Special Issue: *Constitutional Reasoning*

Clarifying, Creating, and Changing Meaning in Constitutional Interpretation: A Comment on András Jakab, "Constitutional Reasoning in Constitutional Courts—A European Perspective."

*By Jeffrey Goldsworthy**

A. Introduction

As a constitutional lawyer, I am always interested to learn more about how constitutions are interpreted in other legal cultures that sometimes use unfamiliar terminology. The interesting question is whether it is only the terminology, or also the concepts or principles referred to, that are unfamiliar.[1] If the latter, I am led to compare these concepts and principles with those used in my legal culture, and to ask which ones are preferable. András Jakab's very interesting paper has inspired me to do this. I would be happy if my comments succeed in provoking the same response in European readers.

Jakab considers all aspects of constitutional reasoning and argumentation. He distinguishes "interpretation," in the sense of "determining the content of a normative text," from three other kinds of reasoning: Those concerned with analogy, establishing the constitutional text, and declining to interpret the text on grounds such as non-justiciability.[2] My comments will deal only with interpretation, although as I will explain, my understanding of its scope and limits differs from Jakab's.

I agree with Jakab that constitutional interpretation is "just a specific case of statutory interpretation," although the stakes are higher because erroneous constitutional interpretations can distort the community's governmental structure and processes.[3] Much of what I have to say applies equally to statutory and constitutional interpretation.

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[1] Two concepts that are unfamiliar to me, as a lawyer in a common law jurisdiction, are first, "objective purpose" or *ratio legis*, and secondly, *Rechtsdogmatik*. I will discuss these below.

[2] András Jakab, *Judicial Reasoning in Constitutional Courts. A European Perspective*, 14 GERMAN L.J. 1215 (2013), 1220-1224.

[3] *Id.,* 1224.

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Judges and practicing lawyers are not particularly good at theorizing their own interpretive practices, by which I mean subjecting them to rigorous and deep analysis. Jakab acknowledges this when he observes that: "[C]onstitutional courts in practice sometimes do not follow any theoretical pattern in weighing the arguments [used in interpretation] (or sometimes they give lip service to old and outdated theories of interpretation, e.g. that of Montesquieu's famous saying that judges are simply 'mouthpieces of the law')."[4] Judges in my legal culture are reluctant to acknowledge their necessarily creative function when laws are ambiguous, vague, or for some other reason insufficiently determinate to resolve a legal dispute. Rather than admitting that they have no alternative but to embroider the law, they tend to attribute their own handiwork to "the lawmaker's intention." In common law jurisdictions, the use of fictions to conceal even legitimate judicial creativity has been recognized since nineteenth century legal philosopher John Austin discussed it, although commentators have disagreed about whether or not such fictions have involved conscious subterfuge.[5] In Australia, the doctrine of the separation of powers may have reinforced judges' reluctance to acknowledge their interstitial lawmaking function, because lawmaking is the province of the legislature.[6] But it is now universally accepted among legal theorists that when a written law—including a constitution—remains in some vital respect indeterminate after full consideration of all admissible evidence of the purpose or intention underlying it, judicial creativity is inescapable.

The word "interpretation" is therefore used in law to denote at least two different processes. One involves revealing or clarifying the meaning of a legal text, a meaning that despite being previously obscured was possessed by the text all along. Laws are never wholly indeterminate: They often have determinate meanings, which limit or even eliminate scope for judicial creativity. Indeed, this is a necessary truth about any law. Because nothing meaningless can be a law, every law necessarily has some meaning; indeed, its meaning is its essence (a law is what it means).[7] Moreover, its meaning must pre-exist judicial interpretation, because otherwise it could not guide behavior until judges interpreted it, nor could it guide judges themselves. In other words, it could not be law until judges interpreted it. If laws could have determinate meanings only after, and as a result of, judicial interpretation of their texts, then the judges would be the only real lawmakers.

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[4] *Id*., 1261.

[5] 2 JOHN AUSTIN, LECTURES ON JURISPRUDENCE OR THE PHILOSOPHY OF POSITIVE LAW 610 (Robert Campbell ed., John Murray 5th ed. 1885) (1865); *see also* MICHAEL KIRBY, JUDICIAL ACTIVISM 6, 11, 28–9, 35, 46, 52, 61, 69 (2004). Jerome Frank said the use of certain legal fictions was unconscious, see JEROME FRANK, LAW AND THE MODERN MIND 10, 40–41 (Anchor Books 1963) (1930). But Martin Shapiro disagreed: see Martin Shapiro, *Judges as Liars*, 17 HARV. J.L. & PUB. POL'Y 155, 155 (1994).

[6] The development of the common law is an exception that is regarded as quite different from legislating.

[7] Jeffrey Goldsworthy, *Originalism in Constitutional Interpretation*, 25 FED. L. REV. 1, 10 (1997).

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The second process called "interpretation" involves constructing the meaning of a text by adding new meanings that it did not previously possess, or by changing it in other ways. To mark this distinction, some American theorists have recently called the second, creative, process "construction" rather than "interpretation."[8] But because popular and professional use of the term "interpretation" encompasses both processes, I prefer to distinguish between "clarifying" and "creative" interpretation.

The least contentious kind of creative interpretation involves supplementing the meaning of the text by adding new meanings to it. Clarifying interpretations are often unable to resolve interpretive problems such as ambiguity, vagueness, self-contradiction, and gaps. Because judges cannot wash their hands of a dispute and leave the parties to fight it out in the street, they must resolve such problems through this kind of creative interpretation. This is legally legitimate because it is necessary. In Germany, the use of analogy to create new rules might be another example of new meaning being added to the constitution through creative interpretation.[9] This judicial technique is unfamiliar to common law jurisdictions where it would be regarded as legitimate only insofar as it was necessary to resolve some indeterminacy in the law.

Occasionally, creative interpretation goes further than supplementing the meaning of a legal text when it is indeterminate. Judges sometimes change the meaning of the text in order to correct or improve it. Examples in common law jurisdictions include: The correction of obvious drafting errors; what used to be called the "equitable interpretation" of statutory provisions to avoid unintended and undesirable consequences in unusual and unanticipated circumstances; and the insertion into the text of so-called "implied terms" on the ground that they are practically necessary for the text to achieve its intended purpose. As to the third example, the great American jurist Learned Hand once observed: "In construing written documents it has always been thought proper to engraft upon the text such provisions as are necessary to prevent the failure of the undertaking." But because this is "a dangerous liberty, not lightly to be resorted to," it is essential that the need be "compelling" and any interpolated provision be confined "to the need that evoked

[8] KEITH WHITTINGTON, CONSTITUTIONAL INTERPRETATION: TEXTUAL MEANING, ORIGINAL INTENT, & JUDICIAL REVIEW 5–9 (1999). The distinction between construction and interpretation has become a staple of recent American literature dealing with the theory called "the new originalism." *See, e.g.*, Amy Barrett et al., *The Interpretation/Construction Distinction in Constitutional Law*, 27 CONST. COMMENT. 1, 1–150 (2010); Randy E. Barnett, *Interpretation and Construction*, 34 HARV. J.L. & PUB. POL'Y 65 (2011).

[9] Jakab, *supra* note 2, 1220-1222.

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it."[10] This has led to the principle that these so-called implications must be necessary in that sense.[11]

I, therefore, find it useful to distinguish between three different functions that are all covered by the broad term "interpretation": (A) Revealing or clarifying a law's pre-existing meaning; (B) supplementing that meaning in order to resolve indeterminacies; and (C) changing that meaning in order to correct or improve the law. Clarifying interpretation concerns (A), while creative interpretation concerns (B) and (C). In common law jurisdictions (B) is confined to cases of necessity, and (C) is also subject to strict limits. For example, drafting errors can be corrected only then they are obvious, and new terms can be added to (or "implied into") the text only when necessary to ensure that the law is efficacious. As previously noted, judges seem reluctant to openly acknowledge the creativity involved even in (B), and especially (C). Yet I believe that these distinctions can assist us in analyzing the role of different interpretive principles and arguments.

B. Clarifying Interpretation

Starting with (A), we need a theory of the nature of the pre-existing meaning that a constitution, like any law, necessarily possesses. One possibility is that this meaning consists of the literal meaning of the numbers, words, and punctuation marks that constitute the text, determined by the linguistic conventions—governing both ordinary and legal usage—of either: (1) the period when the constitution was drafted and enacted, or (2) contemporary society. But this possibility is ruled out because it cannot accommodate the inexplicit components of a constitution's meaning.

I. Inexplicit Content

The meaning of any law, including a constitution, is undoubtedly richer than the literal meaning or meanings of its text. Many philosophers of language now regard literal meanings as "typically quite fragmentary and incomplete, and as falling far short of determining a complete proposition even after disambiguation."[12] Our words often provide only the bare bones of what our utterances mean. As Justice Felix Frankfurter once said of statutory interpretation (and in my opinion constitutional interpretation is the

[10] LEARNED HAND, THE BILL OF RIGHTS 29 (1958); *see also id.* at 14.

[11] For further discussion, see Jeffrey Goldsworthy, *Constitutional Implications Revisited*, 30 U. QUEENSL. L.J. 9 (2011).

[12] Dan Sperber & Deirdre Wilson, *Pragmatics*, in THE OXFORD HANDBOOK OF CONTEMPORARY PHILOSOPHY 468, 477 (Frank Jackson & Michael Smith eds., 2005) (emphasis added). *See also* Andrei Marmor, *The Immorality of Textualism*, 38 LOY. L.A. L. REV. 2063 (2005); RICHARD EKINS, THE NATURE OF LEGISLATIVE INTENT 218–243 (2012).

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same), the most fundamental question is "what is below the surface of the words and yet fairly a part of them?"[13]

1. Ellipses

Consider the following examples of the inexplicit components of constitutional meaning. First, constitutional provisions can include ellipses that omit essential details conveyed by the context. For example, in ordinary speech "everyone has gone to Paris" means "everyone in some contextually defined group has gone to Paris," not "everyone who has ever lived has gone to Paris."[14] Similarly, in the Australian Constitution, the express power given to the Commonwealth Parliament to make laws "with respect to taxation" is universally acknowledged to be a power to make laws "with respect to Commonwealth taxation" and not "with respect to all taxation" including state taxation.[15] Section 92 of that Constitution is also notoriously elliptical: It provides that interstate trade, commerce, and intercourse shall be "absolutely free," which is now rightly understood to mean something like "absolutely free from discriminatory protectionism," and not "absolutely free from all constraint."[16]

2. Implications and Presuppositions

A constitution or other written law can also include or convey implications, and depend on presuppositions—tacit assumptions. The philosopher H.P. Grice famously coined the term *implicatures* to refer to meanings that a speaker deliberately attempts to communicate through implication, by providing the audience with clues that they need to "read between the lines."[17] His best known example involves a professor who, asked to provide a reference for a student seeking an academic position in Philosophy, states that the student writes good English and regularly attends tutorials. By saying nothing about the student's philosophical acumen, the professor implies that it is poor.[18] Deliberate implications are rare in legal texts, because lawyers usually attempt to be as explicit as possible to avoid any chance of misunderstanding.

[13] Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 533 (1947).

[14] *See* JEFFREY GOLDSWORTHY, PARLIAMENTARY SOVEREIGNTY: CONTEMPORARY DEBATES 263–38 (2010).

[15] AUSTRALIAN CONSTITUTION s 51(2).

[16] Or "absolutely free from all unreasonable constraint." *See Cole v Whitfield* (1988) 163 CLR 360 (Austl.).

[17] PAUL GRICE, STUDIES IN THE WAY OF WORDS 22–57, 138–43, 268–82 (1989).

[18] *Id.* at 33.

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Other implications are inferred from the way in which speakers choose or arrange their words. Jakab refers to various interpretive principles used in common law jurisdictions, such as *expressio unius exclusio alterius*—expressing one means excluding the other; *noscitur a sociis*—the unknown may be known from its companions; and *eiusdem generis*—of the same kind.[19] The first belongs to a family of similar principles which, as Jakab notes, are inferences drawn from what the lawmaker chose to explicitly provide.[20] The application of principles of this kind makes sense only on the assumption that the way in which words are chosen or arranged is often evidence of the intentions of the author. For example, the *eiusdem generis* principle holds that very often a general term, which follows a list of more specific terms belonging to a single genus, was also intended to be confined to that genus. The application of the principle makes sense only if all admissible evidence does suggest that this was the intention of the lawmaker; indeed, the principle is not applied in cases where there is stronger evidence of a contrary intention.[21] The same is true of other interpretive principles of this kind: All are defeasible depending on the overall balance of admissible evidence of what the lawmaker intended. They are based on how authors usually arrange their texts to communicate their intentions. If a text either could not or should not be treated as an attempt to communicate intentions, then none of these principles could sensibly be applied to it.

Next, presuppositions, or tacit assumptions, are not deliberately communicated by implication, but instead are taken for granted. They are so obvious that they do not need to be mentioned or, sometimes, even consciously taken into account.[22] If background assumptions are not grasped, almost anything we say is open to being misunderstood in unpredictable and bizarre ways. For example, if I order a hamburger in a restaurant, and carefully list all the ingredients I want, I do not think it necessary to specify that they should be fresh and edible, the meat not frozen, and so on. If I thought about this at all, I would expect it to be taken for granted. Even if I did go to the extra trouble of specifying these requirements, I would not think to add that the hamburger should not be encased in a cube of solid Lucite plastic that can be broken only by a jackhammer.[23] My order implicitly requires a hamburger that can be immediately eaten without much difficulty.

The meaning of legal texts also inevitably depends on tacit assumptions that are taken for granted. Despite the attempts of lawyers who draft such documents to be very explicit,

[19] Jakab, *supra* note 2, 1240 and 1234 respectively.

[20] *Id.*, 1240.

[21] D.C. PEARCE & R.S. GEDDES, STATUTORY INTERPRETATION IN AUSTRALIA 135-140 (7th ed. 2011).

[22] *See* Jeffrey Goldsworthy, *Implications in Language, Law and the Constitution*, *in* FUTURE DIRECTIONS IN AUSTRALIAN CONSTITUTIONAL LAW 150 (Geoffrey Lindell ed., 1994).

[23] JOHN SEARLE, *Literal Meaning*, *in* EXPRESSION AND MEANING 117, 127 (1979).

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some dependence on presuppositions is inescapable. Some presuppositions are simple common sense, which is why the old "golden rule" requires that provisions sometimes be understood non-literally to avoid obvious absurdities.[24] Many presumptions of intention used in statutory and constitutional interpretation can arguably be justified on the ground that they are presuppositions. In principle, if not always in practice, the context provided by the general law often implicitly limits language that, read literally, would be over-inclusive.[25] Presuppositions of this kind include the presumptions that statutes are not intended to extend beyond territorial limits, to be retrospective, to over-ride traditional freedoms, and so on.[26]

It is possible that constitutions rely on background assumptions more than other legal instruments because they must be "expressed in general propositions wide enough to be capable of flexible application to changing circumstances."[27] Their method "is rather to outline principles than to engrave details."[28] Justice Gaudron of the Australian High Court once remarked that some fundamental doctrines are not expressed "either because they are assumed by the Constitution, or because what they entail is taken to be so obvious that detailed specification is unnecessary."[29] Yale Law Professor Jack Balkin has acknowledged that constitutional drafters sometimes "leave things silent . . . because certain matters go without saying [or] because they are implicit in the structure of the constitutional system."[30]

One example of a tacit assumption may be the power of judicial review itself. This power was undoubtedly presupposed by the founders of the Australian Constitution although it is not explicitly granted by the text.[31] Another example of a tacit assumption may be the role of binding precedent in a common law jurisdiction. As Balkin suggests, "a common law system of precedents was entirely foreseeable and indeed is implicit in the constitutional framework of a country with a common law tradition."[32] Other suggested presuppositions, or perhaps implications, that have been inferred from the Australian Constitution include

[24] FRANCIS BENNION, STATUTORY INTERPRETATION 407 (2d ed., 2003). *See* Jakab, *supra* note 2.

[25] For many examples, see Bennion, *supra* note 24, at Parts XVI, XVII, XXIII, XXIV.

[26] All this is recognized by Jakab, *supra* note 2, 1249.

[27] *Australian Nat'l Airways v Commonwealth* (1945) 71 CLR 29, 81 (Austl.).

[28] *Tasmania v Commonwealth & Vict.* (1904) 1 CLR 329, 348 (Austl.).

[29] *Australian Capital Television Pty Ltd. v Commonwealth* (1992) 108 CLR 577, 650 (Austl.).

[30] JACK M. BALKIN, LIVING ORIGINALISM 204 (2011).

[31] *See* CHERYL SAUNDERS, THE CONSTITUTION OF AUSTRALIA: A CONTEXTUAL ANALYSIS 75 (2010).

[32] Balkin, *supra* note 30, at 714.

implied legislative powers, the separation of judicial power, and implications protecting the states from certain kinds of federal laws, which one judge described as "tacit" or "underlying assumptions."[33]

These examples of inexplicit content provide powerful support for the theory that the meaning of a constitution is necessarily determined partly by evidence of the intentions and purposes of those people who created or enacted the text. It is rare for legal implications to be logically entailed by express words.[34] Most legal implications therefore depend on some ingredient in addition to the words of the text, and it is difficult to understand how this can be anything other than evidence of their intended meaning or purpose. Ellipses depend on our understanding that speakers intend to communicate more than their bare words mean literally. Gricean implicatures depend on evidence of the speaker's intention to communicate something by implication.[35] Even when we say that something is implicit in or presupposed by an utterance, in the sense that it is tacitly assumed or taken for granted, we are saying that the speaker took it for granted. Texts cannot meaningfully be said to take anything for granted, at least not when their meaning is confined to literal meaning, severed from their authors' intentions. Strictly speaking, words do not have intentions or purposes—only the people who use them do. In the case of a constitution, it is natural to think that the pertinent people are those who founded it. For this reason, the orthodox view is that a constitution is based on or embodies unwritten or structural principles, such as representative democracy, federalism, the rule of law, and the separation of powers, only if and insofar as its provisions were intended by the founders to implement those principles.

II. "Objective" Purpose

We have seen that the meaning of a law cannot be the literal meaning of its text, because that could not accommodate the law's inexplicit content. I have suggested that the best way to accommodate inexplicit content is to understand the meaning of a law in terms of the intentions or purposes of its makers. Jakab's paper, drawing on European concepts that are relatively unfamiliar to me, favors an apparently different theory of meaning. He refers to the idea that a norm can possess an "objective purpose"—or *ratio legis*—which is distinct from the subjective purpose of the lawmaker.[36] He suggests that this might be a "social purpose"—presumably, a purpose attributed to the norm by the community—or the imagined purpose of a supposed or ideal legislator.[37]

[33] *Victoria v Commonwealth* (1971) 122 CLR 353, 403 (Austl.).

[34] Some *conventional* implications are expressed by words.

[35] *See supra* notes 17–18.

[36] Jakab, *supra* note 2, 1241-42.

[37] *Id*.

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Professor Donald Kommers, a well-known American expert on German constitutional law, once observed that "[t]he notion of an objective value order rings strange to the ears of a common lawyer."[38] This is true: I have difficulty understanding the idea of objective purpose, except by deriving it from the purpose of the actual lawmaker. As Jakab acknowledges, "there are no 'abstract authors,' only actual ones."[39] He concludes that "therefore it is more preferable to refer to the purpose of the text [rather] than to the intention of an abstract author."[40] But as he also points out, "the text has no intention: only persons have intentions."[41] The purpose of the text must, therefore, be the purpose of: (a) Those who created it; or someone else who subsequently uses it, such as (b) the community as a whole, or perhaps (c) the judiciary (or legal profession) on behalf of the community.

Let us consider the last two of these three possibilities. Jakab says that legal provisions must have "objective" purposes "attributed to them."[42] But to appeal to supposed purposes of the community as a whole—independently of the purposes of the lawmakers—would be to indulge in blatant fiction, given that very few citizens (other than lawyers) would have any knowledge of the legal provisions in question or their function in the legal system. This would also undermine the essential role of elected lawmakers in a representative democracy, which is to represent the community in intelligently designing laws to serve chosen purposes. The purposes that the lawmakers choose to pursue on behalf of the community have better credentials than anyone else's to be deemed the community's purposes. This objection is even stronger when aimed at the last of the three possibilities. To allow the judiciary or legal profession to attribute to laws whatever purposes they deem to be best would be to give them an undemocratic power to reshape those laws. Instead of democratically elected lawmakers having authority to design laws to serve purposes chosen by them on behalf of the community, they would only be permitted to provide raw material—a bare text—to the judges, who could then decide what purposes the text should be directed towards and reshape its meaning accordingly.

My objection to these understandings of objective purpose is similar to Jakab's objection to Dworkin's theory: Namely, that it gives too much scope for moral and political value judgments on the part of judges, undermining legal certainty and provoking undesirable

[38] Donald P. Kommers, *Germany: Balancing Rights and Duties*, *in* INTERPRETING CONSTITUTIONS: A COMPARATIVE STUDY 161, 180 (Jeffrey Goldsworthy ed., 2006).

[39] Jakab, *supra* note 2, 1245.

[40] *Id.*

[41] *Id.*

[42] *Id.*

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political controversy.[43] However, I would place more emphasis than Jakab does on the need to respect democratic choices that are embodied in legislative and constitutional provisions.

In common law jurisdictions, in relation to the interpretation of constitutions, legislation, and private instruments such as contracts, the courts draw a distinction between "objective" intentions and the "subjective" intentions of individual legislators or contracting parties. In a recent Australian case, objective intentions were described as *expressed* or *outwardly manifested* intentions.[44] As Lord Diplock of Britain's House of Lords once explained:

> [T]he relevant intention of each party is the intention which was reasonably understood by the other party to be manifested by that party's words or conduct notwithstanding that he did not consciously formulate that intention in his own mind, or even acted with some different intention which he did not communicate to the other party.[45]

The distinction drawn is between the actual mental state of a party, which might have been unknown to other parties, and evidence of that party's mental state that was publicly manifested or exhibited. In the context of statutory interpretation, Lord Radcliffe stated that "the paramount rule remains that every statute is to be expounded according to its manifest or expressed intention."[46]

This principle is sound, and also applies to the meaning of communications in everyday life. We do not allow post hoc revelations of a previously hidden subjective intention to change our understanding of the objective meaning of what was said or written. Instead, we say: "That may be the meaning you intended to communicate, but it is not the meaning you did communicate," or "that may have been what you meant, but it is not what your statement meant."[47] As I have argued previously:

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[43] *Id*., 1243-1245.

[44] *Byrnes v Kendall* (2011) HCA 26, 53, 55, 57, 59, 94 (Austl.).

[45] *Byrnes v Kendall* (2011) HCA 26, 107 (Austl.) (quoting *Gissing v Gissing* (1970) HL 3 886, 906 (UK)).

[46] *Corporate Affairs Commission (NSW) v Yuill* (1991) 172 CLR 319, 345–46 (Austl.) (quoting *Attorney-General v Hallet & Carey Ltd.* (1952) AC 427).

[47] *See* Jeffrey Goldsworthy, *Moderate Versus Strong Intentionalism: Knapp and Michaels Revisited* 42 SAN DIEGO L. REV. 669 (2005).

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> [T]he full meaning of what people say to us depends partly on what we know about their intentions; but it does not depend on esoteric information such as what they confide only to their spouses or write in their private diaries. The meaning of an utterance depends partly on what its intended audience knows, or can reasonably be expected to know, about the speaker's intentions, but not about concealed intentions. In the case of laws, the courts have therefore distinguished between whatever hidden intentions the law-makers may have had, and those intentions they have communicated by the law they have enacted, given readily available knowledge of its context and purpose. While the former are irrelevant, the latter may be crucial.[48]

The principle that only objective, publicly manifested evidence of the lawmakers' intentions is relevant to interpretation overcomes the fears of Justice Antonin Scalia, whom Jakab quotes. Scalia rejects the relevance of *original intent* partly on the ground that the American people are bound by the text of the Constitution, but not its founders' unexpressed, and possibly secret, intentions, which were never promulgated as law.[49] Further, it should be noted that Thomas Jefferson's argument that constitutions should not be regarded as unchangeable, which Jakab enlists as an objection to reliance on the founders' original intentions,[50] is really an objection to making a constitution unduly difficult for later generations to amend. If the prescribed amendment procedure strikes an appropriate balance between the competing needs of constitutional stability and adaptability to social change, that objection dissolves. If original intentions become outmoded, the constitution can be amended.[51]

It is crucial to realize that "subjective" intentions remain relevant. An "objective" intention amounts to this: What a reasonable audience would conclude was the author's "subjective" intention, given all the publicly manifested evidence of it. The existence of a subjective intention is a crucial presupposition of our attribution of an objective intention to the author of a text and, therefore, to the text itself. If we knew that the creators of a text had no relevant subjective intention—for example, they were monkeys pounding

[48] Jeffrey Goldsworthy, *Originalism in Constitutional Interpretation*, 25 FED. L. REV. 1, 10–11 (1997).

[49] Jakab, *supra* note 2, 1232 and 1247; see also the similar concerns of Judge László Kiss of the Hungarian Constitutional Court, *id*., 1247-49.

[50] *Id*., 1247.

[51] *See also infra* the final paragraph of this article.

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randomly on keyboards—we would have no rational basis for attributing any objective intention to them or their text.

I am able to make sense of the idea of an "objective" purpose or *ratio legis* only by thinking of it in this way, as what publicly manifested evidence suggests was the lawmakers' purpose. A purpose is a kind of intention—an intention to achieve some objective. A purpose that a law seems designed to serve is a purpose that we have good reason to believe the lawmakers designed it to serve. Nevertheless, my observations about legislative intentions being "objective" apply equally to legislative purposes.[52] An objective purpose, in that sense, must be publicly expressed or manifested. It is the purpose that reasonable members of the lawmakers' intended audience—whether lawyers or citizens—would attribute to the lawmakers, based on textual and contextual evidence available to them, and it might, therefore, differ from the actual subjective motives or purposes of the lawmakers as individuals.

If this theoretical explanation of "objective" purpose is rejected, some other explanation must be provided. It must somehow explain how legal purposes or values can be both created by acts of lawmaking, yet also objective in the sense of being independent of the lawmakers' intentions or objectives. We can at least understand how moral values might be objective even if, after philosophical reflection, we do not accept that they are. But that is because we do not think of moral values as being deliberately created by human beings. By contrast, legal texts are deliberately created by human lawmakers. How, then, can they give rise to "objective" purposes or values that are independent of the lawmakers' intentions and purposes?[53] As a legal philosopher, I regard that notion with deep suspicion: To me, it seems too metaphysically strange to be believable.[54] But I confess to ignorance of the European jurisprudential literature on the nature of objective constitutional values.[55]

Understanding a law's purpose or intention in the way I have suggested, I question Jakab's classification of it as lying "beyond legal content."[56] We understand the meaning of every communication partly in the light of what we take to be the intention or purpose that motivated it. Intention or purpose is, to that extent, part of the meaning of the communication, not something outside it. Moreover, even what Jakab labels non-legal

[52] *See supra* section B.II.

[53] The lawmakers might intend to incorporate objective moral values into the law. That is a different matter, but it still depends on their intention.

[54] Dworkin's theory that imputes a collective morality to the community personified might be invoked, but that is subject to many objections. *See, e.g.*, *supra* text accompanying note 43.

[55] *See* Kommers, *supra* note 38 at 179–83.

[56] Jakab, *supra* note 2, 1241 (title to section III).

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(moral or economic) arguments[57] have a legitimate—but limited—role to play as evidence of objective legislative purpose, insofar as the lawmakers can realistically be presumed not to have intended to produce gross injustice or economic waste. This approach can, of course, be misused by judges in order to substitute their moral assessments for those of the lawmakers. But that is true of all interpretive principles: All are open to being misused for that purpose.

C. Creative Interpretation

I. Supplementing Meaning to Resolve Indeterminacy

Jakab refers to a variety of problems that lead to indeterminacy in legal texts, including ambiguity, vagueness, self-contradiction, and "gaps."[58] He rightly observes that in resolving such problems, "very often there is no 'single right solution,' just better or worse solutions."[59]

Sometimes, resort to the founders' "objective" intentions can resolve these problems. But it cannot answer all, or perhaps even most, interpretative disputes of the kind that constitutional courts must resolve. If admissible evidence of those intentions does not resolve a legal dispute, judges may be forced to act creatively and, after considering matters such as consistency with general legal doctrines and principles, public policy and justice stipulate what the disputed provision shall be taken to mean. When judges act creatively in this way, they should be free to take into account contemporary values.

A large part of what is properly called *constitutional law* is comprised of general doctrines, methodological principles, interpretations of specific provisions, and often complex tests for their application that are consistent with, but not required by, either the bare text of the constitution or its founders' "objective" intentions and purposes. In common law jurisdictions, this body of law is the legitimate creation of the judges, who may continue to develop it in the interests of good government, subject to the doctrine of binding precedent and to the underlying constitution insofar as it has a determinate meaning. To use the terminology now favored by many American scholars, this body of law is the product of *construction* rather than *interpretation*.[60] As I understand Jakab's discussion, in Germany and Austria, the equivalent body of constitutional law is called *Verfassungdogmatik*, and it is the fruit of collaboration between legal scholars and the judiciary that has resulted in professional consensus. *Verfassungdogmatik* may be

[57] *Id.*, 1250-1251.

[58] *Id.*, 1219 (ambiguity); 1220 (gaps); 1232 (vagueness); 1234 (conflicts between provisions).

[59] *Id.,* 1228.

[60] *See supra* note 8.

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considerably more comprehensive, systematic, and stable than the judicial doctrines developed by common law courts.[61]

In the case of old constitutions, these bodies of legal doctrine will be resorted to more frequently than evidence of the founders' objective intentions or purposes. This is because those intentions and purposes will usually have been considered in earlier cases, leading to conclusions that have become embedded in legal doctrine that governs subsequent decision-making. I doubt that subsequent decision-making which simply applies precedents or established legal doctrine should be regarded as involving interpretation of the constitution. The process of interpretation has already occurred and subsequent decision-making amounts to the faithful application of earlier judges', and in Germany, legal scholars', interpretations, rather than involving fresh and direct interpretations of the text.[62] Of course, in some cases decision-making may involve elements of both processes.

Much more could be said about this kind of creative interpretation, but that must await another occasion.

II. Changing Meaning to Correct or Improve the Constitution

I have already given some examples of techniques of interpretation—perhaps in a loose sense of that term—that, on a rigorous analysis, amount to changing the meaning of the constitution, rather than clarifying or supplementing it.[63] I mentioned the correction of obvious drafting errors and the insertion of so-called "implied terms" when necessary to ensure that the constitution can achieve its objectives. It is worth noting that both processes presuppose that it is possible to discern some purpose that the law was intended to achieve. A drafting error, for example, can only be detected by comparing the literal meaning of a law with some other meaning that the lawmaker apparently intended, but failed, to communicate with precision.

Another example might be changing the meaning of the constitution in response to social or technological developments in the community. Jakab says that "Sometimes the Constitution can be made to fit the altered circumstances by modifying the interpretation."[64] Indeed, he says that his "most essential thesis" is that a constitution must be interpreted both according to its text and by adapting it to changing circumstances.[65]

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[61] Jakab, *supra* note 2, 1215 n3.

[62] *Cf.* Id., 1235-1239.

[63] *See supra* notes 9–10 (text).

[64] Jakab, *supra* note 2, 1257.

[65] *Id.*

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If a constitutional provision is ambiguous, then it might be legitimate for a court to prefer one of its possible meanings on the ground that it is more compatible than alternative meanings with contemporary circumstances. But that would be a case of adding meaning in order to resolve ambiguity, which we considered in section C. *I.*, rather than of changing a settled meaning in order to improve the operation of the constitution.

Constitutions can adapt to changed circumstances without their meaning having to be changed. The Australian High Court has frequently affirmed that, although the Constitution's meaning may not change except by formal amendment, its application may legitimately change as a result of changes in the circumstances to which it must be applied. The same was always true of statutes. For example, the word "vehicle" used in a nineteenth century statute was capable of application to motor vehicles, even though their invention was not envisaged when the statute was enacted, without the meaning of that word having to be changed. The High Court borrowed John Stuart Mill's terminology of *connotation* and *denotation* to draw this distinction—today, more philosophically sophisticated concepts such as sense and reference, and intension and extension, can be used for the same purpose.[66] The meaning, connotation, sense, or intension of a word consists of the criteria or the function that determine its denotation—in the case of "vehicle," the criteria that define the word and determine which objects are vehicles. The application, denotation, reference, or extension of a word is comprised of all the things in the world that it denotes or refers to—in the case of "vehicle," all the vehicles that exist within the relevant jurisdiction. As time goes by, and new kinds of vehicles are invented, the application of the word can change without its meaning having to be changed.

This distinction can explain quite dramatic changes in the operation of a constitution. For example, the Australian Parliament has power to legislate with respect to *external affairs*, a term whose original meaning probably included power to implement international treaties ratified by the executive government.[67] Early in the twentieth century, the treaty-implementing power was insignificant because governments ratified only a small number of treaties that dealt with a narrow range of subject-matters. Due to massive increases in both these respects, the treaty-implementing power now has a much greater practical ambit and impact than when the constitution was first enacted. As a result, the balance of power within the Australian federation has dramatically shifted in favor of the national government, without the meaning of the external affairs power having changed.

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[66] *See* Christopher R. Green, *Originalism and the Sense-Reference Distinction*, 50 SAINT LOUIS U. L.J. 555 (2006); Jeffrey Goldsworthy, *Original Meanings and Contemporary Understandings in Constitutional Interpretation*, *in* CONSTITUTIONAL ADVANCEMENT IN A FROZEN CONTINENT: ESSAYS IN HONOUR OF GEORGE WINTERTON 245, 245–268 (H.P. Lee & Peter Gerangelos eds., 2009).

[67] *Victoria v Commonwealth* (1996) 138 ALR 129 (Austl.).

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A consequential distinction between intended meaning and intended application is also important. I have argued that the meaning of a constitutional provision may depend partly on publicly available evidence of what its founders intended it to mean.[68] But it need not depend on publicly available evidence of how the founders intended the provision to be applied in particular cases. The rule of law and the separation of powers require that judges decide for themselves how laws should be applied, according to their true meaning, rather than slavishly deferring to applications the law-makers may have expected or desired. Because that decision may depend on judgments of fact or value—depending on the terms of the provision—and because in making these judgments, judges are properly guided by the beliefs and values of their own time and place, there is legitimate scope for temporal variation in the application of constitutional provisions. For example, to properly apply a provision incorporating a moral principle, judges must decide what the principle requires, rather than what the law-makers may have believed it required. That is why the American Supreme Court's decision in *Brown v. Board of Education*,[69] that racially segregated education violated the equal protection clause, should not be regarded as wrong on the ground that it was inconsistent with the expectations or desires of a majority of those who adopted the clause.

But can the judges go further, and change the very meaning of the constitution in order to improve its operation in changing circumstances? That is much more controversial. Modern constitutions invariably include a special, democratic procedure for their own amendment, so they can be kept up to date with social and technological changes and evolving community values. In addition, they usually expressly provide or imply that they may be changed only through that procedure. In the United States, for example, Article V seems to imply that it prescribes the exclusive means of constitutional amendment, which binds even the "sovereign people," and evidence of original intent corroborates that impression.[70] (Incidentally, this implication is a good example of what I previously called "inexplicit content" in a constitution).[71] Section 128 of Australia's Constitution is explicit, stating that "[t]his Constitution shall not be altered except in the following manner," which involves a referendum.

There is no good reason for judges to be exempted from this prohibition of constitutional change by other means, which is binding on all other officials. It might be argued that the

[68] *See supra* section B.II.

[69] *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

[70] This has been generally accepted. *See, e.g.*, Henry Paul Monaghan, *We the People[s], Original Understanding, and Constitutional Amendment*, 96 COLUM. L. REV. 12 (1996); David R. Dow, *When Words Mean What We Believe They Say: The Case of Article V*, 76 IOWA L. REV. 1 (1990); John R. Vile, *Legally Amending the United States Constitution: The Exclusivity of Article V's Mechanisms*, 21 CUMB. L. REV. 271 (2003).

[71] *See supra* section B.I.

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constitution's amendment procedure should be construed as governing only changes made to the text of the constitution, and not changes made to the meaning of the text, or at least, not changes wrought by judicial interpretation.[72] But that would surely be an odd construction. As we have seen, to change the meaning of a law is to change the law.[73] What would be the point of forbidding changes to the constitution made by textual amendment, except by a special democratic procedure, but permitting changes to it made by textual "interpretation"? Evidence of original intent could, conceivably, reveal that the constitution's founders intended this. But it is surely unlikely that they would deliberately permit judges to change a constitution that ordinary democratic procedures are forbidden to change. My conclusion, therefore, is that a court that deliberately changes the meaning of a constitution changes the constitution, contrary to the letter and spirit of the prescribed amendment procedure.[74]

[72] For an argument that judges generally have authority to change the meaning of a constitution, see Joseph Raz, *On the Authority and Interpretation of Constitutions: Some Preliminaries*, *in* CONSTITUTIONALISM: PHILOSOPHICAL FOUNDATIONS 152 (Larry Alexander ed., 1999). For a critique of Raz's argument, see Jeffrey Goldsworthy, *Raz on Constitutional Interpretation*, 22 L. & PHIL. 167 (2003).

[73] *See supra* text accompanying note 7.

[74] For elaboration of this point, see Jeffrey Goldsworthy, *The Case for Originalism*, *in* THE CHALLENGE OF ORIGINALISM, THEORIES OF CONSTITUTIONAL INTERPRETATION 42 (Grant Huscroft & Bradley W. Miller eds., 2011).