 86 (1988); De Paz Lisk v. Aponte Roque, 124 DPR 472, 484 (1989).

Court simply did original intent analysis without direct reference to that concept.[90] In most of these cases, the concept of *intent* varies, but it mostly relates to what the Framers wanted and attempted to do, their goals, purposes, and reasons for adopting a particular text, as well as the desired outcome of their work.

But the issue of intent is not limited to affirmative claims of what the intent was. It also extends to conclusions as to what *it was not*: "[a] contrary holding would require assigning the Convention the intent to;"[91] "it was not the intent of the Constitutional Convention;"[92] "if the intent had been;"[93] "[t]here is no trace in the record of an intent to."[94] As a result, intent becomes a powerful tool, whether to affirmatively assign intent to the Framers or to reverse engineer intent to oppose a particular interpretation of a provision.

The process of identifying such intent also varies. It can take many forms: from the Framers themselves expressly articulating their intent to the Court's own analysis of the historical record in order to identify intent. In either case, the goal is the same: to ascertain the intent of the Framers as an authoritative element of constitutional interpretation and adjudication. Whether the intent relates to purpose, elaboration as to semantic or legal meaning, or concrete applications of the constitutional text, the search for intent is more or less the same and, as a general rule, plays a decisive role. Sometimes that intent manifests itself through obvious context and what it implicates:[95] "[t]he Constitutional Convention . . . knew that the [provision] could not be used to that immediate end."[96] But the Supreme Court has gone even further than that by *inferring* the information and knowledge available to the Framers.[97] Some things are so obvious that they went without saying.[98]

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90 Sometimes the Court or its members makes reference to the "will" or what the Convention was "thinking" when it adopted a particular provision. *See* Sánchez v. González 78 DPR 849, 854, 855 (1955) (Negrón Fernández, J., concurring). It also makes reference to what the Convention "had in mind." Mun. de Guaynabo v. Tribunal Superior, 97 DPR 545, 547 (1969) (translation by the author).

91 González v. Tribunal Superior, 75 DPR 585, 622 (1953) (translation by the author).

92 Pueblo v. Soto, 77 DPR 206, 212 (1954) (translation by the author). *See also* UTIER v. JRT, 99 DPR 512, 523 (1970); Rosario v. Toyota, 166 DPR 1, 43 (2005) (Rodríguez Rodríguez, J., dissenting).

93 Rodríguez Rivera, Alcalde v. Comisión, 84 DPR 68, 80-81 (1961) (translation by the author).

94 PSP v. ELA, 107 DPR 590, 598 (1978) (translation by the author).

95 Lawrence B. Solum, *Originalism and the Unwritten Constitution*, 2013 ILL. L. REV. 1935, 1956 (2013).

96 *González*, 75 DPR at 622 (translation by the author). *See also* Figueroa v. Díaz, 75 DPR 163, 168 (1953); Fournier v. González, 80 DPR 262, 266 (1958); Herrero v. ELA, 179 DPR 277, 293 (2010).

97 Pueblo v. Álvarez Trinidad, 85 DPR 593, 598 (1962) ("We have to suppose that when our Constitutional Convention met, it was aware . . . ." (translation by the author)).

98 JRT v. Asoc. Servs. Médicos Hosp., 115 DPR 360, 365 (1984) ("At no time did the debate focus on employees of private establishments [as to their right to unionize and bargain collectively]. Within the context of the constitutional guarantees, the rights of these workers was not a debatable proposition." (translation by the author)).

d. Using the Record

Over the past sixty years, the Supreme Court of Puerto Rico has consistently looked to the Convention's official Record. It is the main, and sometimes exclusive, source of authoritative meaning of the Constitution. It would almost seem like the delegates have become permanent members of the Supreme Court, with the justices serving as their intermediaries. Of the 201 cases analyzed for this article, the Supreme Court cited or made reference to the Convention Record as an authoritative source of constitutional meaning a total of 121 times.[99] Quantitatively, references to the debates on the floor were the primary source of Record usage: eighty-nine times. The reports were mentioned seventy-three times. The Supreme Court referenced both in a single case a total of forty-two times. This confirms that original explication is the main model of constitutional adjudication in Puerto Rico.

But what, exactly, does the Supreme Court use the Convention's Record for? First, it can determine the *content* of original communicative meaning; what the words mean. Again, I do not mean that the Record offers *evidence* of original meaning, but that it is the *authoritative source* of meaning. The Record *explains* both what the words meant to the Framers and what they thought the text would entail, that is, what its effects would be. What started out as evidence became authoritative: "[t]he Reports of the Commissions and the debates on the floor -along with text- are the main sources used in order to determine the meaning of our Constitution's specific provisions."[100] *Meaning* in this context includes both semantic content of language and its scope. This is the main crux of the original explication approach.

The Supreme Court of Puerto Rico has expressed the authoritative nature of the Framers' *interpretation* of the Constitution. As early as 1956, the Court stated: "[t]he Constitutional Convention *interpreted* [the provision in the following way]."[101] In 1971, it went a step further: "[the contrary position] *would go against the interpretation* that the Constitutional Assembly gave to Article II, Section 11, of our Constitution that guarantees the right to trial by jury in Puerto Rico."[102]

The textual clarity that characterizes the Constitution of Puerto Rico leaves little room for research into the semantic meaning of the words. As a result, the Court's historical analysis of the constitutional text focuses more on purpose and scope. Still, the search for further explanation and elaboration as to the communicative content of the text can be found in the Court's cases. The net effect is to give the Constitutional Convention a second bite at the apple: to repeat what they put in the Constitution, but in longer phrases and sentences that offer a

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99 The remaining cases do not reference the Record for a variety of reasons: the simple nature of the case only required neat application of precedent or settled doctrine, and so on.

100 Pueblo v. Figueroa, 77 DPR 188, 196 (1954) (translation by the author).

101 Estado v. Fajardo Sugar Co., 79 DPR 321, 330 (1956) (emphasis added) (translation by the author).

102 Pueblo v. Guzmán Vélez, 100 DPR 198, 201 (1971) (emphasis added) (translation by the author).

neater picture of what they attempted to communicate, without cluttering the constitutional text. In some cases, the Framers themselves directly offered definitions as to the adopted text.[103]

One of the main issues in constitutional adjudication is the scope, reach, and effect of the words of the Constitution. The ultimate goal of judicial interpretation is not to ascertain communicative meaning, but to give it effect in concrete situations. After identifying purpose, ascertaining effect and scope is probably the main goal behind constitutional analysis in Puerto Rico. Examples abound.[104] Meaning and effect cannot be separated.[105] Finally, as with intent, the Record can also reject a particular view of the scope of the text.[106]

Second, the Record explains the *purpose* of the constitutional text. This can happen in two instances: (1) directly, when the Record expressly states what the purpose is,[107] or (2) indirectly, when the Court can identify purpose from the Record.[108] Reach and meaning can also be seen as an extension of purpose.[109] The search for purpose is the main focus of the original explication model.

Third, the constitutional record *elaborates* on what a particular provision entails. It offers longer explanation where the constitutional text is terse.[110] The Record "clarifies",[111] "sheds light" and "reveals"[112] issues like meaning, intent, purpose, goals, reach and scope. It can also confirm the apparently plain meaning of language.[113]

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103 Figueroa v. Díaz, 75 DPR 163, 166 n.2 (1953).

104 ELA v. Hermandad de Empleados, 104 DPR 436, 440 (1975); Molina v. CRUV, 114 DPR 295, 309 (1983) (Irizarry Yunqué, J., concurring) ("[The debates among the delegates] are very revealing as to the nature and scope of this [provision]." (translation by the author)); Pueblo Int'l, Inc. v. Srio. de Justicia, 122 DPR 703, 729 (1988) (Negrón García, J., concurring).

105 Sánchez v. González, 78 DPR 849, 853 (1955).

106 Pueblo v. Figueroa, 77 DPR 188, 190 (1954) ("The debate in the Constitutional Convention clearly established that [the provision] was not meant to [say that] . . . ." (translation by the author)).

107 *See, e.g.*, Vélez v. Mun. de Toa Baja, 109 DPR 369, 373 n.1 (1980); Pueblo v. Rivera Morales, 133 DPR 444, 447 (1993).

108 *See, e.g.*, San Miguel Lorenzana v. ELA, 134 DPR 405, 426 (1993); Iglesias v. Sria. Dept. Corr. y Rehab., 137 DPR 479, 493 (1994) (Naveira, J., dissenting).

109 A.D. Miranda, Inc. v. Falcón, 83 DPR 735, 739-40 (1961); *In re* Partición de los Jueces, 80 DPR 784, 784 n.1 (1958); Clemente v. Depto. de la Vivienda, 114 DPR 763, 767 (1983); Hernández Agosto v. Ortiz Montes, 115 DPR 564, 566 (1984).

110 *See* Herrero v. ELA, 179 DPR 277, 299 (2010).

111 Aponte Martínez v. Lugo, 100 DPR 282, 290 (1971) (translation by the author); Pueblo v. Pagán Medina, 175 DPR 557, 568 (2009).

112 *See, e.g.*, J.R.T. v. Asoc. Servs. Médicos Hosp., 115 DPR 360, 364 (1984) (translation by the author); Morales Morales v. ELA, 126 DPR 92, 106 (1990).

113 Vega v. Telefónica, 156 DPR 584, 601 (2002).

e. Broad Purpose and Intent

Puerto Rican originalism is of a progressive, rights-protective and expansive nature. A court in sync with this constitutional model will be legitimized -at the very least- in pursuing those progressive substantive results. It cannot be charged with being activist, unduly interventionist, or illegitimate.

This combination of text, history and policy -all of a progressive, expansive nature- is not a coincidence. Progressive constitution-makers, backed up by corresponding social and political forces, created a new type of constitutionalism that is explicitly ideological in nature. In order to achieve these results, constitution-makers must: (1) be clear and expansive in the text they adopt; (2) articulate their progressive views and motives in clear, authoritative history, and (3) include important social and economic issues in the text and structure of the Constitution. In all of these instances, there is a structure-content split. You can have clear text, but it can also be narrow and minimalist in nature. You can have clear and authoritative history, but it can be conservative, reactionary or minimalist. You can include socioeconomic rights and entrench policy choices, but these can also be of a conservative nature.

So far, we have seen the structural features of the Puerto Rican Constitutional Record: clarity, detail, explanation, authoritative nature, and so on. But, there is also a substantive side to this history: the intent and purposes of the Framers were, for the most part, explicitly progressive and rights-protective. In particular, we can clearly appreciate a strong, pro-rights view of constitutionalism. This *also* applies to a broad and expansive view as to the social role of the state and its police powers. While certain aspects of the Bill of Rights mistrusts government encroachment, the rest of the constitutional structure sees the state as an ally in the type of society the Constitution wishes to build.

In Puerto Rico, the Record of the Constitutional Convention points to broad, expansive intent.[114] Rights get the most attention.[115] As such, seemingly broad rulings by the Supreme Court are directly supported by original purpose and intent.[116] This also applies to constitutional prohibitions related to progressive policies.[117]

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114 *A.D. Miranda, Inc.*, 83 DPR at 735 (workers' rights); Mun. de Guaynabo v. Tribunal Superior, 97 DPR 545 (1969) (labor policy).

115 Zachry Int'l v. Tribunal Superior, 104 DPR 267, 280-81 (1975); ELA v. Hermandad de Empleados, 104 DPR 436, 440 (1975) (privacy); Figueroa Ferrer v. ELA, 107 DPR 250, 258 (1978) (same); Bonilla Medina v. PNP, 140 DPR 294, 299 (1996) (free speech); Díaz v. Wyndham Hotel Corp., 155 DPR 364, 380 (2001) (workplace discrimination).

116 *See, e.g.*, Dolphin Int'l of PR v. Ryder Truck Lines, 127 DPR 869, 877 (1991) ("When drafting our Constitution, the delegates to the Constitutional Convention gave central importance to the issue of labor and workers' rights. Proof of that is the agenda of the Commission on the Bill of Rights." (translation by the author)).

117 Asoc. Maestros P.R. v. Srio. Educación, 137 DPR 528, 544 (1994).

f. Specific Examples and Defeated Proposals

While discussing the meaning, purpose and reach of each constitutional provision, the delegates to the Constitutional Convention constantly used examples of possible effects of the text as part of their attempts to persuade their fellow delegates. Obviously, examples are scarce. Yet, they serve two purposes.

First, there have been cases where the question under analysis was directly related to some of the examples used during the Convention. In those circumstances, the applicable example served as authority to resolve the question. Second, when the examples are not on-point, they can be used as authoritative analogies.

Some statements by the delegates can also have authoritative effect when they *were not challenged by the other members of the Convention*. That is, the lack of objection is taken as a sign of approval.[118] Also, the Supreme Court has taken note of instances in which an objection *would have been expected*, in which case it concludes that the lack of objection points to a different interpretation that would make an objection unnecessary.

This approach is not identical to looking for original, expected applications. These are concrete examples and conversations during the proceedings of the Convention that shed light on what a provision was actually designed to do. There is a difference between expected application and the Convention's ability to actually predict one possible scenario where its text would be applied.[119]

In *Municipio de Guaynabo v. Tribunal Superior*, the Court analyzed whether the Constitution's unqualified command that all employees working more than eight hours a day shall receive overtime compensation applied to municipal workers.[120] Unsatisfied with the purely textualist approach, the Court turned to the records of the Constitutional Convention and took note of the *lack* of debate as to the possibility of an exception for municipal workers:

> It is well-known that during the debates in the Constitutional Convention no one proposed or discussed the need to exclude government or municipal workers from the protections of Section 16. This happened, even though the [previously existent statutory] exclusion was *well-known to the labor union leadership present at the Constitutional Convention.*[121]

As a result of the unconditional nature of the text and what would have been an expected objection from the tri-partite labor delegation, the Court held that

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118 González v. Tribunal Superior, 75 DPR 585, 607 (1953).

119 Sánchez Rodríguez v. López Jiménez, 116 DPR 392, 396 (1985). In the middle of the 1980s, the Court was briefly only staffed by one Chief Justice and three Associate Justices. Whether they were a legitimately constituted Court became an issue. The Court held that it was. In support to their apparent self-serving conclusion, the Court stated that "[t]hankfully, the Convention had the vision and sensibility to foresee this problem." *Id.* (translation by the author).

120 Mun. de Guaynabo v. Tribunal Superior, 97 DPR 545 (1969).

121 *Id.* at 549-50 (emphasis added) (citation omitted) (translation by the author).

municipal workers were not excluded from the constitutional right to overtime pay. This is an example of lack of expected debate as indicative of what the meaning of the provision must be.[122]

One of the most important cases that used the explanations of the Framers as to their choice of words relates to their discussions on the right to strike and the Government's power to regulate it. Sections 17 and 18 of the Bill of Rights give workers the right to unionize, bargain collectively, and engage in strikes. The text also states: "[n]othing herein contained shall impair the authority of the Legislative Assembly to enact laws to deal with grave emergencies that clearly threaten the public health or safety or essential public services."[123] The original proposal gave much more discretion to the Legislature to pass laws restricting strikes. The delegates from the Socialist Party objected. They proposed that the Legislature be able to regulate strikes only in circumstances of "grave" emergencies, where there were "imminent" threats to the health, safety or the "general welfare." The labor delegates from the majority party *objected* to that proposal. They suggested that the legislative power be available only in situations of strikes that "clearly threaten" (instead of "imminently threaten") the health, safety and "essential public services" (instead of "general welfare"). The latter proposal prevailed. Which of these languages was more pro-strike or more pro-legislative power to regulate strikes? A linguistic argument could be made either way, *but the Framers themselves answered these questions* through specific explanation. Just before proposing their amendment, the labor delegates from the majority party stated that the Socialist language was *insufficient*, that is, that it did not protect enough the right to strike.[124] Persuaded that the new language was more labor-protective than their own original proposal, the Socialists withdrew their amendment. This is a clear example of when the delegates' specific characterizations of the meaning of language can be used as the determining source for interpreting a constitutional provision.

This brings us to the issue of proposals and amendments that were defeated during the Constitutional Convention. In general, the Supreme Court of Puerto Rico has found that rejected amendments shed light on the meaning and construction of constitutional provisions.[125] Sometimes, the rejected amendment is on-point as to the specific question before the Court. If the drafters rejected that

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122 See also *PIP v. ELA*, 109 DPR 685, 696 (1980) (Negrón García, J., concurring), where one of the delegates addressed the scenario where a 5-member Court splits 2-2-1 in a constitutional case. He stated that such a split would render the statute constitutional ("Nobody objected this example or his conclusions." (translation by the author)).

123 P.R. CONST. art. II, §§ 17-18.

124 AAA v. Unión Empleados AAA, 105 DPR 437, 453 (1976) (emphasis added) (translation by the author).

125 *See, e.g.*, Estado v. Fajardo Sugar Co., 79 DPR 321, 330 n.7 (1956); ELA v. Northwestern Const., Inc., 103 DPR 377, 381-82 (1975) (both unsuccessfully trying to limit the eminent domain power); *AAA*, 105 DPR at 453; Fuster v. Busó, 102 DPR 327, 344 (1974).

proposal, it cannot be reintroduced through interpretation.[126] In that sense, they have the same effect as examples, whether they are on-point or serving as analogies.

Attention should also be given to *successful* floor amendments. Because they are specifically added, they *must mean something*, which requires giving them independent meaning. Otherwise, they were useless amendments. For example, the original constitutional text only protected workers against workplace risks that threatened their health. The delegates added the concept of *personal integrity* to accompany health. But, there was no debate on why the addition was necessary or what it was meant to do. The Court felt forced to give it independent meaning and effect, so it used normal tools of interpretation and construction for that purpose.[127]

g. Other Historical Sources: The University and the Delegates in their Own Words

If you find it in the Convention Record, you have greatly improved your chances for success in a constitutional case in Puerto Rico, but that is not the only historical source worth researching. Almost as authoritative is the University of Puerto Rico's School of Public Administration's Report to the Convention. The same can be said about two particular texts by leading delegates: (1) Dr. Antonio Fernós Iserns' book *Original Intent in the Constitution of Puerto Rico: Notes and Comments Submitted to the Congress of the United States*, and (2) José Trías Monge's book *A Constitutional History of Puerto Rico*.

Prior to the first meeting of the Constitutional Convention in 1951, the U.P.R. School of Public Administration was recruited to draft a report that would suggest a constitutional text and structure that would, in conjunction with the political parties' programs, serve as a starting point for the works of the several Convention Commissions and, later on, the Convention as a whole. Evidently, many of the suggestions made by the report were modified or even rejected. As to those issues, the U.P.R. Report helps to figure out what the changes entailed. When it comes to the suggestions that were adopted by the Convention, the Report serves as authoritative history. The Supreme Court explains: "[w]hen the constitutional process got underway, the School of Public Administration of the University of Puerto Rico organized a group of political science and constitutional law specialists and scholars to advise the Constitutional Convention."[128]

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126 García Passalacqua v. Tribunal Electoral, 105 DPR 49, 51 (1976). We also saw Justice Fuster Berlingeri's view that if the Convention considered an issue and settled it during their debates, the Court cannot revive the issue by way of interpretation. *See* Defendini Collazo v. ELA, 134 DPR 28 (1993).

127 A.D. Miranda, Inc. v. Falcón, 83 DPR 735, 738 (1961) (translation by the author).

128 *Id.*

Part of that advising role included producing *very valuable reports* that would be used by the Convention's Commissions.[129]

Like with the Record of the Convention, the U.P.R. Report includes elaboration and explanation not found in the formal constitutional text. Those explanations are relevant both for the process of semantic interpretation and legal construction.[130] The scholarly nature of the Report helps explain the ideological underpinnings of the constitutional structure.[131] But, because of the interesting *social* composition of the Convention, there was some disparity in points of view. For example, the U.P.R. suggested omitting references to labor rights in the constitutional text, in order to allow for further developments in conflict resolution that would be hindered if the text was too strict as to labor rights. The Convention flat out rejected that proposal.[132] This generates several results. First, it reinforces the modification, because it expresses a particular will on behalf of the Framers that trumped the U.P.R.'s suggestions. Second, it can create an ideological disparity that requires us to: (1) be very careful when using the U.P.R. Report as an authoritative source, and (2) take into account the ideological makeup of the Convention when engaging in constitutional adjudication.[133] Still, when the Report is in sync with the Convention, it can be used as an authoritative source, even more so when its content is on-point with the question before the Court.[134] That is why some Justices believe the Report is "an integral part of the history of the Constitution."[135] Most of the time, the Report is used as one tool out of many that confirms the overall interpretation.[136]

Dr. Antonio Fernós Isern was appointed Resident Commissioner in 1946 and then elected to that post in 1948, which he would occupy until 1964. As Resident Commissioner during this crucial part of Puerto Rican history, Fernós Isern served as a sort of permanent ambassador in Congress. Because of the congressional origin of the constitutional process, the final Constitution had to be pre-

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129 *Id.*

130 Mari Brás v. Caseñas, 96 DPR 15, 19 (1965).

131 Aponte Martínez v. Lugo, 100 DPR 282, 291 (1971). The Report makes reference to the "liberal state" in formation.

132 AAA v. Unión Empleados AAA, 105 DPR 437, 443 (1976).

133 Sometimes the ideological views coincided, as with the issue of socio-economic rights. *See* Rodríguez v. Srio. de Instrucción, 109 DPR 251, 263 (1979); García v. Aljoma, 162 DPR 572, 580-81 (2004).

134 Fuster v. Busó, 102 DPR 327, 348 (1974) ("*The New Constitution of Puerto Rico*, a very valuable volume that includes the Reports to the Constitutional Convention prepared by the School of Public Administration of the Social Sciences College of the University of Puerto Rico, published in 1954, includes commentary about [the question before the Court] in such a manner *that they would seem to have been written because of the case at bar.*" (emphasis added) (translation by the author)). *See also* Pueblo v. Ramos Santos, 138 DPR 810, 829 (1995) (Fuster Berlingeri, J., concurring).

135 PPD v. Peña Clós I, 140 DPR 779, 813 (1996) (Fuster Berlingeri, J., concurring in part and dissenting in part) (translation by the author).

136 *See, e.g.*, Nogueras v. Rexach Benítez I, 141 DPR at 492 (Hernández Denton, J., concurring); Ramírez, 144 DPR at 175; Córdova v. Cámara Representantes, 171 DPR 789, 804 n.7 (2007).

sented to Congress for its approval. Because of his status as Resident Commissioner and as one of the principal members of the P.D.P. leadership, Fernós Isern was chosen as President of the Constitutional Convention. Yet, one of his most critical roles would be played after the Convention finished its work: selling the Constitution to Congress.

Hence his *Original Intent in the Constitution of Puerto Rico: Notes and Comments Submitted to the Congress of the United States*. Although not an official report, as President of the Convention and Resident Commissioner in Congress, Fernós Isern's views on the Constitution were highly authoritative. Still, some caution should be had when reading Fernós Isern's book. Precisely because he had to sell the Constitution to a conservative Congress at the height of the Cold War, several of the more progressive and socially-oriented provisions of the Constitution were downplayed. The same thing happened to provisions that were based on foreign sources. This can create confusion as to the apparent limited scope of these provisions. It was not until 2004 that it was first quoted by the Supreme Court.[137]

José Trías Monge served as Chief Justice of the Supreme Court of Puerto Rico from 1974 until 1985. Before that, he served as Attorney General. At only 31, he was elected as a delegate to the Constitutional Convention, where he would distinguish himself greatly. He is considered one of the main architects of the Constitution. One can only imagine the process where, as Chief Justice, he had to interpret and apply constitutional provisions he helped create as a delegate, without making direct statements to his former role. As such, his role alone as former delegate turned Chief Justice makes for a very interesting discussion.

Trías Monge published a scholarly book called *A Constitutional History of Puerto Rico* in 1980, that is, while serving as Chief Justice. Probably because of the awkwardness of quoting the then-Chief Justice's book about the Constitution, it was not used by the Supreme Court until 1996, shortly after the latest edition came out.[138] Curiously, the main use of this book is more historic than legal: to explain the inner workings of the Convention and the compromises made during its proceedings.[139] In other words, it helps to piece together *how* the text was adopted and how the different sources, like the U.P.R. proposals and the positions of the several political parties, interacted.[140] Thus, it is a rich, non-legal

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137 *See, e.g.*, *García*, 162 DPR at 587; Pueblo v. Candelario, 166 DPR 118, 140 (2005); *In re* Disposiciones Cód. Electoral, 184 DPR 369, 376 (2012) (Rodríguez Rodríguez, J., dissenting).

138 JRT v. Corp. del Conserv. Música P.R., 140 DPR 407, 429 (1996).

139 *Id.* According to the book, Article II, Section 17's recognition of the right to unionize in private companies and public corporations:

> [W]as the result of an agreement made during the constitutional drafting process, between those who wanted to give those rights to every worker in Puerto Rico, whether in the private or government sector, and those who wanted to deny such rights to public employees, even those of public corporations that operated as private business.

Id. (translation by the author); *see also* Misión Ind. P.R. v. JCA, 145 DPR 908, 919 (1998).

140 *See* Herrero v. ELA, 179 DPR 277, 292 (2010).

source for ascertaining intent, just like Madison's notes are to the federal Constitution.[141] Yet, Trías Monge's book is quoted just as often as the U.P.R. Report, and just as authoritative,[142] and the Court has made efforts to harmonize his descriptions with the constitutional text.[143] Of course, all of these secondary sources pale in comparison with the use of the official Convention Record.[144]

III. PURPOSE, INTENT AND TEXT: A DYNAMIC RELATIONSHIP

A. Iron in the Glove: When Purpose, Intent and Text Combine

Normally, there is a neat correlation between what was intended and what is enacted through text. As we have seen, even in cases where the text is clear and unambiguous, the Supreme Court of Puerto Rico looks for confirmation in the Record of the Constitutional Convention. Most of the time, the conclusion is unsurprising: the Record confirms the reading of the text. The instances in which the Record fits in hand in glove with the apparent meaning of the text are just too many to mention individually: I have counted at least thirty-four cases where this phenomenon can be identified by plain sight. The lesson is simply enough: when this combination exists, the case is basically over. Examples abound.[145]

B. Purpose versus Text: When the Why (Mostly) Trumps the What

The Constitutional Convention adopted text that could have wide effect. Sometimes, this type of text was chosen for a particular reason that *might* be narrower than what the text could encompass from a semantic standpoint. In other words, the Framers might have adopted text that exceeded their designs. What should the Supreme Court do in these circumstances? The empirical answer to what the Court has actually done is complex. First, it has taken different

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141 *See* Empresas Loyola v. Com. Ciudadanos, 186 DPR 1033, 1043 (2012) (explaining that the Convention was very aware that the environmental policy provision was not aspirational but operative). *See also* Alvarado Pacheco v. ELA, 188 DPR 594, 614 (2013).

142 *See* Freire Ayala v. Vista Rent, 169 DPR 418, 433 (2006).

143 PPD v. Peña Clós I, 140 DPR 779, 801 (1996) (Naveira, J., concurring).

144 Another important historical source related to original explication were the actions of the First Legislature after the Constitution was adopted. Most of its members had been delegates to the Convention. The Court considers their actions both as an extension of original explication and as almost inherently constitutional. *See In re* Gallardo, 81 DPR 19, 50 (1958) (Opinion of Hernández Matos, J.); González v. Tribunal Superior, 75 DPR 585, 626-27 (1953).

145 Pueblo v. Tribunal Superior, 75 DPR 535, 548 (1953); Mun. de Guaynabo v. Tribunal Superior, 97 DPR 545, 550 (1969); Zachry Int'l v. Tribunal Superior, 104 DPR 267, 282 (1975); *In re* Ríos, 112 DPR 353 (1982); Hernández Agosto v. Ortiz Montes, 115 DPR 564, 566 (1984); Dolphin Int'l of P.R. v. Ryder Truck Lines, 127 DPR 869, 878 (1991); Asoc. Maestros P.R. v. Srio. Educación, 137 DPR 528, 545-46 (1994); McClintock v. Rivera Schatz, 171 DPR 584, 597 (2007); Asoc. Fotoperiodistas v. Rivera Schatz, 180 DPR 920, 977 (2011) (Rodríguez Rodríguez, J., dissenting).

roads with no discernable criteria as to why it would hold one way in one case and another later on. Second, *it mostly has split in favor of purpose over text.* This last fact reinforces the notion that Puerto Rican originalism gives more weight to the framer's intent than to the public meaning of the adopted words. Finally, there are also instances with the opposite effect: text appears to not allow a particularly expansive construction but then the purpose and intent behind it allows it.

The *purpose-over-text* method reveals an originalist mindset. At the same time, because the Framers' intent and purpose is mostly expansive and progressive, the familiar originalists-as-conservatives idea dissipates quickly. Add to this a rights-protective text that articulates and entrenches social-oriented policy choices, and Puerto Rican originalism takes the classic notions of originalism in a whole new direction which can be very relevant to other constitutional systems.

Purpose-and-intent-over-text's main manifestation is using the former to qualify and limit the latter. Its effect has *not* been a negation of the text in the name of intent. It has merely contained text that, without being linked with very particular purposes, could have allowed for *additional* results. Expansive does not equal progressive. Purpose-based containment of text can yield progressive results when the potential expansion, outside the realm of the original intent, can actually create conservative results, contrary to the wishes of the Framers. But mostly, *the concern of the Court which has led it to apply a purpose-over-text method does not come from an interest in yielding progressive results, but in order to be able to claim to have acted legitimately.* It was the Framers who were progressives, not the justices.[146]

In *Toll v. Adorno Medina*, the Court faced the question of whether the Constitution's seemingly absolute exclusionary rule as to evidence obtained illegally applied to *civil* controversies in which the *state was not a party*.[147] The text states that "[e]vidence obtained in violation of this section shall not be admissible in court."[148] Both the majority and the dissent agreed that the text, on its face, appeared to be an "absolute prohibition."[149] Yet, the majority dove into the Convention's Record to ascertain the purpose and intent behind this provision and found that the purpose of the exclusionary rule was to dissuade improper state action, which was not present in a civil case where the state was not a party. Therefore, it held that the exclusionary rule did not apply in these situations.

One dissenter struck back in *textualist* terms. According to Associate Justice Rebollo López -mostly a text-over-purpose believer-, by allowing the illegal evidence to be used in this case, "a majority of the members of this Court *rewrite*, at

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146 *See* P.R. Tel. Co. v. Martínez, 114 DPR 328, 325 (1983) (limiting the absolute ban on phone-tapping to its purpose of protecting private consensual conversations); De Paz Lisk v. Aponte Roque, 124 DPR 472, 484 (1989) (Article II, Section 1's list of prohibited discriminations is not exhaustive).

147 Toll v. Adorno Medina, 130 DPR 352 (1992).

148 P.R. CONST. art. II, § 10.

149 *Toll*, 130 DPR at 359-60.

their leisure, Article II, Section 10, of our Constitution, sacrificing the rights that the Constitutional Convention expressly wanted to guarantee to the citizens of this Country by adopting the quoted provision."[150] In his view, while the purpose behind the text protects its minimum use -criminal cases or cases where the state is a party-, the text does not limit itself to those situations. Justice Rebollo López clearly stated that his view was not expansive for expansion's sake, but *"simply, we are confronted with express and specific language in our Constitution, which we are bound to obey and put into practice."*[151] In final analysis, "the *command* . . . could not be any clearer;" illegally obtained evidence simply could not be introduced in Puerto Rican courts.[152]

For his part, Associate Justice Fuster Berlingeri -the Court's iconic progressive, living originalist who favored intent over text- *also dissented*. But his dissent was premised on an *original purpose* model. For him, the original purpose behind the text was not limited to the one mentioned in the majority opinion, which covered the controversy before the Court.[153]

The purpose-versus-text clash would rise again. In *Díaz Aponte v. Comunidad San José*, two private actors engaged in an economic transaction. One of the parties failed to pay what he owed to the other party.[154] The creditor filed a collection action with the consumer protection agency, which ordered his debtor to pay what he owed. The debtor ignored the order. Eventually, he was found in civil contempt and incarcerated until he obeyed the order, that is, until he paid his creditor. The problem was that the Constitution has the following provision: "[n]o one shall be incarcerated because of debt."[155] No qualifications, no conditions, no limitations. For the majority, by way of Justice Rebollo López, this was an open and shut case: the text was simply overwhelming. Because the debtor had been sent to jail, in the end, for failure to pay a private debt, there was a constitutional violation.

But the dissent felt the majority failed to do what it normally did: look to the Record of the Convention and find out *why* the Framers adopted that text. According to Justice Fuster Berlingeri, the Framers were concerned with poor people "who couldn't pay their debts" and, as a result, were sent to jail; unlike the defendant in the present case who, "although he could pay, simply chose not to."[156] He then blasted the Court, not just for its textualism, but for its disregard to the original intent of the Framers:

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150 *Id.* at 364 (Rebollo López, J., dissenting) (emphasis added).

151 *Id.* at 368.

152 *Id.* at 369.

153 *Id.* at 373 (Fuster Berlingeri, J., dissenting).

154 Srio. DACO v. Comunidad San José, Inc., 130 DPR 782, 815 (1992) (Fuster Berlingeri, J., dissenting).

155 P.R. CONST. art. II, § 11.

156 *Srio. DACO*, 130 DPR at 814 (Fuster Berlingeri, J., dissenting).

> We cannot give such a misplaced effect to an alleged command of our Constitution, *especially when the only direct source that exists to interpret the constitutional provision in question, the Report on the Bill of Rights, expressly limits the prohibition on incarceration because of debt to persons who do not have the resources to pay.*[157]

This is one of the few clear-cut cases where purpose was ignored in favor of a textualist reading.[158] It is also one of the few cases where adopting a broad and generous interpretation of a right did not necessarily coincide with the purposive, and especially progressive, approach. Of course, there are also cases that *transcend* the original purpose by taking expansive text in a progressive direction.[159]

The lessons that can be derived from the purpose-containing-text model are: (1) text does not operate alone, it requires context in order to adequately identify its appropriate legal effects; (2) purpose is the main tool that can achieve this; (3) purpose is defined as the original intent and design of the Framers and the goals they wished to achieve; (4) original purpose is, most of the time, of a broad and expansive nature; (5) purpose may result in narrower applications of text than what the language could include, but that narrower use may still be quite expansive, broad and progressive when compared to other constitutional structures, and (6) finally, the Supreme Court adopts this model because of the authoritative nature of the Convention Record. But probably one of the most interesting results from the purpose-versus-text experience has been that, in most cases, *either one* will yield some sort of progressive result in the end. Both can take you to similar places, as we saw with the dissents in *Toll v. Adorno Medina*.

C. When the Record is Silent: What is the Court to do?

We already saw what happens when the text is silent as to the crucial question before the Court. In most cases, the Supreme Court will look to general language or implicit answers that derive from the text. It can also fall back on the Record. Because of the substantial differences in length between the constitutional text and the 2,500 page Record, we can think of scenarios where the text is silent but the Record is not. But, even 2,500 pages have limits; the Framers could not state everything they thought, much less see into the future. In those circumstances, the Supreme Court finds itself on strange ground: having to address the constitutional question without any guidance from the Framers. What the U.S. Supreme Court does every day, the Puerto Rico Supreme Court sees as an

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157 *Id.* at 815 (emphasis added).

158 *See* PAC v. Gobernador, 87 DPR 177, 182 (1963).

159 Mercado Vega v. UPR, 128 DPR 273, 284 (1991) (equal pay for equal work provision not only applies to gender inequalities, but to *any* "pay gap that is devoid of justification." (translation by the author)).

anomaly. And because there is no progressive intent to rely on, the Court's own interpretations can go either way.

One of the most interesting aspects of these types of situations is that *the Court will volunteer in its opinion the fact that there is no Record on which to fall back.* The Court, in order to protect its legitimacy, feels obligated to justify the use of its independent power of interpretation by referencing the lack of direct commands from the Framers.[160] And when a *direct* command is missing,[161] the Court will still look to *general* statements made by the Framers.[162] Even isolated statements made during the proceedings of the Convention will be used.[163] That is, the Court's use of the Record resembles classic approaches to text: first look for the specific and, if absent, look for the general. Finally, sometimes historical silence, like textual silence, means that whatever we are looking for probably is not there to begin with.[164] In the end, a rule emerges: *only* when the Record is *totally* silent will the Court take it upon itself to offer its own interpretation of the Constitution.[165]

IV. CONSTITUTIONAL SELF-GOVERNANCE: ENTRENCHED SOCIO-ECONOMIC RIGHTS AND PROGRESSIVE POLICY CHOICES

A. The Effects of Textual Entrenchment

The emergence of constitutional supremacy, and the idea of legal provisions that become higher law outside the reach of ordinary legislation, opened a new era of constitution-making: *what* should be entrenched in the Constitution? Slowly but surely, modern constitutionalism moved in a direction of entrenching more and more rights, and of a new nature: socio-economic, positive and collective. Eventually, substantive policy choices of issues related to economic structure, environmental conservation, labor organization, and so on, would also be entrenched. Because of the nature of these rights and the rationale behind them -mistrust of ordinary politics susceptible to hijacking by powerful economic forces-, the new entrenched content of modern constitutions is, generally, of a progressive nature.

There are two main effects of entrenchment. First, that a right or policy is shielded from modification by ordinary legislation. It is simply out of reach. But the content and effect of that right or policy are the same as if they were statutes;

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160 The Court would also seem to suggest that parties should find support for their arguments in the Record. Sánchez Rodríguez v. López Jiménez, 116 DPR 392, 394 (1985).

161 *See* Rullán v. Sec. Hacienda, 78 DPR 521, 531 (1955); González v. Alcalde de Utuado, 101 DPR 47, 51 (1973).

162 Arroyo v. Rattan Specialties, Inc., 117 DPR 35, 58-59 (1986).

163 Rodríguez Rivera, Alcalde v. Comisión, 84 DPR 68, 80 (1961) ("[S]carce references").

164 Autoridad de Comunicaciones v. Tribl. Superior, 87 DPR 1, 11 (1962).

165 García v. Aljoma, 162 DPR 572, 589 (2004).

just that they are now entrenched statutes. Second, that because something received constitutional status, it must mean that, on top of formal entrenchment, the adopted text has a *different* effect than if it had been adopted as a statute. Both manifestations of the entrenchment effect are present in Puerto Rican constitutional adjudication. The *history* of the provision shows if the Framers preferred one of these effects. The cases of the Supreme Court signal a preference for the second view, that is, that obtaining constitutional rank means the particular issue has gained substantive weight on top of formal entrenchment.[166] This means that only if the record *clearly* shows that constitutional entrenchment was done merely as a formal device to avoid potential modifications in the future, the Court will assume constitutional status means stronger substantive weight.

B. The Notion of Constitutionally-Ranked Public Policy

From a purely textual standpoint, it seems difficult to distinguish a cluster of rights and directives -or even a single right or rule- from a coherent public policy as to particular issues. Yet, the Supreme Court of Puerto Rico has acknowledged the existence of constitutionally-ranked *public policies*.[167] The interesting thing is that these are, precisely, the result of *individual* rights (individual as in rights independent of each other) and specific rules, plus the *combinations* they create.

In some cases, the Framers themselves state that the combination of rights and rules they are adopting constitutes an entrenchment of public policy.[168] In other situations, *it is the Supreme Court itself that concludes, through its own analysis of the provisions and their history, that a constitutionally-ranked public policy exists*.[169] It is an instance of the Court recognizing that what the Convention did was not just adopt separate, independent provisions related to rights

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166 For cases that limit constitutional status as merely formal entrenchment, see González v. Tribunal Superior, 75 DPR 585, 606 (1953); Fournier v. González, 80 DPR 262, 265 (1958); Rodríguez Rodríguez v. ELA, 130 DPR 562, 573 (1992). Most cases give an *additional* effect to entrenchment, and these are generally to labor and other socio-economic rights. *See* A. D. Miranda, Inc. v. Falcón, 83 DPR 735, 740 (1961); Figueroa Ferrer v. ELA, 107 DPR 250, 258 (1978); JRT v. Asoc. Servs. Médicos Hosp., 115 DPR 360, 364 (1984) ("constitutional roots" of collective labor rights); Misión Ind. P.R. v. J.C.A., 145 DPR 908, 918 (1998); AMPR v. Srio. Educación, ELA, 178 DPR 253, 271 (2010) (education); COPR v. SPU, 181 DPR 299, 317 (2011); Whittenburg v. Col. Ntra. Sra. del Carmen, 182 DPR 937, 949, 966 (2011).

167 SIU de PR v. Otis Elevator Co., 105 DPR 832, 843 (1976); Santini Rivera v. Serv. Air, Inc., 137 DPR 1, 12 (1994).

168 Paoli Méndez v. Rodríguez, 138 DPR 449, 460 (1995). Actually the *text of the Constitution itself states the existence of the public policy*, in this case, as to environmental conservation. See also Rivera Sierra v. Supte. Anexo 500 Guayama, 179 DPR 98, 101-02 (2010), for the textual provision relating to the rehabilitation of persons convicted of crimes.

169 Pueblo v. Soto, 77 DPR 206, 212 (1954); P.R. Tel. Co. v. Martínez, 114 DPR 328, 343 (1983).

and substantive rules, but a coherent whole that reveals policy choices.[170] This can be the product of analyzing provisions plus their history, or it can be deduced from an integrated reading of several provisions independent of their history.[171]

Constitutional public policies have three types of effects: (1) they influence the way courts adjudicate concrete cases that deal with issues related with those policies;[172] (2) they generate a constitutionally-sensitive process of statutory construction,[173] and (3) they can combine with those statutes to create even stronger policy commands and directives.[174]

C. The Ideological Underpinnings and Social Context of the Constitution

Modern constitutions do not tend to be neutral and have recently become the focus of triumphant social, political, cultural and economic forces. Whether a new nation declaring its independence, a democratic transition from an authoritarian regime or a socialist revolution empowering previously oppressed classes, the resulting constitution becomes the culmination and crystallization of that process, and the beginning of a new one under its reign. As a result, modern constitutions can be very polarizing. One of the main goals of these types of constitutions is to establish itself as *the* constitution of the land, and not only of the victorious forces; to create a new hegemony with the constitution as the uniting center. The creation and sustainment of a social consensus is therefore key: creating the consensus that will allow the constitution to have a strong beginning and then sustaining that consensus to allow the constitution to grow roots and become part of the social identity of the community.

Puerto Rico's Constitution is of a mixed sort. On the one hand, it is despised as a colonialist tool. On the other hand, Puerto Rico has functioned under the current Constitution uninterruptedly since 1952. Furthermore, the progressive, expansive and protective nature of the Bill of Rights has allowed the Constitution to sustain its legitimacy for over sixty years. All attempts to change the Constitution towards a regressive direction have failed. The People have protected their Bill of Rights.

Finally, constitutions are also not divorced from their social context. What was going on when it was written? This is fundamental to an originalist approach: the why behind the why. When analyzing the purposes, intent and ex-

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170 Asoc. Maestros P.R. v. Srio. Educación, 137 DPR 528, 541 (1994).

171 Rivera Figueroa v. The Fuller Brush Co., 180 DPR 894, 902 (2011).

172 *See, e.g.*, *Paoli Méndez*, 138 DPR at 460.

173 *See, e.g.*, Autoridad de Comunicaciones v. Tribl. Superior, 87 DPR 1, 11 (1962); Marrero v. Mun. de Morovis, 115 DPR 643 (1984); García Pagán v. Shiley Caribbean, Etc., 122 DPR 193 (1988); UPR v. Asoc. Pur. Profs. Universitarios, 136 DPR 335 (1994); *Rivera Figueroa*, 180 DPR at 903.

174 *See, e.g.*, JRT v. Asoc. Servs. Médicos Hosp., 115 DPR 360, 365 (1984); Rivera Sierra v. Supte. Anexo 500 Guayama, 179 DPR 98, 101-02 (2010); Whittenburg v. Col. Ntra. Sra. del Carmen, 182 DPR 937, 949-66 (2011).

planations of the Framers, one must also keep in mind the social forces that were influencing the drafting process. The Constitution of Puerto Rico is a child of 1951-1952, and the social struggles and battles that preceded it.[175]

Puerto Rico's Constitution has had a central role in social life. While Puerto Ricans may not know every detail in the text, they share a notion that we have our own Constitution and that it is more progressive and rights-protective than its federal counterpart. Consequently, affirmations of loyalty to the Constitution and its text soak any argument in political legitimacy. The case for some sort of originalism grows stronger.

But, what are the ideological underpinnings of the Constitution of Puerto Rico? How has the Supreme Court characterized and used those ideological foundations and the social context behind the creation of the Constitution? The ideological battle for the soul of the Constitution is not a settled matter and it is an issue that is constantly debated.

"On the 25th of July, 1952, life was given in America to the most beautiful and human of statements concerning social justice that a People's democratic conscience can aspire to: equality of birth before the law."[176] This statement from 1953 is a celebration of the new Constitution. From the very beginning, the Supreme Court was aware of the social ideology that created the Constitution:

> The People of Puerto Rico have constantly demonstrated, both ideologically as well as in practice, that they have faith in the fundamental values of the *liberal* tradition, in freedom and the dignity of the individual as the ultimate point of reference in terms of values for social organization. They have strengthened the ideals and the practice of democracy *in its economic, political and social aspects.* We have to acknowledge their admirable effort to contribute to the vindication of democratic as to its own capacity to deal with the problems caused by *the failures of the capitalist system.* The quality and respectability of these triumphs require constitutional provisions of the greatest category, which are included in the Preamble, the Bill of Rights *and in every corner of our Supreme Law.* This will be the first democratic Constitution we have after four and a half centuries of our existence as an organized community, and such opportunity cannot be squandered.[177]

Whether harmoniously or in tension, the liberal democratic and social democratic tendencies of the Constitution are a constant presence in Supreme Court practice in Puerto Rico. I suggest that, in 1952, social democracy was seen as the natural development of liberal democratic thought, having Puerto Rico's Consti-

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175 Ramírez de Ferrer v. Mari Brás, 144 DPR 141, 221 (1997) (Negrón García, J., concurring) ("Every Constitution brings with it historical and legal-political meaning that reflects the vicissitudes of the process of its creation, the content and tenor of its norms, values and institutions." (translation by the author)).

176 Figueroa v. Díaz, 75 DPR 163, 166 (1953).

177 A.D. Miranda, Inc. v. Falcón, 83 DPR 735, 739 (1961) (emphasis added) (quoting ESCUELA DE ADMINISTRACIÓN PÚBLICA DE LA UNIVERSIDAD DE PUERTO RICO, LA NUEVA CONSTITUCIÓN DE PUERTO RICO 216 (1954)).

tution "*one of the most liberal, generous and authentically democratic Bill of Rights in the world.*"[178] Whether that was a plausible ideological proposal is another matter and it has allowed the Court to navigate through both waters from time to time; as to political rights, the Constitution of Puerto Rico incorporates the most advanced concepts and principles of liberal democratic thought,[179] while, as to the new wave of socio-economic rights, its approach is of a different nature.[180] The main thrust behind the latter are provisions that deal with labor matters and the express ideological explanations offered by the Framers.[181] The Court has not shied away from acknowledging the Constitution's overt social purposes or ideological connotations.[182] I believe the dual nature of the Constitution can also be attributed to the liberal-democratic model used by the U.P.R. School of Administration when drafting its proposals, and the more socialistic tendencies of many of the Framers.[183]

The question that remains is what to make of the Constitution as a whole. According to the Supreme Court, our Constitution is a high intensity liberal democratic document that incorporated social-democratic principles and serves as a link between these two models. I believe this is where the Court's originalism fails to make an appearance: it has been the *Court*, on itself and building on classic notions about the judicial role and constitutionalism, that has somewhat *redefined* the ideological character, if not the content, of the Constitution. Yet, because of the force of its text and history, the Constitution strikes back and its ideological nature finds a way into the Court's opinions. But, what has served as an ideological common ground, originalism included, is the Constitution's unequivocal commitment to human dignity as the defining constitutional value,[184] which can be claimed both by *high intensity* liberal democratic and socialist perspectives.

Puerto Rico's Constitution is hardly neutral; its history is overtly ideological. While not revolutionary in any sense of the word, its social nature cannot be ignored. That is why most, if not all, of the entrenched public policy choices are

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178 Pueblo v. Santiago Feliciano, 139 DPR 361, 436 (Rebollo López, J., dissenting) (emphasis added).

179 *See* ELA v. Rivera Rivera, 105 DPR 640, 641-42 (1977) (Negrón García, J., dissenting); Pierson Muller II v. Feijoó, 108 DPR 261, 270-71 (1978).

180 Molina v. CRUV, 114 DPR 295, 308 (1983) ("In Puerto Rico, we forged a Bill of Rights, not in the 18th Century, like in the United States, but in the thrust of the Twentieth Century inspired by the American Declaration of the Rights and Duties of Man and the Universal Declaration of Human Rights." (translation by the author)).

181 *See, e.g.*, Mercado Vega v. UPR, 128 DPR 273, 284 (1991).

182 Mun. de Guaynabo v. Tribunal Superior, 97 DPR 549 (1969); Rivera Figueroa v. The Fuller Brush Co., 180 DPR 894, 902 (2011).

183 *See* García v. Aljoma, 162 DPR 572, 580-81 (2004); FARINACCI FERNÓS, *supra* note 38.

184 According to the chairman of the Constitutional Convention's Commission on the Bill of Rights, the concept of human dignity is the central, constant and core element of the entire constitutional structure. In that sense, human dignity serves as an omnipresent value that permeates all constitutional analysis. Andino Torres, *ex parte*, 151 DPR 794, 807 (2000) (Negrón García, J., concurring).

of a progressive nature that give away its ideological tendencies and, one would hope, should force courts to recognize it and abide it. I dare characterize Puerto Rico's Constitution as within the post-liberal family.

D. Constitutional Public Policy in Practice

i. Labor

It is no coincidence that labor issues are front and center in the realm of constitutionally-ranked public policies in Puerto Rico. As we saw in Part II(a), after lawyers -some of whom were known labor attorneys-, the most represented occupations in the Convention were farmers, labor leaders and teachers. These delegates came from all three parties. Moreover, both the P.D.P. and, especially, the S.P., made their labor proposals the centerpiece of their electoral campaign for the selection of delegates. The Socialists even wanted to introduce a Labor Bill of Rights that would be separate from the general Bill of Rights.

The end result was a Bill of Rights that is labor-focused. As the Supreme Court has observed, more than a *quarter* of all Article II (Bill of Rights) sections deal with labor issues.[185] The main textual provisions are Sections 16, 17 and 18. Section 16 deals with individual rights, while the other two sections deal with collective rights. One could say that these sections merely articulate a catalogue of rights that have no collective weight that is different from the sum of its parts. But even then, it is quite a list and the rights these sections enumerate are all justiciable: right to freely choose one's work and to resign from it, an eight-hour work day and minimum overtime pay of a time-and-a-half, equal pay for equal work, a reasonable minimum wage, protection against hazardous working conditions, right to unionize, bargain collectively and strike, and so on.[186]

But the Constitution's approach to issues related to workers and labor conditions is not limited to a set of separate rights. There is a discernible constitutional public policy that transcends them. This conclusion is not just an evaluation of the textual structure of the Constitution, but, of course, of the history of the framing. This has resulted in a host of *constitutional* cases dealing with labor issues, even if the Constitution is only used as background or as a prism for statutory interpretation. When it comes to labor cases, it is virtually impossible to ignore the Constitution. Of the 201 cases used for this article, no less than 44 deal, whether directly or indirectly, with labor issues. Constitutional labor cases have been a constant for more than sixty years.

These cases come in all sizes and shapes. Originalism can only take us so far. At the end of the day, we need willing courts. There is no guarantee that courts will obey the commands of the text, the intent of the Framers or the purposes

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185 Rivera Figueroa v. The Fuller Brush Co., 180 DPR 894, 902 (2011).

186 The Socialists even proposed that the Constitution require that a minimum percentage of the profits of certain sized private establishments be shared with the workers. FARINACCI FERNÓS, *supra* note 38.

behind both. If the goal is to force courts to arrive at a particular result, judges can still go rouge. An originalist approach can only help to minimize these risks. But, an argument can be made in these circumstances that would be totally absent in older constitutional settings: that the court has acted illegitimately or contrary to the constitutional design.

This is crucial in marginal cases in Puerto Rico that do not directly threaten the *existence* of the right to strike, but its *effectiveness*. Two things are key here. First, a court that goes for the *expansive*, progressive reading would be, *at least*, legitimized by the constitutional text and history. A broad ruling would not be vulnerable to attack. Second, if the court *does not* engage in expansive construction, and limits itself to the minimum requirements of the Constitution –for example, that the right to strike exists- it *can* be accused of having acted illegitimately. In this scenario, the decision *could* be seen as an underuse, or even blatant disregard, of the Constitution. The point is that while a court with an ideological Constitution can always escape the desired result, that minimalist approach is vulnerable to charges of constitutional illegitimacy. At the same time, a court that decides to go full force can always count on the text and history of the Constitution to back its decision. As a result, probably the best guarantee that the substantive designs of the Constitution will be adequately used would be, interestingly enough, *through an originalist approach.*

First things first. In Puerto Rico, the Supreme Court has acknowledged the existence of a constitutionally-ranked, pro-worker labor policy.[187] The Court's recognition of the existing policy is mostly based on text and the corresponding history behind it, notably the Framers' explications.[188] The Court's use of history and original explication reveals the highly ideological nature of the Constitution's labor policies.[189] The effect has been a well-rounded string of cases interpreting, constructing and applying the specific labor provisions that take note of the overarching constitutional policy.[190] Even when the relevant constitutional provision was *not* at the heart of the question before the Court, it still had a role

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187 Freire Ayala v. Vista Rent, 169 DPR 418, 455-56 (2007); Santini Rivera v. Serv Air, Inc., 137 DPR 1 (1994); Mercado Vega v. UPR, 128 DPR 273 (1991); SIU de PR v. Otis Elevator Co., 105 DPR 832, 843 (1977).

188 *Mercado Vega*, 128 DPR at 284-85; Dolphin Int'l of P.R. v. Ryder Truck Lines, 127 DPR 869, 877-78 (1991) (noting the high priority labor rights received from the Commission on the Bill of Rights); JRT v. Asoc. Servs. Médicos Hosp., 115 DPR 360, 365 (1984); Mun. de Guaynabo v. Tribunal Superior, 97 DPR 545, 549-50 (1969); A.D. Miranda, Inc. v. Falcón, 83 DPR 735, 738-41 (1961).

189 Rivera Figueroa v. The Fuller Brush Co., 180 DPR 894, 902 (2011); *A.D. Miranda, Inc.*, 83 DPR at 739.

190 Rivera Padilla v. OAT, 189 DPR 315 (2013) (equal pay); Whittenburg v. Col. Ntra. Sra. Del Carmen, 182 DPR 937, 969 (2011) (disability insurance); García v. Aljoma, 162 DPR 572 (2004) (protection from hazardous working conditions); *Dolphin Int'l of P.R.*, 127 DPR at 869 (right to resign and freely choose one's occupation); Amy v. Adm. Deporte Hípico, 116 DPR 414 (1985) (right to work); *Asoc. Servs. Médicos Hosp.*, 115 DPR at 360 (collective bargaining); AAA v. Unión Empleados AAA, 105 DPR 437 (1976) (right to strike); *Mun. de Guaynabo*, 97 DPR at 545 (overtime pay); *A.D. Miranda, Inc.*, 83 DPR at 738 (overtime pay).

to play, whether as an *additional* reason to sustain a holding,[191] or in order to interpret an ordinary labor statute.[192] The end result has been a vigorous judicial policy favoring labor rights.[193]

The link between constitutional provisions and statutes in the labor context, and the use of originalist methodologies, are best exemplified by *Rosario v. Toyota*.[194] The plaintiff in this case was fired because his employer found out he had a decades-old prior criminal conviction. Plaintiff sued under the employment anti-discrimination statute, which did not expressly mention criminal convictions, but it did include *social condition*. Why is this a constitutional matter? Well, the statute's ban on discrimination on social condition *is a literal copy of Article II, Section I, of the Constitution*. It was not a legislative creation. Therefore, the *statutory* interpretation analysis required interpreting the *constitutional* provision. That led the Court into original explication territory. Both sides claimed to be following the original meaning, purpose and intent of the Framers. Puerto Rican originalism at its best.

The concurrence referenced the history behind the social condition classification. It was *not* included in the original draft of the Constitution. While being considered by the Convention, a Socialist delegate proposed that *condition* be added to the *social origin* classification. Because of a generalized agreement among the delegates, the amendment was adopted *without debate*; there was no express explanation on the part of the Framers. But not all was lost. *After* the amendment was adopted, a delegate referenced the newly-approved language. According to him, the new category would prohibit *all degradation, favoritism or prejudice* related to a person's extraction, economic position and *"status in the community."*[195] After quoting from Fernós Isern's *Original Intent* and Trías Monge's *Constitutional History*, as well as using a *modern* dictionary, the concurrence held that the *purpose* of the social condition category was to protect socially stigmatized persons, such as convicted felons.

The dissent also quoted from the Record of the Convention as its main source. According to it, the Record showed that the Framers opted for *social condition* as a substitute for *economic condition*, because the former term was *broader* than the latter.[196] Therefore, they argued, the original purpose behind

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191 Emp. Pur. Des., Inc. v. HIE Tel., 150 DPR 924, 929 (2000) (labor protest inside a shopping mall as protected speech); Arroyo v. Rattan Specialties, Inc., 117 DPR 35, 58-59 (1986) (employer's attempted use of polygraph; right to privacy); Rodríguez v. Srio. de Instrucción, 109 DPR 251 (1979) (free speech rights of teachers engaged in union organizing); Zachry Int'l v. Tribunal Supremo, 104 DPR 267, 279 (1975) (different working hours for men and women).

192 *Whittenburg*, 182 DPR at 937; Díaz v. Wyndham Hotel Corp., 155 DPR 364 (2001); Rodríguez Meléndez v. Sup. Amigo, Inc., 126 DPR 117 (1990); García Pagán v. Shiley Caribbean, 122 DPR 193 (1988).

193 Morales Morales v. ELA, 126 DPR 92, 106 (1990).

194 Rosario v. Toyota, 166 DPR 1 (2005).

195 *Id.* at 12 (Rebollo López, J., concurring) (emphasis added) (translation by the author).

196 *Id.* at 34 (Fuster Berlingeri, J., dissenting) (emphasis added) (translation by the author).

the term was to protect poor people, not all and any socially stigmatized individual; it was synonymous with social class.

It is difficult to tell who got it right from an originalist perspective, precisely because the lack of a developed Record and adequate explanation as to the new term. Furthermore, there seem to be statements supporting each view. The concurrence was able to adopt the expansive reading without being labeled as activist.

Rosario v. Toyota is part of a long list of cases where, because of the slightest link with labor issues, the Constitution makes an entrance.[197] Another manifestation of this omnipresence is the *clash* between constitutional labor rights and *other* individual rights. Interestingly enough, in many of these cases, the substantive labor content is severely minimized in the face of the opposing right.[198] Labor cases are the main source of *anti-originalist decisions by the Supreme Court*. Living constitutionalism in Puerto Rico has thrived on labor cases. It would seem that conservative judges find labor-related originalism too much to bear.[199] Most of the time, the Court will only protect the minimum core recognized by the text and Record,[200] sometimes even less.[201] This allows for originalist dissents that blast the Court's minimalist use of labor policy.[202] If the current Supreme Court really embraces the originalist label, one would think that progressive results in the area of labor rights and policy will follow.

ii. Environmental Policy

Section 19 of Article VI of the Constitution of Puerto Rico reads: "[i]t shall be the public policy of the Commonwealth to conserve, develop and use its natural resources in the most effective manner possible for the general welfare of the community; to conserve and maintain buildings and places declared by the Legislative Assembly to be of historic or artistic value."[203] Is this merely aspirational

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197 Asoc. Maestros v. Sist. Retiro Maestros IV, 190 DPR 854 (2014); Domínguez Castro v. ELA I, 178 DPR 1 (2010); Pueblo v. Figueroa Jaramillo, 170 DPR 932, 937 (2007) (Rivera Pérez, J., concurring).

198 ELA v. Hermandad de Empleados, 104 DPR 436, 440 (1975) (clash between the right of workers to protest against their employer and the privacy rights of the employer in his home. The concurrence criticized the majority for failing to *accommodate* the labor angle); Academia San Jorge v. JRT, 110 DPR 193, 234 (1980) (Trías Monge, J., dissenting) (the Court prevented employees at a Catholic school from organizing a labor union, because the intrusive nature of the state's intervention could hinder the religious freedoms of the school. The dissent blasted the majority for tilting the balance in favor of religious rights over labor rights. Both quoted from the Record, but from *different pages*).

199 AAA v. Unión Empleados A.A.A., 105 DPR 437, 453 (1976).

200 SIU de PR v. Otis Elevator Co., 105 DPR 832 (1977); Green Giant Co. v. Tribunal Superior, 104 DPR 489 (1975); UTIER v. JRT, 99 DPR 512, 523 (1970).

201 COPR v. SPU, 181 DPR 299, 317 (2011).

202 UPR v. Asoc. Pur. Profs. Universitarios, 136 DPR 335, 413 (1994) (Negrón García, J., dissenting).

203 P.R. CONST. art. VI, § 19.

or justiciable language? The answer was provided *by the Framers themselves.* Original explication strikes again.

According to the Supreme Court, "the importance of this constitutional command must not be undervalued" and it cannot be "reduced to a simple declaration of principles."[204] Why? Because when Section 19 was sent to the Convention floor, the delegates responsible for its drafting made sure of it: "[t]here is no technical error here. We are aware of what we are doing. We are structuring something, the preservation of natural resources. Puerto Rico is an island. We should be worried."[205] Those statements were backed up by the Commission's Report: "[o]ur goal is to state *with absolute clarity* the convenience and necessity of preserving Puerto Rico's natural resources."[206]

These types of statements by the Framers empower the Supreme Court to develop a judicial policy of environmental protection. According to the Court, Section 19 "[i]s a protection against the State, society, the government and even mankind, who in the world today, and without noticing that they are undermining their own existence, destroys nature thanks to rampant consumerism and materialism, thus creating irreversible systemic imbalances."[207] Moreover, the Court has held that "this provision is not merely an inconsequential statement nor a declaration of general principles of an exhortative nature. Actually, it is a command that must be obeyed rigorously and that trumps any statute, rule or municipal ordinance that is contrary to it."[208] As a result, Section 19 has two distinct legal effects: (1) it serves as an independent source of law that judges must use when analyzing the *validity* of environmental legislation, and (2) it constitutes a prism through which statutes will be analyzed in order to further the constitutional policy.[209] The Court's record putting these words into practice is mixed.[210] But, it seems difficult to miss the originalist approach to environmental cases.

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204 Paoli Méndez v. Rodríguez, 138 DPR 449, 460 (1995) (translation by the author).

205 *Id.* at 461 (translation by the author) (quoting 3 DIARIO DE SESIONES DE LA CONVENCIÓN CONSTITUYENTE 2116 (1952)).

206 *Id.* (emphasis added) (translation by the author) (quoting 4 DIARIO DE SESIONES DE LA CONVENCIÓN CONSTITUYENTE 2622 (1952)).

207 *Id.* at 462 (translation by the author).

208 Misión Ind. PR v. JCA, 145 DPR 908, 919 (1998) (translation by the author).

209 *Id.* at 919-20.

210 *Compare* Lozada Sánchez v. JCA, 184 DPR 898 (2012), *with* Empresas Loyola v. Com. Ciudadanos, 186 DPR 1033, 1043 (2012).

ii. The Ill-fated Section 20 and Other Socio-Economic Rights[211]

For a brief moment, Section 20 was the crown jewel of the Puerto Rico Bill of Rights and the pride and joy of the Constitutional Convention. It represented the ultimate codification of the framing generation's progressive agenda and the principal space for the Constitution's enumeration of socioeconomic rights. It read:

> The Commonwealth also recognizes the existence of the following human rights:
>
> The right of every person to receive free elementary and secondary education.
>
> The right of every person to obtain work.
>
> The right of every person to a standard of living adequate for the health and well-being of himself and of his family, and especially to food, clothing, housing and medical care and necessary social services.
>
> The right of every person to social protection in the event of unemployment, sickness, old age or disability.
>
> The right of motherhood and childhood to special care and assistance.
>
> . . . .
>
> In the light of their duty to achieve the full liberty of the citizen, the people and the government of Puerto Rico shall do everything in their power to promote the greatest possible expansion of the system of production, to assure the fairest distribution of economic output, and to obtain the maximum understanding between individual initiative and collective cooperation. The executive and judicial branches shall bear in mind this duty and shall construe the laws that tend to fulfill it in the most favorable manner possible.[212]

Although not meant to be justiciable from the very beginning, Section 20 was not meant to be purely symbolic. It directed legislative action and could indirectly help courts in their adjudication. But, even as an aspirational provision, Section 20 proved too much for Congress during the Cold War. It was just too socialist. As a result, *even though the People of Puerto Rico had already ratified the Constitution by popular referendum –including Section 20–* Congress forced the Constitutional Convention to meet again and agree to eliminate Section 20. They agreed and the issue was not taken back to the People until *after* the Constitution came into effect. Colonialism crept back into the Constitution.

But Section 20 has also crept back in to the Constitution by way of Supreme Court case law. Its substantive and moral force has made it impossible to simply leave it in the history books. Its watershed moment was *Amy v. Adm. Deporte*

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211 For a more in-depth look at this issue, see Esther Vicente Rivera, *Una mirada a la interpretación de los derechos económicos, sociales y culturales en las decisiones del Tribunal Supremo de Puerto Rico*, 44 REV. JUR. UIPR 17 (2010).

212 2 DIARIO DE SESIONES DE LA CONVENCIÓN CONSTITUYENTE 1103 (1952).

Hípico, where the Court revived Section 20's promise of a right to obtain and retain work:

> The right to a job, that is, to generate income and to have a just and decent life, is an inalienable value of man that predates the most ancient of all known constitutions. The uncertain destiny of the ill-fated Section 20 of our Constitution lives within those rights that, even if not expressly mentioned in the text, the People retain against the established political power.[213]

Later developments in the case law point to the *possibility* of giving real force to symbolic rights of this nature,[214] or, at least, recognize their existence.[215] The story of Section 20 is still on-going and so is the potential for the remaining, justiciable socio-economic rights in the constitutional text. The text and history are there; it is just a matter of a court willing to use them.

V. IT ALL COMES TOGETHER: ORIGINALIST METHODS, LIVING CONSTITUTIONALIST RHETORIC AND ORDINARY CANONS OF CONSTITUTIONAL ADJUDICATION

Not every constitutional case requires an in-depth look into history, intent or purpose. But originalist methods, even if only superficially, are always there. The same goes for the *rhetoric* of living constitutionalism. Finally, one of the most interesting aspects of Puerto Rico's Supreme Court practice has been *constitutional cases where the Court splits down the middle and both sides engage in originalist methods of interpretation and construction*. Such has been and continues to be the power of Puerto Rico's original explication originalism.

A. Puerto Rico's Multiple Heller Moments

Much has been said in the U.S. about the fact that both the majority and dissenting opinions in *District of Columbia v. Heller* engaged in some sort of originalist methodologies, with the former focusing on original public meaning and the latter on original purpose.[216] Yet *Heller*-type situations have been around in Puerto Rico for sixty years.[217] But aren't clear text, authoritative explications

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213 Amy v. Adm. Deporte Hípico, 116 DPR 414, 421 (1985) (translation by the author).

214 "We can't allow the rights enshrined in the Constitution to become mere abstract aspirations." Arroyo v. Rattan Specialties, Inc., 117 DPR 35, 81 (1986) (citing *Amy*, 116 DPR at 414) (translation by the author).

215 García v. Aljoma, 162 DPR 572, 596 (2004); San Miguel Lorenzana v. ELA, 134 DPR 405, 427 (1993); Rosario v. Toyota, 166 DPR 1, 3 (2005) (Rebollo López, J., concurring).

216 District of Columbia v. Heller, 554 U.S. 570 (2008).

217 At least twenty of the analyzed cases contain majority and dissenting opinions that both employ originalist methodologies. *See, e.g.*, *In re* Solicitud Aumentar Núm. Jueces TS, 180 DPR 54 (2010); Rosario v. Toyota, 166 DPR 1 (2005); Pérez, Román v. Proc. Esp. Rel. de Fam., 148 DPR 201 (1999);

and entrenched policy choices supposed to prevent all that? Most of the time the answer is *yes*. But that is not the point: modern constitutions accompanied by original explications theory are not perfect tools. It would be foolish to argue that they are and incorrect to discard them because of it. *Heller* itself is the perfect example. *Heller* was not a defeat of originalism because it proved that the same sort of method can create different results; it was a victory for originalism because it created a common method of constitutional adjudication. We do not know if *Heller* is an outlier in U.S. Supreme Court practice. What we do know is that in Puerto Rico it is the norm, and that speaks volumes to the success of the Framers' designs.

The most dramatic *Heller* moment in Puerto Rico was *In re Aprob. Rs. y Com. Esp. Ind.*[218] Like *Heller*, this case was highly political. Unlike *Heller*, it was not about rights or policy. It was about power: who has ultimate *administrative* power over the Judicial Branch? The Court as a whole or the Chief Justice exclusively? *Both sides* resorted to text and authoritative explications. As an empirical mater, it would seem like the majority focused more on text and the dissenters on history, but both claimed to be following the Framers' intent.

B. Non-Originalist Constitutional Adjudication

Originalism is not a magic wand nor is it the exclusive tool of constitutional adjudication. Other devices also play a part: doctrine, precedent, classic canons of interpretation, and so on. In some instances, the case is so simple or the question so narrow as to not warrant a historical analysis of the applicable constitutional provision. Little or no mention of the Framers' intent or explications has sometimes been made, be it because it is *unnecessary*,[219] or because the precedents that serve as authority already *did the corresponding historical inquiry into intent and explication*.[220] A survey of Supreme Court cases reveals that original explication is the principal methodological tool used in terms of *quantity* and in relation to the relative *importance* of the question before the Court. Precedent and doctrine-based decisions are fewer in number and mostly relate to less controversial issues.

Finally, there is the issue of the Constitution's *textual command about its own interpretation and construction*, articulated in Article II, Section 19, of the Constitution.[221] Several surprising things emerge from the Supreme Court's practice as to this issue. First, it's the lack of *express* use of this provision.[222] While

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Pueblo v. Santiago Feliciano, 139 DPR 361 (1995); P.R. Tel. Co. v. Martínez, 114 DPR 328 (1983); UTIER v. JRT, 99 DPR 512, 523 (1970); Ocasio v. Díaz, 88 DPR 676 (1963); PIP v. ELA, 186 DPR 1 (2012).

218 *In re* Aprob. Rs. y Com. Esp. Ind., 184 DPR 575 (2012).

219 CRIM v. Fed. Central Trabajadores, 142 DPR 968 (1997); Pueblo v. Borrero Robles, 113 DPR 387 (1982).

220 Pueblo v. Matías Castro, 90 DPR 528 (1964); Pueblo v. Santiago, 78 DPR 69 (1955).

221 P.R. CONST. art. II, § 19.

222 Only a few examples exist. *See, e.g.*, PSP, PPD, PIP v. Romero Barceló, 110 DPR 248, 256 (1980).

one could argue that the Court has constantly made *use* of this command, there have been scarce occasions in which the Court explicitly mentions it. The end-result is quite anti-climactic: Section 19 has had a negligible *official* role. But maybe the key lies elsewhere: the text, history and substantive content of the Constitution has made reference to Section 19 unnecessary or even superfluous. And that is quite a story indeed.

C. Living Constitutionalist Rhetoric

Puerto Rico has not been a stranger to living constitutionalism *rhetoric*. And there are reasons for this. First, because of the *progressive substantive nature of our Constitution*, some Justices, influenced by the U.S. dichotomy of originalist-as-conservative and living-constitutionalists-as-liberals, have felt that the latter is the more adequate method for Puerto Rican constitutional law. Section 19 adds to this because it expressly requires liberal construction of rights provisions and an expansive method of interpretation that is actually rooted in originalism. Second, because Puerto Rican jurisprudence has yet to articulate the interpretation-construction distinction,[223] expansive construction is mistakenly seen as a necessary product of living constitutionalism.

But once one makes the interpretation-construction distinction and recognizes that expansive legal effect based on adequate originalist interpretation is not anathema to originalism, the picture changes. The Court's concern that originalism-equals-stagnation is misplaced and its use of living constitutionalist rhetoric should be seen in its appropriate context. The more one looks at it, the more one can conclude that living constitutionalist rhetoric in Puerto Rico is simply mislabeled expansive construction *which the text and history of the Constitution allows and even requires*.

As early as 1961, the Supreme Court emphasized that, since language is adopted because of historical and social factors, constitutional interpretation requires a look at both the historical context of the language when adopted, as well as the context "of current reality."[224] Thus, started the road of references to updating and currentness as elements to consider in constitutional adjudication. But this first quote fits perfectly into the interpretation-construction distinction, in which the meaning of words traces back to the historical moment of its adoption, while the effect it is to be given in the present applies to current realities.

Probably the first case where appeals to current social circumstances arguably clashed with the Framers' intent was in *AAA v. Unión Empleados AAA*.[225] There the Supreme Court, after spending several pages going in to the history of the right to strike in Puerto Rico -including the Framers' insistence that this right could only be restricted in the most urgent of circumstances-, declared

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223 Lawrence B. Solum, *The Interpretation-Construction Distinction*, 27 CONST. COMM. 95 (2010).

224 A.D. Miranda, Inc. v. Falcón, 83 DPR 735, 746 (1961) (translation by the author).

225 AAA v. Unión Empleados AAA, 105 DPR 437 (1976).

unconstitutional a statute that *a priori* prohibited any strike in the state-owned water corporation. Yet, in a few sentences, the Court says *enough is enough* and issues an injunction to stop the strike, partially circumventing the Framers. In fact, the opinion reveals the Court's substantive stand on strikes, stating that society is not *unarmed* in the face of a *paralyzing* (that is, effective) strike.[226] By emphasizing the need to understand the right to strike *in its historical perspective*, the Supreme Court looked to the present. Living constitutionalist rhetoric was not far behind: "[t]he Constitutional Convention did not limit itself in Section 18, as it relates to this *dynamic* field, to elevating current law [about the right to strike] to constitutional status, *to mummifying it and to establish its reign for decades, with its ancient objectives and terms.*"[227] Still, the Court stated: "[l]et's examine the debates [on the Convention floor]."[228] You cannot escape the Framers that easily. Actually, the Court was careful and emphasized that its statements about updating and change were not decisive. Instead, it alleged that the Framers' explications were on its side. Moreover, the Court insisted that the right to strike remains as strong as it ever was.

The author of the Court's opinion in *AAA v. Unión Empleados AAA* was Chief Justice Trías Monge, Puerto Rico's eminent living constitutionalist. It was he who emphasized that many constitutional provisions, as a linguistic fact, are concepts that have "partially determinate content," that are also "partially flexible or variable, subject to the general process of change that affects law."[229] According to Trías Monge, "[o]ur obligation is to *obey* the constitutional command, in accordance with the other provisions of our Constitution and *the needs of the country.*"[230] He is the primary source of reference to "the values of a changing society,"[231] or to the Constitution as a "living organism."[232] But he, like the rest of the Court, always looked to the Framers' explications. He updated the text by applying it, not by re-defining it. His holding in *Figueroa Ferrer* that the right to privacy prohibits the Government from forcing married people to stay together even when both spouses want to divorce, reflects his view that constitutions must be *relevant* to current problems.

Justice Negrón García also shared this approach: the Constitution means *at least* what it says, but it can mean so much more, depending on current social needs. His views about what constitutes cruel and unusual punishment are an example of this.[233] Like Trías Monge, he must still pay heed to the Framers.[234]

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226 *Id.*

227 *Id.* at 449 (emphasis added) (translation by the author).

228 *Id.* (translation by the author).

229 Pueblo v. Arcelay Galán, 102 DPR 409, 413 (1974) (translation by the author).

230 Cortés Portalatín v. Hau Colón, 103 DPR 734, 738 (1975) (emphasis added) (translation by the author).

231 ELA v. Hermandad de Empleados, 104 DPR 436, 437 (1975) (translation by the author).

232 Peña Clós v. Cartagena Ortiz, 114 DPR 576, 588 (1983) (translation by the author).

233 *See supra* note 66.

According to Justice Fiol Matta, "[o]ur Constitution is not an exact map. On the contrary, it offers coordinates."[235] The Supreme Court of Puerto Rico has also referred to the Constitution as:

> [A] document that transcends the personal preferences of its authors and it articulates the hopes of future generations. Its breadth is modern, its language clear and simple, open to continued renovation. It is not written in an extinct tongue, hard to define or related to esoteric issues. We are interpreting a Constitution, not the Dead Sea Scrolls.[236]

According to Justice Hernández Denton, "[i]n the modern State, the Constitution is a document which possesses great dynamism and it creates a political structure for present and future generations. Its vitality and durability depend on its capability to define a People's fundamental values across time."[237] Such has been the living constitutionalist rhetoric.

Justice Hernández Denton has probably been the one who has attempted to emulate Trías Monge and Negrón García's approach the most. He constantly emphasized the Constitution's "dynamism" in order to ensure its current "vitality."[238] According to him, when "interpreting the contours of the Constitution of the Commonwealth of Puerto Rico we must guarantee its vitality and relevance to the socioeconomic and political problems of our times."[239] He has been the closest in proposing that the *meaning* of the Constitution is subject to change: "[w]e must also avoid that inflexible interpretations and attachments to antiquated models impede the applicability [of the Constitution] to future events so that in a few years the Constitution, designed to guide the life of a People for several centuries, turns obsolete."[240]

But, notwithstanding florid language to the contrary, the Court has mainly limited its use of living constitutionalist tools to making sure that the Constitution is *constructed* in a way that is relevant to current social needs, which simply

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234 P.R. Tel. Co. v. Martínez, 114 DPR 328 (1983).

235 PIP v. ELA, 186 DPR 1, 79 (2012) (Fiol Matta, J., dissenting) (translation by the author); ELA v. Rivera Rivera, 105 DPR 640, 641-42 (Negrón García, J., dissenting) ("[O]ur Supreme Law possesses enough flexibility and mechanisms to provide a just balance for the problems present and future generations will face." (translation by the author)); Ortiz Angleró v. Barreto Pérez, 110 DPR 84, 107 (1980) (Negrón García, J., concurring) ("[A] constitution, even though it is designed to generate greater stability, as a document created by the human mind, it is not permanent, but flexible and dynamic." (translation by the author)); *Peña Clós*, 114 DPR at 588 ("Precisely because we are dealing with a constitution, this creation that first saw the light of day more than thirty years ago is not an inert, static objet. It is a living organism, whose goal is to serve, like any constitution, the society it governs. It has to change, like a river, without ceasing to be a river. It has to respond to new realties." (translation by the author)).

236 *P.R. Tel. Co.*, 114 DPR at 350 (translation by the author).

237 Nogueras v. Hernández Colón I, 127 DPR 405, 410 (1990) (translation by the author).

238 *Id.* (translation by the author).

239 *Id.* at 411 (translation by the author).

240 *Id.* (translation by the author).

takes us back to the interpretation-construction distinction that strengthens, instead of weakening, originalism.[241] Rhetoric aside, the Framers still carry the day.

i. Separation of Powers Revisited and a Final Example

Liberal democratic models of representative government and the separation of powers have created a limited role for the judiciary. Courts basically serve three functions: adjudicators of specific controversies among parties, statutory interpretation and constitutional adjudication. The separation of powers doctrine is premised, mainly, on the operation of a framework constitutional structure. The courts have limited roles *because the constitutions they interpret, construct and apply are themselves limited.* These constitutions seem to require a passive and limited role for courts. In terms of constitutional controversies, unless the constitution specifically requires judicial intervention, courts should butt out. Passive constitutions require and create passive courts. But what about active constitutions that make up the core of modern constitutionalism? Popular sovereignty and constitutional supremacy are not mutually exclusive concepts, even if the latter is accompanied by judicial enforcement. At some point, concepts normally associated with the separation of powers doctrine such as deference to the elected branches, abstaining from going into issues of policy, political questions, minimalism, and so on, must be either re-evaluated or complemented by new concepts.

The point of originalism is to constrain courts, protecting democracy from rogue courts that substitute democratically adopted policy for their own. But the situation in teleological or ideological constitutions is different: in those circumstances, when courts faithfully apply the *substantive content of the constitution,* they are simultaneously constrained and active: constrained as to picking policy, but active as to putting constitutional policy into practice. We must not forget that one of the goals of teleological constitutionalism is to empower the People to govern themselves, not just through an active political process that results in legislative action, *but through the constitution itself.* When that happens, courts, as the ultimate interpreters of the constitution, become governing bodies. That is not a choice made by power hungry judges; it is a fail-safe desired by the People in case ordinary politics fail. New constitutions need new models for the judicial role. Classic notions of the separation of powers are simply inadequate. The gap between how courts see their own roles and the role assigned to them by ideological constitutions is the final frontier.

The Supreme Court of Puerto Rico has not always shied away from its expanded constitutional role. When it feels backed by text and intent, the Court

241 Emp. Pur. Des., Inc. v. HIE Tel., 150 DPR 924, 956 (2000).

feels free to state that its intervention in cases dealing with substantive policy is not law-making but constitutional adjudication.[242]

But ever since the Court's landmark, *and most unoriginalist*, decision in *ELA v. Aguayo*, it has been quite difficult to shed off the chains of classic separation of powers concepts.[243] *ELA v. Aguayo* is an existential mess. On the one hand, it is a non-textualist, un-originalist and activist decision. On the other hand, its substantive result is passive and restrained. Here, the Court incorporated the classic concepts of justiciability, case or controversy, political questions, and standing, among others. By doing so, it established a very narrow role for courts. Yet, the decision itself was wholly activist: there is absolutely no provision in the Constitution that required this result. On the contrary, it based its decision on classic notions of constitutionalism. Through an activist move, the Court became passive. Puerto Rico's substantive Constitution has been paying the price ever since. Any future Court that has wanted to justify a narrow, deferential, minimalist and passive decision in the face of legislative action has always been able to trace back to *ELA v. Aguayo* and to the principle of the separation of powers,[244] since they can hardly trace back to text. But *ELA v. Aguayo* has not been the end of the story either. The Court can always count on the text and history of the Constitution, as well as its policy implications, to allow it to transcend the shackles of the separation of powers.

One of the interesting results of the tension between classic separation of powers concerns and the Puerto Rico Supreme Court's acknowledgment of its own political power under the Constitution is that the political question doctrine is very different than in the federal system, with more and more questions being susceptible to judicial adjudication.[245] Still, some current justices of the Supreme Court appear to take separation of powers doctrine, particularly its more classic articulations, as a *given* and then work back from that.[246] The end-result is a more passive Court and a less active Constitution. The surprising part is that these views are held by the same Justices that self-proclaim as originalists, when the Framers' intent was, precisely, to adopt an active Constitution. While in the U.S. originalism and classic notions of the separation of powers seem to go hand in hand, that link is neither natural nor inherent; it is content contingent. In Puerto Rico, that content breaks the link: originalism is inherently interventionist.

The promise of Puerto Rican originalism is to expand the reach of the Constitution. The safety provided by Puerto Rican originalism is that it protects an

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242 Figueroa v. Díaz, 75 DPR 163, 176 (1953).

243 ELA v. Aguayo, 80 DPR 552 (1958).

244 Lozada Sánchez v. JCA, 184 DPR 898, 927 (2012) (Fiol Matta, J., dissenting); Córdova v. Cámara Representantes, 171 DPR 789, 799 (2007).

245 Silva v. Hernández Agosto, 118 DPR 45, 54-57 (1986); Santa Aponte v. Srio. del Senado, 105 DPR 750 (1977).

246 *See Lozada Sánchez*, 184 DPR at 927 (Pabón Charneco, J., dissenting); AAR, *ex parte*, 187 DPR 835, 897 (2013) (Martínez Torres, J., concurring) (emphasis added).

irreducible core. Judges have occupied the middle-ground. Courts can opt for the minimalist approach and only rule proactively when the constitutional text and the Framers' explications are on-point. This is a sort of *core-originalism*. But inherent in Puerto Rican originalism is the notion that attention to the core is not enough. The Framers invite or even command courts to always look beyond the core. When courts engage in pro-active adjudication, the issue of legitimacy can be easily dispensed by reference to the text and history of the Constitution. The Court's history is full of this minimalist-maximalist dichotomy.[247]

Finally, I wish to discuss a very particular constitutional issue that neatly captures all the issues discussed previously. I refer to the constitutional prohibition on discrimination on account of birth and its relation with the rights of children born out of wedlock.

One of the burning issues before the adoption of the Constitution in 1952 was the blatant discrimination faced by children born out of wedlock, particularly the rights of children that resulted from adulterous relationships, many of which were functioning family units where the father, because of social and economic pressures, did not or could not divorce his legal spouse. The legal system in Puerto Rico, particularly the Civil Code inspired by Spanish law, still distinguished children between so-called legitimate and natural offspring. Besides the social stigma created by the use of those terms, the legal system treated these children differently. As most relevant here, these differences included not being able to carry their fathers' surnames or not participating in their estates.

Section 1 of the Bill of Rights expressly prohibits discrimination on the basis of birth.[248] The Record of the Constitutional Convention makes absolutely clear that the purpose and goal behind this particular classification was to "eliminate the legal stigma of children born out of wedlock [and give] all children equal status in relation to their parents and the legal system."[249] Shortly after the Constitution was adopted, the Legislature gave equal legal status to children born after 1952. But, what about all those children born before 1952? Well, the text would appear to be clear: no discrimination. But there was a problem. The Report by the Commission on the Bill of Rights stated: "[a]s to estates and properties, the changes required by this provision shall not be retroactive to births that occurred before the [adoption of the Constitution]."[250] That is, the new constitutional provision would only protect children born after 1952. All those born be-

247 Compare examples of minimalism like *COPR v. SPU*, 181 DPR 299 (2011), *Salvá Santiago v. Torres Padró*, 171 DPR 332 (2007), *Pérez, Román v. Proc. Esp. Rel. de Fam.*, 148 DPR 201 (1999), *UPR v. Asoc. Pur. Profs. Universitarios*, 136 DPR 335 (1994), *Asoc. Academias y Col. Cristianos v. ELA*, 135 DPR 150 (1994), *Green Giant Co. v. Tribunal Superior*, 104 DPR 489 (1975), and *UTIER v. JRT*, 99 DPR 512 (1970), with maximalist examples like *Rivera Padilla v. OAT*, 189 DPR 315 (2013), *AMPR v. Srio. Educación*, ELA, 178 DPR 253, 271 (2010), *Rosario v. Toyota*, 166 DPR 1 (2005), *Andino Torres, ex parte*, 151 DPR 794, 807 (2000), and *Mun. de Guaynabo v. Tribunal Superior*, 97 DPR 545 (1969).

248 P.R. CONST. art. II, § 1.

249 Figueroa v. Díaz, 75 DPR 163, 168 (1953) (translation by the author).

250 *Id.* (translation by the author).

fore that date and whose parents died after 1952 were still excluded from their inheritance.

The Framers' explications and intent could not be clearer. As a result, the Supreme Court obliged. For the first couple of years after the adoption of the Constitution, the Court mainly limited itself to giving these children only the right to bear the fathers' surnames. The *only* obstacle to giving these children full equality was the clear text of the Report.[251] As much as the Court wanted to extend equality to these children, the Report simply "left no doubt" as to the prospective nature of the provision.[252]

But the gap between the constitutional promise and the injustice still facing all these children born before 1952 was too much to bear. The Court began to crack. The rebellion started in 1961, nearly a decade after the Constitution proclaimed the inviolable nature of human dignity. To the challengers, the text of the Constitution was absolutely clear "no matter when it was adopted or when the birth took place, or what laws established" before 1952.[253] In his concurring opinion, Santana Becerra added:

> When it comes to the essential equality of people that the constitutional declaration searches for, I cannot conceive of a rule of law that applies that constitutional provision in terms of [discrimination on account of] birth, only to those who were born after its adoption, which implies a reservation as to its effectiveness and validity which neither its text nor its spirit includes and that allows a regime of inequality and indignity to continue for several generations until they extinguish themselves through the natural process of their disappearance.[254]

Finally, the Court followed suit in one of the most celebrated cases in Puerto Rican history, akin to the *Brown* case in the U.S. In *Ocasio v. Díaz,* the Supreme Court held that the constitutional prohibition of discrimination on account of birth protected those children who were born before 1952 but whose parents died after the adoption of the Constitution. Well aware that it was going against the express explications of the Framers, the Court treaded carefully and used every argument at its disposal.

First, it concluded that, as a matter of inheritance law in Puerto Rico, the rights of children with respect to their parents' estates do not accrue at their birth but at the death of their parents. When the children were born was irrelevant. The only appropriate question was when their parents died. Second, the Court emphasized the broad *purpose* and the expansive *principle* behind the constitutional prohibition. Third, the Court went on the textualist offensive: the constitutional text makes no reference to dates which would limit the scope of

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251 Álvarez v. Álvarez, 77 DPR 909 (1955); Sánchez v. Díaz, 78 DPR 811 (1955).

252 Márquez v. Avilés, 79 DPR 988 (1957) (translation by the author).

253 Berdecía v. Tyrell, 82 DPR 698, 716-17 (1961) (Santana Becerra, J., concurring) (translation by the author).

254 *Id.* at 717 (translation by the author).

its protection to only births that occurred after them. If the Framers wanted the prohibition to apply only to births that took place after 1952, they should have written that *into the Constitution*. Finally, the Court confronted the explicit statement included in the Report. Then it really went to work. It concluded that the Report *was actually wrong. They could not have meant births that took place before 1952*. Because of the previously mentioned particularity of Puerto Rican estate law, the correct term *had to be* deaths instead of births. That is, that Section 1 would not apply to situations where the parent died *before* the adoption of the Constitution, where, presumably, the estate had already been divided up. The Court felt it was better to re-write the Report than to ignore it. But in the end, the Court made itself clear. Even if the Report meant births instead of deaths, "[t]he delegates did *not* follow the recommendations of the Report when they adopted the Constitution. They did not include in it any reference that a child born before the 25th of July of 1952 could not inherit or be treated equally for purposes of the estate."[255]

Ocasio v. Díaz is probably the only case in Puerto Rican history where the Court reached a result that contradicted the express statements of the Framers. Without a doubt, this case stands out because of the substantive justice it granted. The Constitution must mean what it says. The promise of equality, respect, and dignity cannot be accompanied by an asterisk.

VI. FINAL THOUGHTS

The Constitution of Puerto Rico is not a revolutionary document. It represents the high-water mark of liberal democratic constitutionalism and its natural fusion with social-democratic thought. Its protection of important socio-economic rights and the clarity of many of its policy provisions signal the start of a new trend in modern constitutionalism. The creation of the Constitution was a social process; a self-constituted People that decided to articulate their blueprint for society not just *through* the Constitution but *in* the Constitution. Although Puerto Rico, because of the enduring nature of its colonial relation with the U.S., still has a long way to go in the road of self-determination, the Constitution represents a crucial step in that direction. The People did not trust Congress, courts, legislatures or national elites: they trusted themselves. Because of the radically democratic nature of the constitution-making process, the People had the opportunity to protect themselves from potential failures in the ordinary political process. And so they did, through the adoption of clear text, authoritative explications by those charged with drafting it, and by including a whole array of matters ranging from the organization of Government and the recognition of political rights, to socio-economic policy matters. It is a Constitution that still has a

255 Ocasio v. Díaz, 88 DPR 676, 735 (1963) (emphasis added) (translation by the author). The Court was not unanimous. The dissent emphasized that when the Court basically re-wrote the Report, they were admitting its authoritative nature. *Id.* at 784 (Pérez Pimentel, J., concurring in part and dissenting in part).

lot of potential. All that is needed are courts willing to give it life. Maybe a method of original explication is the way to go. So far, it has served us well. Maybe Puerto Rico has something to teach us all.