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# CARLOS S. NINO AND HOW TO CONSTRUCT OUR CONSTITUTIONS: REVISITING A METHODOLOGICAL CHALLENGE OF NEW ORIGINALISM

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Abstract: *New Originalism stresses the original public meaning, not the semantic intentions of the framers. This requires a reformulation of the two main activities of every constitutional practice. First, interpretation implies discovering the original public meaning, i.e., what the ordinary users of language intended to mean through constitutional provisions. Second, constitutional construction is a subsequent stage of interpretation, as it involves giving effect or implementing those provisions, mainly if they are vague or ambiguous. In this article, I contribute to that ongoing debate by resorting to one of the most well-known law philosophers from Latin America: Carlos S: Nino. I shall claim that his scholarship may pose an actual and significant contribution to one of the toughest challenges of New Originalism: how to construct our constitutions. Although I will not label Nino as an originalist, he elaborates three requirements that could be very useful for constructing constitutional provisions: (i) to secure democratic processes; (ii) to respect individual rights, and (iii) the preservation of continuous legal practice.*

Keywords: *American constitutionalism, Carlos S. Nino, constitutional interpretation, Latin America constitutionalism.*

Resumen: *El nuevo originalísimo pone el acento en el significado público original, no en las intenciones semánticas de los constituyentes. Esto implica una reformulación de dos de las principales actividades que conlleva toda práctica constitucional. En primer lugar, la interpretación supone el descubrimiento del significado público original; esto es, lo que la generalidad de usuarios del lenguaje designaba mediante una disposición constitucional. En segundo término, la construcción constitucional es una etapa posterior a la interpretación, la cual implica hacer efectivas o implementar tales disposiciones jurídicas, particularmente si estas resultan ambiguas o vagas. En este artículo contribuiré a esta*

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*discusión mediante los aportes de uno de los filósofos del derecho más reconocidos de América Latina: Carlos S. Nino. Sostendré que su trabajo académico podría implicar una colaboración significativa a uno de los retos más duros del Nuevo Originalísimo: cómo construir nuestras constituciones. Si bien no caracterizaré a Nino como un originalista, este autor propone tres requisitos que podrían ser útiles para construir disposiciones constitucionales: (i) asegurar el procedimiento democrático; (i) respetar los derechos individuales; (iii) preservar una práctica jurídica de tipo intergeneracional.*

Palabras clave: *constitucionalismo estadounidense, Carlos S. Nino, interpretación constitucional, constitucionalismo iberoamericano.*

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## I. Introduction: Complementing how to Construct the Original Public Meaning with a Non-Originalist Contribution

New Originalism stresses original public meaning, not subjective intentions of the framers. That poses a reformulation of the very concept of constitutional interpretation.[1] According to that theoretical framework, interpretation is discovering the original meaning of a particular clause; that is, what the ordinary users of language intended to mean through a particular constitutional provision.[2] A constitutional construction is a subsequent stage of interpretation and involves giving effect or implementing those provisions.[3] Although that former step requires some methodological specifications, the current trends on

[1] Randy E. Barnett, *An Originalism for Nonoriginalists*, 45 Loyola Law Rev. 611–654 (1999).

[2] Randy E. Barnett, *Interpretation and Construction*, 34 Harv. J. Law Public Policy 65–72 (2011).

[3] *Id.*, at 67.

originalism do not often tackle them. To put it differently, the how-to problem when constructing our constitutions is one of the toughest challenges for the New Originalism.[4]

In this article, I contribute to that ongoing debate by resorting to one of the best well-known legal philosophers from Latin America: Carlos S. Nino. I claim that his scholarly work can pose an actual and significant contribution to a pressing challenge of new originalism: how should we construct our constitutions? Nino's theoretical contributions to that topic are an original and creative blend of Anglo-Saxon analytical philosophy and Habermas' discursive theory.[5] That blend represents one of the most interesting attempts to connect the continental and the analytical tradition within the Latin American practical philosophy. Thus, Nino's scholarship could work as a bridge between an American discussion on constitutional adjudication and the Latin-American legal tradition, especially for legal systems that had incorporated a judicial review following most of the main features of American constitutionalism like Argentina, for instance.

Although I do not label Nino as an originalist, nor do I aim at contrasting his overall work with the New Originalism, I will claim that he proposes three requirements for constitutional adjudication that could be very useful for constructing constitutional provisions: (a) to secure democratic processes; (b) respect for individual rights, and (c) the preservation of continuous legal practice.

To unfold my claim: (i) I will briefly describe Nino's theory on constitutional adjudication. (ii) Then, I will offer some criticisms to Nino's approach to originalism, as the former is not necessarily committed to a deference to subjective intentions of the framers. Indeed, Nino could not possibly anticipate the emergence and significance of new originalism. (iii) However, Nino's work on legal adjudication might enhance the constitutional construction as elaborated by the Original Public Meaning Originalism movement. Although I do not intend to associate Nino with any originalism, I aim at complementing the way to construct our constitutions —according to new originalism—, with Nino's theoretical contributions.

## II. Nino's Case for Constitutional Adjudication: Methodological Steps

Constitutional adjudication is part of the two-stage argumentative structure that explains how the constitution is an enduring social practice. Nino rejects that constitutional text entails a practical difference when interpreting

[4] John Danaher, *The Normativity of Linguistic Originalism: A Speech Act Analysis*, 34 Law Philos. an Int. J. Jurisprud. Leg. Philos. 397-431 (2015).

[5] *See*, for instance, Carlos Santiago Nino, *Constructivismo epistemológico: entre Rawls y Habermas*, 5 Doxa. Cuad. Filos. del Derecho 87-105 (1988).

the constitution, as he asserts that not only the constitutional text constrains our practical-legal reasoning. In fact, the conventional nature of the constitution is what mainly constrains our reasoning.[6] But what did Nino mean by that? The enduring social practice called "constitution" is a convention in a highly technical and philosophical sense. Conventions are instruments to solve coordination problems; that is, intersubjective situations in which agents' intentions might be frustrated.

Besides, the constitution is a convention from the internal point of view of justificatory reasoning. In fact, "decisions of political agents are not isolated individual actions, but that their efficacy derives from a system of intertwined actions, attitudes and expectations".[7] Indeed, when a judge delivers her judgment, she contributes to a social practice that is constantly dynamic and operative. Judges work as a link within the network of conducts and attitudes comprising those legal practices considered as a whole.[8]

Thus, Nino compared a constitution with building a cathedral. Both necessitate a commitment across several generations to conclude the masterpiece. The architect who designed a cathedral knew he would never see it concluded. Once the architect passed away, the community usually preferred to end that building —if necessary, fleshing out some details—, instead of restarting all over again. Something quite alike happens with a constitution. The framers expected their constitutional project to be completed by the following generations. Each generation may fine-tune details to adapt constitutional provisions to the needs of every particular time.[9] We hardly ever consider restarting from zero unless our constitutional order is falling to pieces.

But which features of that convention referred to as "constitution" may solve coordination problems? One of the main factors for achieving that goal is that we generally follow the constitutional text. However, that would be merely accidental or contingent. For example, UK constitutionalism has been applying basic rights without resorting to a Bill of Rights incorporated in a formal constitution.[10] In any case, Nino maintains that a fact is insufficient for providing "reasons for action". In contrast, what we need is a constitutional practice that produces effective decisions delivered by Congress or judges, and mostly, ordinary citizens. This practice is the most relevant feature, as social expectations lie on two grounds: (i) the general belief that most people

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[6] Carlos Santiago Nino, The Constitution of Deliberative Democracy 25 (2007).

[7] *Id.,* at 218.

[8] *Id.,* at 218.

[9] Carlos Santiago Nino, La Constitución como Convención, 6 Rev. del Cent. Estud. Const. 189–217 (1990).

[10] This issue became far more complex since the UK passed the Human Rights Act in 1998, and then adopted the European Convention of Human Rights. For a survey on this topic, see Richard Bellamy, *Political Constitutionalism and the Human Rights Act*, 9 Int. J. Const. Law 86–11 (2011).

will act in a certain way, and (ii) our consecutive willingness to keep on doing that if others keep on behaving that same way.

Nino holds that the conventional process entails a sequence of linguistic acts, texts and, lastly, practices. The normative propositions function as the link of that sequence. The very starting point is a linguistic prescriptive act uttered to work as an exclusive reason for action. That prescription comes from a particular political body or fulfills a procedure for decision-making.[11] Nino acknowledges that we might achieve the former through the oral form. Even though it is not conceptually necessary, prescriptive acts usually adopt a written form, since they are intended to endure over time, and they try to avoid misunderstandings.[12]

After the prescriptive linguistic act is informed in an oral or written form, if successful, then regular or frequent behaviours emerge, which result in constitutional practices or conventions.[13] However, those "regular behaviours" are not fixed once and for all. Nino claims that there is a wide range of possibilities to contend with new or alternative solutions. Those changes partially fit in the previous constitutional solutions, but they may also introduce new elements. The constitutional practice sometimes applies those changes in a disruptive manner, and sometimes this is done in a subtle and almost imperceptible way.

In Nino's theoretical framework, the methodological topics on how to apply constitutional provisions are only an instance of the former conventional process. Indeed, he does offer a quite precise "to-do list" when applying provisions to specific cases. That is quite remarkable, as most theoretical elaborations on constitutional adjudication do not offer such methodological guidelines.

The first step is (i) *defining significant legal material*. Nino holds that this stage is evaluative, since it aims at providing legitimacy to constitutional decisions. Then, for example, we may need to resort to some principles which may ground legitimacy for treating some legal material as authoritative. Thus, it would be possible to try some substantive solutions lying on its moral plausibility. And those solutions can be recognized by following the legal practice through some institutional acts or decisions.[14]

A second step is (ii) the *discovery of relevant legal material.* This step relies on the previous one and does not require evaluative activities but rather empirical inquiries. Indeed, once we accept some evaluative principles for selecting relevant legal materials, then we are up to discover those. That might entail a difficult pursuit and, sometimes, a simple inquiry. Every practitioner knows

[11] Carlos Santiago Nino, Fundamentos de derecho constitucional: análisis filosóficos, jurídicos y politológicos de la práctica constitucional 78 (1992).

[12] *Id.,* at 79.

[13] *Id.,* at 79.

[14] *Id.,* at 81.

that sometimes she may have a hard time collecting some judicial decision or administrative order.[15]

A third step is (iii) *to attribute a sense to those relevant materials*. Applying a legal provision to an actual case must deal with many facts —*e. g*, legal texts, speech acts—, that are not sufficient to justify an action or practical decision. Thus, we need to move from those raw facts to normative propositions. Therefore, we require more than normative principles to legitimate that operation. We must attribute meaning to those acts. But how shall we perform that activity? According to Nino, we have two possibilities.

(a) *Subjective criterion*: in this case, we are to consider which intentions of speech acts are relevant to the law of the case. Those speech acts could be performed by a precise author of a specific legal provision or refer to a broader speech community through customary practices of a specialized group. Then, we have a second possibility: (b) *objective criterion.* In this case, we shall examine the ordinary and everyday use of language. Nino holds that the meaning of expressions does not depend on the fit in their semantic intentions. To put it differently, according to the objective criterion, common use of language might overlap with —but it is not necessarily tailored to— the speaker's semantic intention.[16]

Nino claimed that some of the most pressing debates on constitutional adjudication, such as originalism vs. living constitution, are merely a dispute on selecting one of those criteria.[17] However, that statement is, at least, outdated. As we shall examine in further sections of this article, originalism thrived, and then it became not just a central theory on constitutional adjudication but a family of theories.[18]Unfortunately, Nino died (1993) before the boost of sophisticated theoretical discussions within originalist tradition (since 1999, approximately).

Although some originalist theories match a subjective criterion —original intent originalism—, the dominant starting point of originalist adjudication in America is beyond mere semantic intentions.[19] The prevailing originalist theory has shifted from original intent to original public meaning, which en-

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[15] *Id.,* at 82.

[16] *Id.,* at 82.

[17] *Id.,* at 83.

[18] Lawrence B. Solum, *What is Originalism? The Evolution of Contemporary Originalist Theory*, in The Challenge of Originalism: Theories of Constitutional Interpretation 12–41 (Bradley Wayne Huscroft, Grant; Miller ed., 2011), at 15.

[19] *Id.* at 12. Barnett, *supra* note 3, at 613. Defenders of living constitutionalism and originalism assume originalism as the dominant theory of constitutional interpretation in the United States of America. Lawrence B. Solum, *We Are All Now Originalist*, in Constitutional Originalism: A Debate 1–77 (2011). For a critical review about current trends on originalism, see James E. Fleming, *Are We All Originalists Now? I Hope Not!*, 91 Tex. Law Rev. 1785–1813 (2013). For a monographic study regarding the current trends on originalism, see Luciano D. Laise, *El poder de los conceptos: convenciones semánticas y objetividad referencial en la interpretación constitucional originalista* (2017).

tails an objective criterion. In that case, the meaning of constitutional provisions refers to what a speech community fixes as the semantic content of a particular norm.

A fourth step is (iv) *discovery of the sense of relevant materials.* That is another mainly empirical step. Once we decide to interpret a legal provision through a subjective or objective criterion, we have a further methodological challenge: to discover the content of that objective or subjective criterion. Indeed, how should we proceed when identifying the original intent of the framers? How should we recognize the current or original public meaning of a particular constitutional provision? Nino acknowledges that those questions are not straightforward. Many constitutional theories of constitutional interpretation do not elaborate a precise set of instructions or guidelines.[20] Consequently, most constitutional theories have left behind the *how-to-do* questions.

Nino noticed that the how-to-do question is not an empirical task. There are, of course, some empirical challenges, especially when dealing with enduring constitutional provisions. Thus, we may become aware of the difficulties of tracing historical records. For example, it is not trouble-free to know what the Argentine amendment (1994) intended to mean by some of its most relevant provisions. More specifically, that amendment introduced Section 75.22 of the Argentine Constitution. According to that provision, some international treaties of human rights —*e.g.* The American Declaration of the Rights and Duties of Man, the American Convention on Human Rights, the Convention on the Rights of the Child, among others— have constitutional hierarchy "in the full force of their provisions".[21] But what the framers did intend to mean by that? How shall we discover the meaning of "in the full force of their provisions?".

One of the framers of that amendment, Rodolfo Barra, stated that "in the full force of their provisions" referred to the conditions assumed by Argentina when it ratified international treaties on human rights.[22] That would have included reservations and interpretative statements made by Argentina when it adopted those international treaties. But what if the Inter-American Court of Human Rights does not pay attention to those reservations? Is Argentina entitled to disobey Inter-American rulings that ignore those reservations and interpretive statements? Would Argentina be responsible for violating a human right if it disobeys that sort of rulings?

Those questions cannot be answered only through empirical inquiries. Those issues pose many empirical challenges intertwined with evaluative cri-

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[20] Aileen Kavanagh, *Original Intention, Enacted Text, and Constitutional Interpretation*, 47 Am. J. Jurisprud. 255–298 (2002).

[21] The translation of the Argentine Constitution was extracted from the official site of the National Ministry of Justice and Human Rights: *http://www.biblioteca.jus.gov.ar/Argentina-Constitution.pdf*.

[22] Rodolfo Carlos Barra, *Convención Nacional Constituyente*. 34a. Reunión – 3a. Sesión Ordinaria (Continuación) (Senado de la Nación, 1994).

teria. To revisit my previous example: how to define the precise extent of the semantic intentions of the Argentine framers? Should we examine only what they intended to mean? Should we infer and then instantiate the purpose of those semantic intentions? As Nino did without putting in Dworkin's words, how should we determine the level of abstraction of those semantic intentions?[23] That involves discovering those intentions through empirical activities, but also performing robust evaluations of the law. As Finnis[24] suggested: legal descriptions are necessarily compromised with a normative point of view.[25]

The fifth step involves *logical implications of those relevant materials discovered in the previous stage*. This logical operation necessitates adequate rules for inferences —*i. e.*, *modus ponens* and *modus tollens*—. Nino does not explicitly elaborate on those rules. So, what do they mean? In a few words, *modus ponens* is one of the primary sorts of legal reasoning. It means that if the rule conditions are satisfied, the rule-conclusion follows from the rule and the concrete description of the facts. Lawyers usually hold that the facts of a case are to be subsumed under a rule, which is why many describe it as the "subsumption model".[26]

*Modus tollens,* or better*: modus tollendo tollens,* applies to reasoning on conditional utterances. But, in this case, when you deny (*tollendo*) the consequence, you would necessarily deny the antecedent's conditional. For example, "Premise 1: if X is drafting her doctoral dissertation, then X is a graduate student". "Premise 2: X is not a graduate student". Conclusion: "Then, X is not drafting her doctoral dissertation".[27]

Nino maintains that such logical implications are sometimes so deeply rooted in our practical reasoning, that we are often unaware of that.[28] Nevertheless, whether we are aware of that or not, we always perform legal reasonings that lie on logical rules. In contrast, we often realize that as soon as we face some of the most challenging logical problems on legal interpretation, such as legal gaps, contradictions, and redundancies.

The sixth step is *overcoming those semantic indeterminacies.* Nino holds that it is impossible to overcome semantic or syntactic indeterminacies without compromising some evaluative point of view.[29] Moreover, avoiding evaluative

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[23] Ronald Dworkin, *The Forum of Principle*, 56 New York Univ. Law Rev. 469–518 (1981).

[24] John Finnis and Tony Honoré were Nino's doctoral supervisors at Oxford University. Santiago Legarre, *John Finnis, el profesor*, 3 Rev. Jurídica Digit. UANDES 164–175 (2019). Roberto Gargarella, *Cuatro temas y cuatro continuaciones posibles para la teoría penal de Carlos Nino*, 6 Quaestio Iuris 98–118 (2013).

[25] John Finnis, Natural Law and Natural Rights 16 (2nd ed. 2011).

[26] Jaap Hage, Studies in Legal Logic 88 (2005). Robert Alexy, *On Balancing and Subsumption. A Structural Comparison*, 16 Ratio Juris 433–449 (2003), *https://doi.org/10.1046/j.0952-1917.2003.00244.x*.

[27] Hage, *supra* note 26, at 88.

[28] Nino, *supra* note 12, at 83.

[29] *Id.* at 84.

principles is a futile effort. According to Nino, it is out of the question to solve a legal gap or contradiction without those evaluative principles. In other words, it is not just desirable but a conceptual necessity to resort to evaluative principles whenever we are surmounting legal indeterminacies, gaps, contradictions, or redundancies.[30]

Finally, the last stage entails subsuming the particular and actual case under a legal provision. This step is the complete synthesis of all previous stages. The most pressing challenge is to identify if the case has any relevant feature for the particular legal system in which that provision is to be applied. For instance, some authors hold that the right to life may permit abortions after rape in Argentina since Article 4.1 of the American Convention on Human Rights only protects that right "in general, from the moment of conception".[31] Other jurists reject that claim as the Argentine legal system made an explicit reservation when ratifying the Convention on the Rights of the Child.[32] That reservation states that *every* child is a human being from conception.

Hence, following that former reasoning, the current Argentine legal system should not allow abortion because every unborn child is entitled to a right to life, regardless of how she was conceived, whether by an act of rape or a consented decision.[33] According to Nino's framework, the Argentine discussion on the right of abortion after rape is a dispute on whether the lack of consent of women is or not a relevant feature for that legal system. However, that feature might be extremely relevant in other legal systems.

## III. Originalism Revisited: Objective Criterion does not Necessarily Involve an Evolving Interpretation

The theory of constitutional adjudication has evolved since Nino passed away (1993). Nowadays, originalism explicitly and systemically has become a "family of theories" and not only a theory regarding authority, regulations, and intelligibility of original intentions.[34] But what Nino was unable to suggest was the possibility of a kind of originalism that referred not to subjective in-

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[30] In a similar regard, *see* Luigi Lombardi Vallauri, Corso di filosofia del diritto (1981).

[31] María Angélica Morán Faúndes & José Manuel Peñas Defago, *La vida como política: la iglesia católica y las concepciones científicas y legales contrarias a la legalización del aborto*, in La reproducción en cuestión: investigaciones y argumentos jurídicos sobre aborto 53–66 (Agustina Bergallo, Paola; Ramón Michel ed., 2018).

[32] Carlos I. Massini Correas, *Los Derechos Humanos y la Constitución Argentina reformada. Consideraciones en ocasión de un aniversario*, 58 Pers. Derecho 71–103 (2008).

[33] Manuel García-Mansilla, *Las arbitrariedades del caso "F, A.L." omisiones, debilidades y (ho)(e)rrores del "Roe v. Wade" argentino*, XXXIX An. Acad. Nac. Ciencias Morales y Política 347-385. (2013).

[34] Solum, *supra* note 19, at 12.

tentions but to what we currently name as "original public meaning".[35] And what do I mean by "original public meaning?" For Barnett, Solum, Whittington and Scalia, the meaning of constitutional texts refers to the public meaning of those provisions when adopted. We may recap the former in the following question: what did "X" mean —"X" = a particular constitutional provision— for the speech community that adopted a specific provision? Most originalist authors describe that community as including drafters or framers and a broader community of speakers.

To put an example, Barnett resorts to magazines, newspapers, judicial decisions, debates within ratifying state conventions, journal articles, the federalist papers, and any historical record that could be useful to discover what "commerce" meant for the community that adopted the clause commerce in the US Constitution.[36] As Scalia claimed in *Heller* (2008) —probably the finest judicial example of originalism in American constitutional history—: "In interpreting this text, we are guided by the principle that «[t]he Constitution was written to be understood by the voters; its words and phrases were used in their normal and ordinary as distinguished from technical meaning».".[37]

Thus, once originalism has left behind —at least for its central tenets— the focus on original intentions, we need to reframe the concept of originalist interpretation. There is no longer a conceptual equivalence between originalism and the subjective criterion when attributing a sense to relevant legal materials, as once Nino maintained. Subjective criterion does not necessarily refer to past practices, and objective criterion does not exhaust our current practices. Indeed, there is a possible blend of past and objective criteria. We could summarize that blend in two central claims of the current originalism: 1) *fixation thesis*: the idea that the semantic meaning of a constitutional text is fixed at the moment of its enactment; 2) *contribution thesis:* the claim that the original meaning of the constitution should make a substantial contribution to the content of constitutional doctrine.[38]

To sum up, Nino's theory of constitutional interpretation turned out to be outdated for describing recent trends of originalism. However, another central claim of new originalism that Nino's work could illuminate is the distinction between interpretation and construction. More specifically, I suggest that Nino's theoretical framework offers a significant contribution to how to construct our constitution. The following section unfolds this claim.

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[35] Randy E. Barnett, Restoring the Lost Constitution: The Presumption of Liberty (2nd Edition ed. 2014); Solum, *supra* note 20; Keith E. Whittington, Constitutional Interpretation: Textual Meaning, Original intent and Judicial Review (1999). Antonin Scalia, *Originalism: The Lesser Evil*, 57 Univ. Cincinnati Law Rev. 849–865 (1989).

[36] Randy E. Barnett, *The Original Meaning of the Commerce Clause*, 68 Univ. Chicago Law Rev. 101–147 (2001); Randy E. Barnett, *New Evidence of the Original Meaning of the Commerce Clause*, 55 Ark. Law Rev. 847–900 (2002).

[37] 54 U.S. 570 (2008).

[38] Solum, *supra* note 19, at 33-35.

## IV. Interpretation vs. Construction Distinction Revisited: Nino's Contributions to how to Construct our Constitutions

As I mentioned before, new originalism stresses the interpretation and construction distinction. Barnett, Solum and Whittington describe constitutional practices as a process with two moments or stages: interpretation and construction.[39] This distinction is only conceptual as both activities are necessarily bound and intertwined in the practice of constitutional law.[40] The distinction aims at enlightening *how to* adjudicate constitutional cases through originalism. As Solum asserted, "without the interpretation construction distinction, our thinking about the law will necessarily be confused".[41]

Interpretation is an empirical activity that aims at discovering the original public meaning of constitutional provisions. Thus, interpretation is nothing more than an activity for illuminating the content of a "matter of fact".[42] Or, to put it differently, interpretation is an empirical activity that entails discovering a fact: knowing what a particular community attributes as the semantic content of a constitutional provision.

Construction is the second moment of constitutional practice. It is an activity that gives effects to texts, either translating the linguistic meaning into legal doctrine or applying or implementing the text.[43] A constitutional construction is an overall normative task. Indeed, constructing a constitutional provision entails a previous interpretation, and, after that, we resort to some normative assumptions to implement that interpreted semantic content.[44] There are many ongoing discussions, within originalism, on how to construct constitutional provisions. Even though there is a quite unanimous consent on interpreting, there is a persistent debate on constructing the constitution, probably, because construction lies on normative and evaluative considerations on what the constitution should be.[45] Or, in other words, construction is "thickly normative".

But how Nino's work could make a significant contribution to those discussions on how to construct a constitution? I hold that his conception of consti-

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[39] Lawrence B. Solum, *The Interpretation-Construction Distinction*, 27 Const. Comment. 95–118 (2010). Barnett, *supra* note 4, at 65 and ss. Keith E. Whittington, *Originalism: A Critical Introduction*, 82 Fordham Law Rev. 375–409 (2013). Lawrence B. Solum & Cass R. Sunstein, *Chevron as Construction*, 105 Cornell Law Rev. 1465–1488 (2019). Keith E. Whittington, *Originalism, Constitutional Construction, and the Problem of Faithless Electors*, 59 Ariz. Law Rev. 903–946 (2017).

[40] Whittington, *supra* note 34, at 5. Solum, *supra* note 37, at 116.

[41] Solum, *supra* note 37, at 116.

[42] Randy E. Barnett, *The Gravitational Force of the New Originalism*, 82 Fordham Law Rev. 411–432 (2013), at 415.

[43] Solum, *supra* note 37, at 103.

[44] Lawrence B. Solum, *Communicative Content and Legal Content*, 89 Notre Dame Law Rev. 479–520 (2013).

[45] Solum, *supra* note 37, at 104.

tutional adjudication as an activity that intertwines empirical and normative/evaluative considerations would be productive to construct our constitution.[46] Although Nino could not engage in current debates on originalism, we may enhance constitutional construction with his constitutional theory. Nino's most remarkable theoretical efforts on this topic consists of a balanced conception of those two elements: empirical and normative activities when interpreting a legal provision.

Nino was quite clear in separating two activities: on the one hand, empirical activities regarding discovering the sense of a constitutional provision and, on the other one, normative considerations about whether we should apply or not that legal provision. However, Nino's normative approach becomes more interesting for constitutional construction. We could resort to his work for holding this claim: to implement or give effect constitutional provisions needs harmonizing democratic process, respect for individual rights, and preservation of continuous legal practice.[47]

Let's explain that by applying Nino's theoretical framework to an actual case. The Argentine constitutional text did not include the supremacy of judicial review, just like the American Constitution. The US Constitution —Article III— reads: "The judicial Power of the United States shall be vested in one Supreme Court, and in such Courts as Congress may from time to time ordain and establish".

And Section 108 of Argentina's Constitution asserts: "The Judicial Power of the Nation shall be vested in a Supreme Court and such lower courts as Congress may constitute in the territory of the Nation".

Barnett holds that the judicial review derives from interpreting *strictu sensu* the Article III, and indeed, the very institution of the judicial power entailed the power to nullify unconstitutional legislation.[48] However, the supremacy of judicial review is a constitutional construction. That supremacy could serve as a paradigmatic example of how to construct a constitutional provision because that doctrine intends to give effect to the judicial review, but not by any means. According to Nino, we should instantiate the supremacy of the judicial review through (i) a democratic process, (ii) respect for individual rights and the (iii) preservation of continuous legal practice.

(i) Although the judicial or constitutional review is one of the most persistent theoretical debates on constitutional theory, the supremacy of judicial review can respect democratic processes. In general, judicial review —but mainly

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[46] Barnett acknowledges that interpretation and construction distinction was first elaborated by contract law. Barnett, *supra* note 4, at 67. Solum, *supra* note 46. Gregory Klass, *Contracts, Constitutions, and Getting the Interpretation-Construction Distinction Right*, 18 Georg. J. Law Public Policy 13–48 (2020).

[47] Carlos Santiago Nino, *A Philosophical Reconstruction of Judicial Review*, 14 Cardozo Law Rev. 799–846 (1993).

[48] Randy E. Barnett, *The Original Meaning of the Judicial Power*, 12 Supreme Court Econ. Rev. 115–138 (2004).

when exercised by the Argentine Supreme Court of Justice— is conceived as an inescapable, necessary, and extreme remedy for securing constitutional supremacy. We should not apply that for an ordinary controversy on whether a legal provision is the best instantiation of a particular constitutional norm.[49] Thus, to judge a legal or administrative norm as unconstitutional should be a last resort to secure constitutional supremacy. To put it differently, it must be downright or indispensable to withdraw some lower law as unconstitutional.

(ii) Does judicial supremacy respect individual rights? Yes. That is one of its primary purposes. Judicial supremacy entails judicial review as a formidable instrument for securing individual rights. Argentinean case law has introduced that doctrine to secure a consistent separation of powers in one of the first judgments delivered by Argentina's Supreme Court of Justice.[50] Nevertheless, the first time Argentina's Supreme Court of Justice declared a federal act as unconstitutional it aimed at entrenching the right to property from arbitrary use of public power —"Municipalidad de la Capital c/Elortondo" (1888)—. In that judgment, an expropriation was declared unconstitutional. Specifically, the Court protected the right of property because a part of expropriated assets was not directed to a specific public utility, as Section 17 of Argentina's Constitution prescribes.[51]

(iii) And what about the preservation of a continuous legal practice? Here we shall recall the cathedral's analogy. Consolidating a constitutional practice does not require to start all over again, but to continue an incomplete and imperfect human creation, just like concluding a cathedral involves a challenging effort across several generations.[52] Nino's contributions suggest that constitutional changes through constitutional constructions should not be disruptive or revolutionary. To sum up, Nino seems to be quite Burkean in this specific issue.

Thus, if the constitution would require some adjustments, those should be progressive, and they should preserve, as best possible, our persistent legal tradition. Even though judicial decisions seem to be disruptive in some particular circumstances, we should not try to hinder our legal tradition. That looks quite similar to Dworkin's "chain novel", as Nino explicitly acknowledges.[53] Collective and significant efforts across several generations —to consolidate a constitutional system or build a cathedral— are usually achieved by these kinds of means.

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[49] C. S. J. N. (Argentina). "Joaquín M. Cullen, por el Gobierno Provisorio de Santa Fé c/ Doctor Baldomero Llerena s/ inconstitucionalidad de la ley nacional de intervención en la Provincia de Santa Fé y nulidad", *Fallos* 53:420 (1893).

[50] C. S. J. N. (Argentina). "Ramón Ríos, Francisco Gómez y Saturnino Ríos, por salteamiento, robo y homicidio perpetrados a bordo del pailebot nacional "Unión" en el río Paraná", *Fallos* 1:32 (1863).

[51] C. S. J. N. (Argentina), "Municipalidad de la Capital c/ Isabel A. Elortondo s/ Expropiación; por inconstitucionalidad de la ley de 31 de octubre de 1884", *Fallos:* 33:162 (1888).

[52] Nino, *supra* note 13.

[53] *Id.* at 67.

However, Nino stresses the possibility that we might realize that our community does not want to continue with a previous project. And what shall we do in that case? Nino holds that sometimes we can adjust our original master plan. But what if those adjustments entail a significantly different style? Sometimes those changes are only possible by several substantive modifications to the master plan, and sometimes we may need to reformulate the whole plan. In both cases, the architect must always be aware of the need for a new design. Conversely, he must acknowledge if amendments could introduce the necessary changes to the original master plan or design.

For example, many discussions on constitutional theory regarding constitutional review of constitutional amendments are instantiations of the following problem: what shall we do to preserve a constant constitutional practice? How to acknowledge if we are before a constitutional amendment that we undertook by the procedures established in the constitution? Or what should we do if we were before a whole new constitution, but formally elaborated as a "constitutional amendment?" Colombian Constitutional Court has several judgments on this topic.[54]

I do not intend to deliver a final answer to those issues, but Nino's theory might illuminate that kind of debate. Thus, I shall offer some tentative answers to the former topic to clarify my claim: we should interpret those three requirements as balanced or harmonized as possible. For instance, the constitutional review of constitutional amendments must preserve constitutional practice and the democratic process from head to toe; that is, we shall respect the formal democratic procedures and secure the outcome of those procedures. At the same time, we shall protect individual rights, specifically, the right to participate in a constitutional assembly to discuss our polities' most relevant issues. Briefly, a particular solution for a constitutional review of constitutional amendments would have to reply or tackle the former questions.

## V. Conclusions: Three Requirements for Constructing our Constitutions

Nino's contribution to constitutional adjudication theory intends to balance the concept of constitutionalism and democracy. That might shed some light on the new originalism debate. His scholarship is not relevant or significant for constitutional interpretation, but it is for constitutional construction. Indeed, Nino may illuminate how to implement or give effect to interpretive practices. More specifically, Nino poses three requirements that could enhance how we construct our constitutions: (i) to secure democratic processes,

[54] Santiago García-Jaramillo & Francisco Gnecco-Estrada, *La teoría de la sustitución: de la protección de la supremacía e integridad de la constitución, a la aniquilación de la titularidad del poder de reforma constitucional en el órgano legislativo*, 133 Vniversitas 59–103 (2016).

(ii) to guarantee respect for individual rights, and (iii) to preserve a continuous legal practice.

Nevertheless, the most relevant suggestion on Nino's work is to highlight the central significance of harmonizing those three requirements. None is the most important of all. They are all equally relevant for securing the constitutional order. For instance, democracy necessitates entrenching individual rights in a context where we preserve a continuous legal practice. And changes must not undermine that ongoing practice. To guarantee a constitutional practice should entrench the constitution's persistence, and, by that means, we shall set some limits to the exercise of public power.

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