

STATUTORY INTERPRETATION IN THE CIVIL CODES: SOUTH-AMERICAN LITERALISM AND BLACKSTONE

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Abstract

William Blackstone, the renowned English legal scholar of the eighteenth century, directly influenced the drafting of the rules of statutory interpretation of the Louisiana Civil Code, and indirectly the rules on the same subject of the Chilean Civil Code (1855). The Chilean rules were later borrowed in South America by the drafters of the Civil Codes of Ecuador (1858), Venezuela (1862), Uruguay (1868) and Colombia (1887). I argue that Blackstone's influence was significant and marked differences with the civil tradition which, in turn, determined certain similitudes with the literalism of English law of the nineteenth century. However, South-American literalism in statutory interpretation was not a copy but a creative response to local political realities. From the research into this topic South-American drafters of legislation emerge as both creative and critical users of legal ideas from an amazingly wide range of sources, unexpectedly including Anglo-American ones. What is more, the South-American political context of mid-nineteenth century suggests that in the subject of statutory interpretation comparative law arguments, up to a certain extent, were only rhetorically used.

Key words: *Statutory Interpretation, South American Civil Codes, Louisiana Civil Code, Andrés Bello, William Blackstone.*

1. INTERPRETATION AND STATUTES

1.1. A creative blend

William Blackstone, a renowned English legal scholar of the eighteenth century, directly influenced the drafting of the rules of statutory interpretation of the Louisiana Civil Code (1825), and indirectly the rules on the same subject of the Chilean Civil Code (1855). Those rules provided that the literal meaning should pre-

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vail over legislative intent, and the “spirit” of the law. The Chilean rules were later borrowed in South America by the drafters of the Civil Codes of Ecuador (1858), Venezuela (1862), Uruguay (1868) and Colombia (1887).²

I will argue that this influence was *significant*, because of the marking differences with the civil tradition, and similitudes with the strict literalism of English law. Furthermore, I will claim that in this matter, Andrés Bello, the drafter of the Chilean Civil Code (1855), and Tristán Narvaja, the drafter of the Uruguayan Civil Code (1868), also made a *direct* and creative use of the ideas of another Anglo-American author, James Kent, known as the *American Blackstone*, in order to relax some of the strictures of the English approach.

More interesting, however, is the creativeness, and wealth of inspirational sources that South-American drafters of legislation put into use in the nineteenth century. Traditional accounts portrayed them as *slavish* imitators of the French Civil Code.³ For example, López Medina has recently noted that:

On traditional and current maps of comparative law (...) ‘Latin American law’ ends up being the basic legal structure of the Iberian republics of the Americas that replicates... post-revolutionary law of republican France.⁴

However, a realistic assessment, which has been endorsed by several legal historians in the last decades, shows that nineteenth-century South-American drafters of the Civil Codes were both creative and critical users of legal ideas from an amazingly wide range of sources. I claim that Anglo-American legal ideas, should be included amongst those relevantly used by the drafters of South-American Civil Codes, as was the case in the area of statutory interpretation analyzed in this article. What is more, as will be explained below, the South-American political context of mid-nineteenth century suggests that in the subject of statutory interpretation comparative law arguments, up to a certain extent, were only rhetorically used. Details aside, the product was a creative blend which, arguably, still influences attitudes towards statutory interpretation in South America.

1.2. Models of Interpretation

Statutory interpretation is the process of discerning the meaning of a statute in order for it to be applied.⁵ When codification of private law took place in South America, several models were available as a source of inspiration.⁶ Those models

² Those rules travelled also outside South America, to the Civil Codes of Nicaragua, Honduras and Panamá.

³ See for example: WATSON (1978), pp. 313-336.

⁴ LÓPEZ MEDINA (2012), p. 348.

⁵ GREENAWALT (2002).

⁶ An excellent and comprehensive review of the topic can be found in GUZMÁN BRITO (2011).

could be found in legal norms, or in the ideas of legal scholars from the civil and the common law tradition. For the purposes of this article, a number of concepts need to be clarified from the beginning in order to allow for the historical and comparative analysis that follows.

The first point is that, while most models of statutory interpretation recognise that judges have a role in interpreting statutory law, in the past, other models restricted that task to the sovereign, or the legislature. Examples of the latter approach were the *ius commune* maxim *est enim eius interpretari cuius est concedere*,⁷ or, the French institution of the *référé au législatif*.⁸ Those models were aimed at securing the monopoly of the sovereign, or the legislature, as the only source of law. In its modern version, the *référé* was connected with the doctrine of separation of powers postulated by Montesquieu.⁹ Its goal was to prevent judges from exercising a legislative function. However, as Blackstone, and the drafters of the Louisiana Civil Code of 1825 noted, ultimately the *référé* allowed the legislature to become a judge, thus violating the same principle of separation of powers.¹⁰

Second, within the models that admit *judicial* interpretation, a further distinction can be drawn between those models that *include* detailed legal rules governing the process of interpretation, and those that lack such rules. The Louisiana Civil Code (1825) was an example of the first, while the French Civil Code (1804) was an example of the second.

Third, in rough terms, two methods of interpretation could be discerned by the time that codification took place in South America: the literal method based on the *plain meaning rule*, and the non-literal method based on the intention of the legislature, and the reason (spirit) of the law. Literal interpretation focuses on the meaning of words isolated or taken in light of their context. It prescribes different ways of adjudicating meaning depending on the sort of language used by the legislature. Non-literal interpretation, on the other hand, focuses on the *spirit* or *reason* of the law or on the *intention* of the legislature. Instead of textual exegesis, the judges are supposed to look closely at “the underlying rationales of texts and practices”.¹¹

Lastly, among those models that prescribe rules for the purpose of governing judicial interpretation, a further distinction can be drawn between *hierarchical and non-hierarchical* models. As Greenawalt has noted, one of the most widely discussed topics in statutory interpretation is the role that ought to be played respectively by the “legislators’ ideas about what they have enacted and [the] readers’ understanding of [those] enactments”.¹² In other words, and as Manning has put it, “the question of

7 PLUCKNETT (2010), p. 329.

8 VAN CAENEGEM (1992), p. 130.

9 VAN CAENEGEM (1992), p. 130.

10 See sections 2.3 below.

11 GREENAWALT (2002), p. 269.

12 GREENAWALT (2002), p. 277.

text versus purpose has always troubled the law of statutory interpretation”.¹³ Hierarchical models *privilege* the literal method of interpretation over others. By contrast, non-hierarchical models allow for the *alternative* or *simultaneous* use of the text, the intention of the legislature, and the reason (*spirit*) of the statute. Both the Louisiana Civil Code (1825), and the writings of Blackstone, were examples of hierarchical models where the literal method was prioritized, and recourse to legislature’s intent permitted only if the literal meaning was unclear. This approach was typical of legal actors “concerned with restricting judicial discretion”.¹⁴ The French scholar Jean Domat, by contrast, suggested a model within which literal and non-literal methods of interpretation could be used simultaneously.¹⁵

Some further methodological remarks need to be made. First, the historical and comparative analysis conducted in the following sections will be developed on the basis of the simplified ideas about statutory interpretation introduced above. Of course, matters are more complex than those ideas tend to suggest. For instance, the plain meaning or literal rule provides that if the text of the law is clear, it should not be disregarded, and that the *legislature’s intent* should be taken into account *only* if the text is unclear. However, Ronald Dworkin, for example, has argued that describing a legal text as “unclear” is inevitably the *result* of taking into consideration the *reason* or *purpose* of the statute, and *not* the *occasion* for looking at such reason.¹⁶ In a similar way, the legislature’s “intent” is also a problematic concept. Some legal theorists, such as Jeremy Waldron, deny the existence of such *an intention*, at least in the case of multi-member assemblies, such as modern parliaments.¹⁷

Second, a further problem concerns the clear influence that broader ideas about legal theory had on the views of particular authors. For example, Jean Domat and Samuel Pufendorf, two authors frequently consulted in Europe and America on the subject of statutory interpretation, belonged to the natural law school. This influenced their ideas about statutory interpretation, and in particular their suggestion that even the clear, literal meaning of a statute was to be disregarded if it was unjust. Blackstone’s ideas on statutory interpretation carry their own problems. In particular, while Blackstone’s general conception of law leaned towards natural law doctrine (he famously argued that *bad law is not law at all*), his approach to statutory interpretation seemed to be more in line with positivist thinking. In his opinion, no matter how unreasonable a statute was, it could not be disregarded by the judge. Thus, Hart argued that Blackstone’s natural law test for positive law was empty,

13 MANNING (2001), p. 4.

14 GREENAWALT (2002), p. 289.

15 DOMAT (1737), p. 7.

16 DWORKIN (1998), p. 352.

17 WALDRON (1999), pp. 121 and 142. Tellingly, the Chilean Code directed the judge to look for the intention of the legislature first of all in the text of the statute itself. That could be a sign of the perception by Bello of the problematic character of the *concept* of legislative intent, and *not* only of the lack of reliable *sources of knowledge* of that intent.

and that any positive law would pass it,¹⁸ and Gareth Jones claimed that it seems impossible to reconcile Blackstone's ideas about natural law with his conception of an "uncontrolled" sovereign.¹⁹

Third, the positions of the various legal scholars analyzed in this article were not as clear-cut as the explanations contained in the following sections may suggest. All of their works referred to a common set of themes, and maxims (several descending from Roman law). At first (and even second) sight, what each of these scholars seems to provide is a similar and slightly incoherent arsenal of maxims and principles. In order to identify the differences between them, it is important to look at the *whole picture* of their ideas, and not to focus too closely on isolated details of their respective conceptions of statutory interpretation. Blackstone is a clear example of the ambiguity just mentioned. While in his analysis of *English* statutory law Blackstone seems more inclined to grant the judges some discretion (e.g. under the mischief rule),²⁰ in his general explanation of the topic of statutory interpretation (the one that influenced the Louisiana Civil Code) he adopted a much more formalistic position, and warned his readers against judicial discretion in interpretation.

1.3. Intellectual history: internalist v contextualist approaches

Though ideas about the nature of statutory interpretation are always complex, in my opinion they are sufficiently clear for the purposes of the historical and comparative task which is the concern of this article. We can deal with past ideas in two different ways: through an *internal critique* of those ideas, or through an analysis of what the actors were *doing* with them in their historical context. Thus, two different methodologies have been proposed within the field of the history of ideas. Some scholars, like Peter Strawson, have been described as "liberating the history of philosophy from history"²¹ for the sake of focusing in the internal strengths and weaknesses of ideas conceived as strategies for solving problems. By contrast, Quentin Skinner and other historians stressed the importance of historical understanding of ideas over philosophical internal criticism. According to Skinner, we need to study the context of any work of political philosophy so as to enable ourselves "to characterize what their authors were *doing* in writing them".²²

Richard Rorty has aptly depicted the contraposition. On the one hand, he argues, traditional "philosophers usually think of their discipline as one which discusses perennial, eternal problems",²³ while, on the other hand, Wittgenstein and others

18 HART (1956).

19 JONES (1973), p. xxxviii.

20 According to which the judge in interpreting a statute must consider not only its text, but also the mischief of the common law that such statute was purported to solve.

21 For this paragraph: JONES (1973), pp. 508-11.

22 SKINNER (1978), p. xiii.

23 RORTY (1979), p. 3.

had built a ‘historicist’ message, looking at the traditional view as merely an “attempt to eternalize a certain *contemporary* language-game, social practice or self-image”.²⁴ This is not unfamiliar to legal scholarship: a similar contraposition can be found in legal theory in the debate between formalism²⁵ and the realism of rule-skeptics.²⁶ In other words, the question is always if we should analyze the *internal coherence* of legal ideas, as formalists urge us to do, or if we should adopt a realistic stance and focus on what the legal actors were *actually doing* with those ideas. Among the legal historians, few would challenge the notion that their task is to understand legal ideas in their historical context.²⁷ However, there is no inconvenience in approaching them ahistorically, so long as that approach is not presented as an historical one.²⁸

Coming back to our subject: from an internal perspective, we may consider that literalists were utterly *naïve* in suggesting that judges ought never to disregard *clear* texts, and we may look with scepticism upon any mention of the *legislature’s* intent. However, these ideas still seem to have a clear core meaning with the result that it remains possible to understand what legal scholars and drafters of legislation were *doing* (or trying to do) with them in the context of South-American problems. Indeed, the vocabulary of literalism, legislative intent, purposive interpretation, etc. is still widely used in legal theory, demonstrating that this language is capable of communicating a reasonably clear idea of what is being *done* with those ideas in the midst of political debates.

1.4. Blackstone and South America: the Trace and its Uncertainties

As mentioned earlier, the Chilean Civil Code (1855) was indirectly inspired by Blackstone’s *Commentaries*, through the vehicle of the Louisiana Civil Code (1825), and, in South America, the rules of the Chilean Civil Code were later borrowed by the Civil Codes of Ecuador, Venezuela, Uruguay and Colombia. In my opinion, the use of Blackstone was significant because it marked a difference with the civil law tradition.

However, that claim must confront some problems. While it is clear that the *language* of the rules of statutory interpretation of the Louisiana Code was directly taken from Blackstone, Blackstone himself was inspired by some civilian authors (notably Samuel Pufendorf), and, thus, some of his ideas were actually of civilian origin. On those grounds, it has been argued by Guzmán Brito²⁹ that Blackstone was only an *intermediary* between the civilian tradition and the drafters of the Loui-

24 RORTY (1979), pp. 9-10. Emphasis added.

25 For instance: WEINRIB (2012), pp. 22-55.

26 For instance: FRANK (1949), pp. vii-xiv. According to Frank, rule-skeptic realists try to reveal the ‘real rules’ used by judges instead of the ‘paper rules’ invoked by them.

27 LOBBAN (2004), p. 3.

28 LOBBAN (2004), p. 12.

29 GUZMÁN BRITO (2009).

siana Civil Code. This would imply that the role played by Blackstone was not that significant. Furthermore, the notes of the drafter of the rules on statutory interpretation contained in the Louisiana Civil Code, Louis Moreau Lislet,³⁰ did not refer to Blackstone, but rather to Jean Domat (another prominent civilian author), and to Spanish law.³¹ While the notes of Moreau Lislet are frequently misleading, as they often refer to different or conflicting ideas, and are focused only on Spanish and Roman law,³² this aspect still needs to be addressed. Finally, at least one article of the Louisiana Civil Code was inspired by the (never enacted) draft of French Civil Code of Year VIII of the Revolution (1800). All these points make it necessary to explore whether these alternative candidates were the *genuine* sources of inspiration of the Louisiana Civil Code, even if the *wording* of the articles of the Louisiana Code was borrowed from Blackstone.

Despite the suggested alternative explanations, I will argue that Blackstone's influence was the dominant one, and that the Louisiana Civil Code marked a departure from the civilian models available at the time. In establishing the prevalence of the literal rule, rejecting the *référé au législatif*, and attempting to narrow judicial discretion through detailed rules on interpretation, the Louisiana Civil Code borrowed from Blackstone. What is more, at the beginning of the nineteenth century, Blackstone's ideas were considered by the American legal scholar James Kent to represent the then dominant approach of English law. According to those ideas, "an act of Parliament delivered in clear and intelligible terms, cannot be questioned (...) in any court of justice", as Parliament was "the highest authority that the kingdom acknowledge[d] upon earth".³³ Blackstone's ideas were contrasted by Kent with those of Sir Edward Coke who, at the beginning of the seventeenth century, had famously argued that "in many cases the common law will control Acts of Parliament".³⁴ Through Blackstone, the Louisiana Code, and later some South-American Civil Codes, came to share a salient characteristic of English law: the prevalence in statutory interpretation of the plain meaning or literal rule. Of course, there were also similarities with civil sources, as I will show, but those alternative potential sources of inspiration did not provide a model of statutory interpretation similar to the Blackstonian or English one.

1.5. Plan of the following sections

In the following sections, I will trace the relevant influences in order to support my claims. First, I will analyse the Louisiana Digest (1808), the Louisiana Civil

30 MOREAU LISLET (1968).

31 According to Cairns, another copy of the Louisiana Digest of 1808, known as the *Mouton Manuscript*, with annotations done by at least two different Louisiana lawyer(s), mentioned Blackstone in relation to six provisions. However, this did not happen in connection with statutory interpretation. Cf. CAIRNS (2009), p. 72.

32 CAIRNS (2009), p. 78-9.

33 KENT (1854), p. 493.

34 *Dr. Bonham's Case*, 8 Co. Rep. 114 (1610).

Code of 1825, and the role that Blackstonian ideas played in inspiring their rules on statutory interpretation. Second, I will explore and relativize the impact of the possible alternative sources of inspiration of the Louisiana Civil Code. The aim will be to demonstrate that Blackstone's ideas provided the dominant inspiration and that the Louisiana drafter did *not* strictly follow the civilian tradition. Third, I will analyse the rules of the Chilean Civil Code on statutory interpretation that were inspired by the Louisiana Civil Code (1825), with the intent to show that the *indirect* use of Blackstone's ideas marked a move away from the civilian tradition, leading to a certain factual convergence with nineteenth century English law. The influence of the rules of the Chilean Civil Code in the Uruguayan Civil Code (1868) will also be addressed, for the purposes of demonstrating the use of James Kent's writings as an additional source of inspiration. Fourth, I will explore briefly if Bello was conscious or not of using Anglo-American legal ideas on the subject of statutory interpretation, and in case the affirmative holds, why he did not acknowledge such use. Finally, some general conclusions will be presented.

2. BLACKSTONE AND THE LOUISIANA CIVIL CODE

2.1. The Influence

Before being incorporated into the United States in 1803, Louisiana was successively a colony of France, Spain, and, again, France. It had, thus, always belonged to the civil law tradition. Its entrance into the United States posed a dilemma for the ruling classes of Louisiana between remaining within the civil law tradition, and being absorbed into the common law world. With the objective of avoiding the latter, in 1806, an act declaring Roman and Spanish law to be in force in Louisiana was approved by the legislature, but was vetoed by the Anglo-American governor.³⁵ Shortly thereafter, however, the Louisiana Digest of 1808, drafted by Louis Moreau Lislet and James Brown, and mostly inspired by French and Spanish law, was enacted.³⁶ The Digest of 1808 included a number of rules on statutory interpretation. In 1825, a new Civil Code was enacted which retained the same rules on statutory interpretation. Thus, in the following pages I will refer indiscriminately to the rules on statutory interpretation of the Digest (1808) and the Louisiana Civil Code (1825), as one and the same set of rules.

The rules of the Louisiana Digest (1808), and the Civil Code (1825) had two main sources: regarding article 13, the French draft of a Civil Code of Year VIII (hereinafter the "French *Projet*"),³⁷ and regarding articles 14 to 18, Blackstone's *Commentaries*. Blackstone's writings have been said to be "a surprising presence (...) in a civilian Code, particularly in matters of interpretation of law, which had been dis-

35 FRANKLIN (1941-1942).

36 BARHAM (1975-1976); HERMAN (2008), pp. 2-6.

37 Commission Nommée par le Gouvernement le 24 Thermidor An VIII, *Projet de Code Civil* (Chez Emery Ventôse an IX-1801).

cussed at length by Domat³⁸. However, this was not the only aspect for which Blackstone's writings provided inspiration, his influence having been traced in relation to other nineteen articles of the Louisiana Civil Code.³⁹

According to Rodolfo Batiza, a prominent Louisiana legal scholar, articles 14 to 18 of the Louisiana Civil Code were a *verbatim* or almost *verbatim* transcription of Blackstone.⁴⁰ That this is so has also been accepted by Antonio Bascuñán⁴¹ and Alejandro Guzmán Brito in Chile.⁴² The following table provides the texts of the Louisiana Code and its corresponding sources of inspiration according to Batiza and Guzmán Brito:

Source of inspiration ⁴³	Louisiana Civil Code 1825 (identical to the provisions of the Digest of 1808)
Article V of French Project Year VIII: When the law is clear, its letter is not to be eluded under the pretext of pursuing its spirit, and in the application of an obscure law, its more natural, and less defective, sense shall be preferred.	Art. 13. When a law is clear and free from all ambiguity the letter of it is not to be disregarded, under the pretext of pursuing its spirit.
Blackstone: Words are generally to be understood in their usual and most known signification; not so much regarding the propriety of grammar, as their general and popular use.	Art. 14. The words of a law are generally to be understood in their most known and usual signification, without attending so much to the niceties of grammar rules as to the general and popular use of the terms.
Blackstone: ...terms of art, or technical terms, must be taken according to the acceptance of the learned in each art, trade and science.	Art. 15. Terms of art, or technical terms and phrases, are to be interpreted according to their received meaning and acceptance with the learned in the art, trade or profession to which they refer
Blackstone: If words happen to be still dubious, we may establish their meaning from the context; with which it may be of singular use to compare a word, or a sentence, whenever they are ambiguous, equivocal or intricate	Art. 16. Where the words of a law are dubious their meaning may be sought by examining the context with which the ambiguous words, phrases and sentences may be compared in order to ascertain their true meaning

38 BATIZA (1971), p. 29

39 TUCKER (1969-1970). BATIZA (1971), p. 12.

40 BATIZA (1971), p. 29.

41 BASCUÑÁN RODRÍGUEZ (2014), p. 306.

42 According to GUZMÁN BRITO (2009).

43 GUZMÁN BRITO (2009).

Blackstone (text introduced by the director of the 12th edition of Blackstone's Commentaries): ...statutes in pari materia, or upon the same subject, must be construed with a reference to each other; that is, that what is clear in one statute, shall be called in aid to explain what is obscure and ambiguous in another.	Art. 17. Laws in pari materia, or upon the same subject matter, must be construed with a reference to each other; what is clear in one statute may be called in aid to explain what is doubtful in another.
Blackstone: The most universal and effectual way of discovering the true meaning of a law, when the words are dubious, is by considering the reason and spirit of it, or the cause which moved the legislature to enact it.	Art. 18. The most universal and effectual way of discovering the true meaning of a law, when its expressions are dubious, is by considering the reason and spirit of it, or the cause which induced the legislature to enact it.

As this table shows, formally, the majority of the rules of the Louisiana Code closely followed Blackstone's wording. Substantially, those rules adopted a hierarchical model of interpretation in which the literal method was given priority. According to the Code, recourse to the spirit of the law and legislative intent was allowed only when the "expressions [were] dubious".⁴⁴ Furthermore, a set of detailed rules guided the judge. Those rules on interpretation were drafted by Louis Moreau Lislet,⁴⁵ a civilian lawyer and French *émigré*⁴⁶ who was familiar with civilian and common law authors in general.⁴⁷ His library included a copy of Blackstone's *Commentaries*,⁴⁸ and, in a report to the Louisiana legislature, he and the other two drafters of the Code of 1825, acknowledged having resorted to "the abundant stores of English Jurisprudence".⁴⁹

In the following sections I will argue that Blackstone pre-figured the main characteristics of nineteenth-century English law on statutory construction,⁵⁰ and that the Louisiana Civil Code followed quite strictly, not only the wording, but also the ideas of Blackstone on statutory interpretation.⁵¹

2.2. Blackstone and English law on Statutory Interpretation

The development of statutory interpretation in English law has been divided into three periods: equity of the statute (up to 1830), strict literalism (1830 to 1950)

⁴⁴ Article 18 of the Louisiana Civil Code.

⁴⁵ BATIZA (1971), p. 28

⁴⁶ PARISE (2012).

⁴⁷ BATIZA (1971), p. 28.

⁴⁸ FRANKLIN (1940-1941), p. 405

⁴⁹ LIVINGSTON *et al.* (1823), p. 6.

⁵⁰ Section 2.2 below.

⁵¹ Section 2.3 below.

and purposive interpretation (1950 to the present).⁵² The development of literalism, according to Plucknett, can be traced back to the middle of the fourteenth century.⁵³ At that time, statutes were ‘regarded as texts which are to be applied exactly as they stand’.⁵⁴ Formally deprived of any discretionary power, the common law judges “took refuge in logic” and devised rules on statutory interpretation of “great complexity”. According to Plucknett, Blackstone, and Kent, in their *Commentaries*, provided a reasonable outline of the system elaborated by the common law courts.⁵⁵ However, the method of interpretation based on the *equity of the statute*, accepted in English law up to the eighteenth century, provided a margin of discretion to the judges “to avoid inequitable results”.⁵⁶ That method according to Bromley C.J. writing in 1554, allowed judges to expound “the words quite contrary to the text [of the statute] in order to make them agree with reason and equity”.⁵⁷ It was the equivalent of the method of interpretation of the civil law tradition based on the *reason* or *spirit* of the law.

The turn to a *strict* literalist approach occurred in the nineteenth century, and was well represented by the decision of the House of Lords in the *Sussex Peerage Claim* in 1844: “if the words of the statute are in themselves precise and unambiguous, then no more can be necessary than to expound those words...”.⁵⁸ This rule is known in English law as the *literal* or *plain meaning* rule.⁵⁹ The English judicial tradition of restricting interpretation to the ‘plain meaning’ of the statute persisted until very recently.⁶⁰ For most of the twentieth century, British courts declined to analyse the legislature’s intent.⁶¹ Waldron noted that “reference to legislative intent is (...) less common in England [than America]”.⁶² Furthermore, English judges only resorted to the *context* of the words when their ordinary meaning was unclear.⁶³

Finally, the unwillingness of nineteenth century English judges to search for the intention of the legislature was a cornerstone of English law till very recently. Originally, in a 1769 case,⁶⁴ the distrust for inquiries into the legislature’s intention seems to have been the lack of reliable materials,⁶⁵ but as late as the 1970s, when

52 LÜCKE (2005).

53 PLUCKNETT (2010), p. 333.

54 PLUCKNETT (2010), p. 333.

55 PLUCKNETT (2010), p. 334 footnote 1.

56 MANNING (2001), p. 8.

57 *Fulmerston v Steward* (1554).

58 *Sussex Peerage Case* (1844), p. 43.

59 HARRIS (2007), p. 157.

60 BIX (2015), p. 165. Bix quotes *Pepper v Hart* (1993).

61 GREENAWALT (2002), p. 281.

62 WALDRON (1999), p. 119.

63 ENDICOTT (2002), p. 949.

64 *Millar v Taylor* (1769), p. 2332 (Willes, J.).

65 VOGENAUER (2005), p. 631.

Hansard reports had become clearly reliable materials, they were still criticized for another reason: they often contained conflicting statements made during the parliamentary debate, and not well-considered responses.⁶⁶

The contraposition between English law and civil law on statutory interpretation is still often summarized as one between textualism and intentionalism:

[T]he English approach is primarily based on ascertaining the plain meaning of the words used, whereas that of the civil law is directed to ascertaining the intention of the legislature.⁶⁷

Blackstone prefigured all the central ideas of English strict literalism.⁶⁸ His writings systematized the rules developed by common law courts and in doing so, as he frequently did, Blackstone also took inspiration from the civil law tradition. In this case he relied heavily on Samuel Pufendorf's works. Blackstone's main ideas can be explained as follows. First, Blackstone rejected the method of interpretation by the legislature (*référé au législatif*), which he considered to afford "great room for partiality and oppression".⁶⁹

Second, he endorsed a hierarchical method of interpretation which had three levels. In the first instance, there was the literal rule, which consisted of interpreting the meaning of the words taken in "their usual and most known signification" or, in case of "terms of art, or technical terms" in their signification "in each art, trade, and science". This rule only admitted of exceptions when the relevant words had *no sense* or had an *absurd* one (the so-called *golden rule*),⁷⁰ for instance, because of the existence of a logical contradiction. The "golden rule" was not to be applied merely because the judge thought that a certain meaning was unreasonable, or unjust.⁷¹ At the second level, Blackstone recommended resorting to the context of the statute *only* if the relevant "words happen[ed] to be still dubious". By context Blackstone understood the preamble of a statute and "other laws [...] that have some affinity with the subject".⁷² Reference to context only in cases of doubt, was to be another central characteristic of English law in this matter. Indeed, the no-context approach was relaxed only after the *Prince of Hanover* case in 1957,⁷³ where the House of Lords

66 VOGENAUER (2005), p. 630.

67 FREEMAN (2008), p. 1555.

68 According to MANNING (2001), the doctrine of the equity of the statute was progressively abandoned after the principle of separation of powers triumphed in the English Revolution of 1688, and literalism began to emerge during the eighteenth century. Blackstone's writings need to be seen in that context.

69 BLACKSTONE (1783), p. 59.

70 HARRIS (2007), p. 158.

71 As HARRIS remarks 'both the literal and the golden rules emphasise fidelity to the legislature's words, although the latter makes some allowance for consequences'. HARRIS (2007), p. 158.

72 BLACKSTONE (1783), p. 60.

73 *Attorney-General v Prince Ernest Augustus of Hanover* (1957).

held that context ought to be taken into account even in cases where the ordinary meaning of words was clear.⁷⁴ Lastly, at a third level, Blackstone indicated that if “the words [were] still dubious” recourse could be have to the reason of the law (its spirit) or to “the cause which moved the legislator to enact it” (the legislature’s intent).⁷⁵ Blackstone’s preference for the literal or plain meaning rule was illustrated by his view that the reason of the law was *only* to be examined if the relevant words were dubious. Marking his discrepancy with other (unidentified) legal actors of his time, Blackstone made clear his opinion that the letter of the law was to be followed even if it seemed unreasonable to the judge:

I know it is generally laid down [...] that acts of Parliament contrary to reason are void. But if the Parliament will positively enact a thing to be done which is unreasonable, I know of no power in the ordinary form of the constitution that is vested with authority to control it.⁷⁶

In the view of Blackstone, to make available to the judiciary the possibility of declaring void an unreasonable statute “would be subversive of all government”.⁷⁷ He was equally distrustful of the doctrine of the *equity of the statute*: “which would make every judge a legislator and introduce most infinite confusion”.⁷⁸ Even though Blackstone tended towards natural law doctrines and argued for the proposition that a *bad law was not law at all*, he clearly subscribed to a literal approach to statutory interpretation which seemed at odds with these natural law school teachings.

Thus, Blackstone’s ideas were very similar to those that will dominate English law in the nineteenth century “when fidelity to the written word [of the statutes] was at its height”.⁷⁹ As already mentioned,⁸⁰ Kent considered Blackstone as a conspicuous representative of the English marked deference for Parliament-made law.

2.3. Coincidences between Blackstone and the Louisiana Code

The Louisiana Civil Code not only used phrases from Blackstone’s *Commentaries*, but also embodied Blackstone’s substantive ideas on statutory interpretation. First, in line with Blackstone, the Louisiana Civil Code did not adopt the mechanism of the *référé au législatif*. Second, the literal method of interpretation was granted strict priority by Article 13, while the intention of the legislature and the reason of the statute were only to be considered in case the meaning of the letter was “dubious”

74 ENDICOTT (2002), p. 949.

75 BLACKSTONE (1783), p. 60.

76 BLACKSTONE (1783), p. 91.

77 BLACKSTONE (1783), p. 91.

78 BLACKSTONE (1783), p. 62.

79 HARRIS (2007), p. 159.

80 Section 1.4 above.

(Article 18 of the Louisiana Civil Code).⁸¹ The wording of the rule was identical to that in Blackstone's *Commentaries*. Thus, as much as Blackstone, the Louisiana Civil Code adopted a *hierarchical* model of statutory interpretation. Third, according to the Louisiana Civil Code, the context of words was to be taken into account only if the meaning of those words was 'dubious' (Article 16 of Louisiana Civil Code). Blackstone postulated the same: "If words happen to be still dubious, we may establish their meaning from the context".⁸² Finally, the Louisiana Civil Code included in its Articles 14 and 15 the same detailed rules postulated by Blackstone for the purpose of guiding the judge in the activity of interpretation: words were to be interpreted in accordance with their ordinary meaning, unless it appeared that they were used in a technical sense, in which case their technical meaning should prevail.⁸³

Not only did the provisions of the Code indicate coincidences between the opinion of the drafters of the Louisiana Civil Code and Blackstone. In a 1823 report,⁸⁴ those drafters explicitly said that the *référé* involved the 'manifest injustice of making the law with reference to an existing case', and, hence, the union of judicial and legislative powers, which was prohibited under the Louisiana Constitution (1812). In their opinion, the central problem with the *référé au législatif* was that it compromised the principle of the separation of powers, by assigning judicial functions to the legislature. These arguments were very similar to those used by Blackstone, who characterized the *référé* as a source of "partiality" and "oppression".⁸⁵

In the same report of the Louisiana Code's drafters, the judges were described as "the organ for *giving voice* (...) to what the legislative branch has decreed".⁸⁶ The only discretion accorded to the judges, it was said, was that which allowed them "to determine the meaning of the Law when it [was] *doubtful*".⁸⁷ Again, these propositions reflect perfectly Blackstone's ideas and, in particular, his suggestion that recourse to the reason or spirit of the law, which involved an element of judicial discretion, was reserved to the cases where the meaning of the letter of the law was "dubious".⁸⁸

The significant influence of Blackstone on the Louisiana Civil Code is evidenced by a series of factors that must be considered together: the marked similarities of wording between the Louisiana Code and Blackstone's *Commentaries*,⁸⁹ the avai-

81 See Section 2.1 above,

82 See Section 2.2 above

83 See Section 2.2 above.

84 LIVINGSTON *et. al.* (1823), p. 5.

85 BLACKSTONE (1783), p. 59.

86 LIVINGSTON *et. al.* (1823), p. 8. Emphasis added.

87 LIVINGSTON *et. al.* (1823), p. 8.

88 BLACKSTONE (1783), p. 60.

89 Section 2.1 above.

lability of those *Commentaries* to the drafters of the Louisiana Civil Code,⁹⁰ the fact that those drafters acknowledged that they had made use of the “abundant stores” of English jurisprudence,⁹¹ and the clear influence of Blackstone in other areas of the Louisiana Code.⁹² Finally, as we shall see in the following section, all the other potential sources of inspiration (either mentioned by the drafters of the Louisiana Code or by legal historians), when considered in their entirety, differed from Blackstone’s ideas, and the Louisiana Code provisions.

3. DISCARDING ALTERNATIVE CANDIDATES

3.1. The Civil Law Tradition and the Louisiana Civil Code

As already mentioned,⁹³ doubts about the significance of Blackstone’s influence have been voiced, and additionally the drafter of the Louisiana Digest (1808) in this respect (Moreau Lislet) indicated some other potential sources of inspiration. In theory, the writings of Jean Domat and Samuel Pufendorf, and French and Spanish law could have been the alternative sources of inspiration of the rules of statutory interpretation of the Louisiana Civil Code. We, therefore, need to consider whether those other sources were indeed an equal, or more relevant source of inspiration than Blackstone.⁹⁴

3.2. Jean Domat

In the *De la Vergne Volume*,⁹⁵ the drafter of the rules of statutory interpretation of the Louisiana Digest of 1808, made several annotations connecting those rules with the writings of Jean Domat (1625-1696). Domat was a French legal scholar from the natural law school, who authored *The Civil Law in its Natural Order*, first published in 1689.⁹⁶ There, among other things, Domat expressed his ideas about statutory interpretation in the form of rules. The following table presents Domat’s rules followed by the articles of the Louisiana Code connected to them, in accordance with Moreau Lislet’s notes.

90 FRANKLIN (1940-1941), p. 405.

91 LIVINGSTON *et. al.* (1823), p. 6.

92 KNÜTEL (1995-1996), pp.1458-1459.

93 See Section 1.4 above.

94 Rolf Knütel, a prominent German legal scholar, has postulated that the source of inspiration of Article 13 of the Louisiana Civil Code was a rule of Roman law on the interpretation of wills (D 32.25.1). However, he does not provide an explanation for the remaining provisions on statutory interpretation of the Louisiana Code. Cf. KNÜTEL (1995-1996), p. 1458.

95 See Section 1.4 above.

96 DOMAT (1689).

Domat's texts indicated by the drafter of the Louisiana Digest ⁹⁷	Louisiana Civil Code
Domat's rule XII: "If the words of a law express clearly the sense and intention of the Law, we must hold to that. But if the true sense of the law cannot be sufficiently understood [...] or that the sense of the Law being clear there arise from it inconveniencies to the publick good (sic); we must in this case have recourse to the Prince, to learn of him his intention [...]"	Art. 13. When a law is clear and free from all ambiguity the letter of it is not to be disregarded, under the pretext of pursuing its spirit.
Domat rule XIX: 'If the difficulties which may happen in the interpretation of a Law [...] are explained by an ancient Usage we must stick to the sense declared by the constant Practice"'.	Art. 13. When a law is clear and free from all ambiguity the letter of it is not to be disregarded, under the pretext of pursuing its spirit.
Domat's rule IX: "The obscurities, ambiguities and other defects of expression, which may render the sense of a Law dubious [...] ought to be resolved by the sense that is most natural, that has the greatest relation to the Subject, that is most conformable to the intention of the lawgiver, and most agreeable to Equity [...]"	Art. 14. The words of a law are generally to be understood in their most known and usual signification, without attending so much to the niceties of grammar rules as to the general and popular use of the terms.
There is no reference for this article in the <i>De la Vergne Volume</i> .	Art. 15. Terms of art, or technical terms and phrases, are to be interpreted according to their received meaning and acceptation with the learned in the art, trade or profession to which they refer
Domat's rule X: "For understanding aright the sense of a law, we ought to consider well all the words of it, and its Preamble, if there be any, that we may judge of the meaning of the law, by its motives, and by the whole tenor of what it prescribes [...] Thus, it is to transgress against the Rules and the Spirit of the laws, to make use [...] of any one part of a Law taken separately from the rest [...]"	Art. 16. Where the words of a law are dubious their meaning may be sought by examining the context with which the ambiguous words, phrases and sentences may be compared in order to ascertain their true meaning
Domat's rule XI: "If there happens to be omitted in a law anything that is essential to it, or that is a necessary consequence of its disposition, and that tends to give the law its entire effect, according to its motive; we may in this case supply what is wanting in the expression, and extend the disposition of the law to what is included within its intention, altho' not expressed in the words."	

97 Cited from: DOMAT (1737), pp. 7 and following. In the Preliminary Book Title 1 Section 2 (of the Rules of Law in General), Domat provides twenty-nine rules numbered from I to XXIX which are referred to in the *De la Vergne Volume*. Emphasis added.

Domat's rule XVIII: "If the Law in which there is some doubt, or other difficulty, have any relation to other laws which may help to clear up their sense, we must prefer to all other interpretations that which they may have from the other Laws [...]"	Art. 17. Laws <i>in pari materia</i> , or upon the same subject matter, must be construed with reference to each other; what is clear in one statute may be called in aid to explain what is doubtful in another.
Domat's rule IX: "The obscurities, ambiguities and other defects of expression, which may render the sense of a Law dubious [...] ought to be resolved by the sense that is most natural, that has the greatest relation to the Subject, that is most conformable to the intention of the lawgiver, and most agreeable to Equity [...]"	Art. 18. The most universal and effectual way of discovering the true meaning of a law, when its expressions are dubious, is by considering the reason and spirit of it, or the cause which induced the legislature to enact it.

As the preceding table shows, there was a certain parallelism between the rules proposed by Domat and those of the Louisiana Civil Code. Both provided that the law was to be followed in cases where the language was clear, though 'clarity' was differently described (Article 13 of the Louisiana Code), that the meaning assigned to words should be their natural (ordinary) one (Article 14 of the Louisiana Code), that the context and laws *in pari materia* were to be consulted (Articles 16 and 17 of the Louisiana Code), and that the spirit of the law was to be taken into account in case of obscurity of the letter (Article 18 of the Louisiana Code). However, a number of key *differences* emerge from the *whole picture* of the ideas proposed by Domat on the subject of statutory interpretation.⁹⁸ Put briefly: differently from Blackstone and the Louisiana Code, Domat did *not* favour giving unconditional priority to a literal interpretation,⁹⁹ and he suggested interpretation by the sovereign when doubts arose (*référé au législatif*).¹⁰⁰

In relation to the first difference, while the Louisiana Code provided that "where the law is clear (...) the letter of it is not to be disregarded" (Article 13), Domat postulated that in some cases even when "the sense of the Law [was] clear" if "there ar[o]se from it inconveniences to the public good" the letter was not to be followed, and the prince (the law-giver) should be consulted (Domat's rule XII). This idea was reaffirmed by Domat in another part of the same chapter:

when it happens that the sense of the law, *how clear so ever it may appear in the words*, would lead us [...] to Decisions that would be unjust [such event] obliges us to discover [...] *not* what the law says, but what it means.¹⁰¹

98 The differences between Domat's ideas and the rules of statutory interpretation of the Chilean Civil Code have been analyzed in detail by Antonio Bascuñán in BASCUÑÁN RODRÍGUEZ, (2014), pp. 263-349.

99 DOMAT (1737), Rule XII.

100 Domat (1737), Rule XII.

101 DOMAT (1737), p. 7. Emphasis added.

Thus, according to Domat, literal interpretation should *not* always prevail over other methods. The interpreter could justifiably look for non-literal interpretations when he was convinced that the literal meaning was unjust or against the public good. Contrariwise, Article 13 of the Louisiana Code prohibited disregarding the letter of the law “under the pretext of pursuing its spirit”. This is a remarkable difference between Domat on the one hand, and Blackstone and the Louisiana Code, on the other. As already mentioned, Blackstone and the Louisiana Code postulated recourse to the reason (spirit) of the law in cases where the meaning of the letter was dubious.¹⁰² Interestingly, Gabriel Ocampo, a member of the governmental commission which reviewed the draft of the Chilean Civil Code, acknowledged in a manuscript note in his draft of the Code, the existence of this difference between Domat and the Louisiana and Chilean Codes.¹⁰³ On the margin of article 19 of the Chilean Civil Code (which reads: ‘When the meaning of the law is clear its literal tenor shall not be disregarded under excuse of consulting its spirit’), Ocampo commented: “Domat seems to profess a contrary opinion”.¹⁰⁴ This is doubly relevant. First, it indicates that some contemporaries were aware of the differences between the Louisiana (and Chilean) Code, and Domat’s ideas. Second, Ocampo’s annotation is likely to reflect the fact that the difference was discussed in the meetings of the commission with Andrés Bello, the drafter of the Chilean Civil Code, and hence that the departure from Domat was conscious.

The second difference with Domat was that, while Blackstone and the Louisiana Code were opposed to the method of the *référé au législatif*, Domat argued for it:

[I]f the true sense of the law cannot be sufficiently understood [...] we must in this case have recourse to the Prince, to learn of him his intention.¹⁰⁵

Therefore, even if there was a similitude between the ideas of Domat, and those of Blackstone and the Louisiana Code, the similarity dissolves as soon as the *whole* picture of the rules on statutory interpretation is borne in mind. Domat endorsed the *référé au législatif* and a *non*-hierarchical model of interpretation, while Blackstone and the Louisiana Code endorsed the *opposite*. As such, Domat might have been a partial inspiration for the Louisiana Code, but not the most significant one.

102 Domat also suggested that in his rule IX. The point is that he admitted the same when the letter of the law was clear, but unjust or inconvenient.

103 Ocampo’s annotated copy of the Chilean Civil Code is preserved at Universidad de Chile. Consulted at <http://libros.uchile.cl/568> on January 2nd, 2017.

104 In Spanish the annotation reads: “Domat parece profesar una opinion contraria”.

105 DOMAT (1737), Rule XII.

3.3. Spanish Law

The drafter of the rules on statutory interpretation of the Louisiana Digest of 1808, also mentioned a number of rules of Spanish law in connection with Article 13 of the Digest. The following table compares those Spanish law rules with the Louisiana Civil Code.

Spanish law	Louisiana Civil Code
<p>Law 14 Title 1 Partida¹⁰⁶</p> <p>Being the meaning of the law doubtful, either due to a mistake in their drafting or to a mistake of the reader, when that meaning needs to be correctly explained and the truth of the law understood, this can be done only by that who made the law.</p>	<p>Art. 13 of the Louisiana Civil Code).</p> <p>When a law is clear and free from all ambiguity the letter of it is not to be disregarded, under the pretext of pursuing its spirit.</p>
<p>Law 4 Title 33 Partida¹⁰⁷</p> <p>No one, but the King, should explain or declare the law when there is some doubt about the words or their understanding</p>	
<p>Law 3 Title 1 Book 2 Recopilación Castellana¹⁰⁸</p> <p>And because it belongs to the King and he has power to enact, interpret and declare the law (...) We think it appropriate that if (...) some declaration or interpretation is needed (...) We [the King] shall do it (...).</p>	

The three rules of Spanish law mentioned by the drafter of the Louisiana Digest of 1808 stipulated that interpretation of the law was reserved to the King (*référé au législatif*). This was clearly in contradiction with the Louisiana Code, which did not make use of this idea. Furthermore, these rules of Spanish law were in opposi-

106 LÓPEZ (1555), p. 8. The text in (old) Spanish reads as follows: “Dubdosas seyendo las leyes por yerro de escriptura, o por mal entendimiento del que las leyese porque debiessen de ser bien espaladinadas, e fazer entender la verdad dellas: esto non puede ser por otro fecho sino por aquel q las fizo o por otro q sea en su logar, que aya poder de las fazer de nuevo, e guardar aquellas fechas”. The translation to English was done by the author of this article.

107 LÓPEZ (1555), p. 97. The text in (old) Spanish reads as follows: ‘Espaladinar, nin declarar, non deve ninguno, nin puede las leyes si non el Rey quando dubda acaeciesse sobre las palabras, o el entendimiento de ellas’. The translation to English was done by the author of this article.

108 *Recopilación de las leyes destos Reynos hecha por mandado de la Majestad Católica del Rey Don Philippe segundo Nuestro Señor* (Alcalá de Henares 1569), pp. 45-46. The source is an Act passed by King Alphonse in 1386. The text in (old) Spanish reads as follows: “Y porq al Rey pertenece y a poder de hazer fueros y leyes y de las interpretar y declarar [...] tenemos por bien que si en los dichos fueros ...o en algunas leyes [...] fuere menester declaración y interpretación [...] que nos lo haremos”. The translation to English was done by the author of this article.

tion to the opinion of Blackstone, and the drafters of the Louisiana's Code.¹⁰⁹ The only explanation available for the making of these mentions by Moreau Lislet is that they were done in order to emphasize the divergence. This is not surprising: John W Cairns, a prominent legal historian, has noted that allusions in the *De la Vergne Volume* point to 'similar, equivalent, and contradictory provisions in Roman and Spanish law, not to sources'.¹¹⁰ Thus, we can discard Spanish law as a primary source of inspiration of the rules of statutory interpretation of the Louisiana Civil Code, even though the drafter mentioned it.

3.4. Samuel Pufendorf

We must now turn to a suggestion advanced by the prominent Chilean legal historian, Alejandro Guzmán Brito. According to him, while it is clear that the drafter of the Louisiana Digest's rules on statutory construction made use of Blackstone's ideas, there was nothing original in Blackstone from which the Louisiana Civil Code could benefit.¹¹¹ In Guzmán Brito's opinion, Blackstone's own ideas were substantially informed by the civil law tradition, through the medium of Samuel Pufendorf's writings. There is a great deal of truth in this assertion: on the matter of statutory interpretation, as with many other topics, Blackstone consulted and partially followed civilian authors. This was a general characteristic of his *Commentaries on the laws of England*. More specifically, in the area of statutory interpretation, Blackstone relied heavily on the works of Samuel Pufendorf (1632-1694), a leading German scholar of the natural law school. In his book, *De Jure Naturae et Gentium (Of the Law of Nature and Nations)*, first published in 1672, Pufendorf devoted one chapter to the interpretation of statutes, explicitly following Hugo Grotius, another prominent member of the natural law school. There were several coincidences in the thinking of Blackstone and Pufendorf. Indeed, it seems clear that many ideas and phrases in Blackstone were taken almost literally from Pufendorf's work, such as the rules on ordinary and technical meanings of words, *parts* of the rule on the intention of the legislature, and many other examples. However, despite these resemblances, there were also some important differences between the views of the two writers. Those differences emerge if, instead of focusing on those *individual* elements, we take a look at the whole picture.

First, the method of interpretation advocated by Pufendorf was a non-hierarchical one in which literal and non-literal elements could be applied simultaneously. According to Pufendorf:

The True End and Design of Interpretation is to gather the intent of the man from most probable signs [...] words, and other conjectures, which may be considered separately, or both together.¹¹²

109 Section 2.3 above.

110 CAIRNS (2009), pp. 77-8.

111 GUZMÁN BRITO (2009).

112 PUFENDORF (1717), p. 51.

Second, there was a more crucial disagreement between the two writers concerning the relationship between a statute and the reason for its enactment. Pufendorf, as much as Blackstone, recommended caution in the use of equity for interpretative purposes. However, he admitted that we could act “counter to” the “letter of the law” if “we find that the precise adhering to the letter is (...) repugnant to the law of God or Nature. For to such, no man can be obliged”.¹¹³ The making of this statement by a writer from the natural law school is not surprising. However, as mentioned earlier,¹¹⁴ Blackstone was in complete disagreement:

[I]f the Parliament will positively enact a thing to be done which is unreasonable, I know of no power in the ordinary form of the constitution, that is vested with authority to control it.¹¹⁵

Thus, according to Blackstone, a statute issued by Parliament should be obeyed, no matter how ‘unreasonable’ or, in other words, how unjust it may seem. This proposition has led several legal scholars to question the consistency of Blackstone’s adherence to natural law doctrines. In particular, Gareth Jones has doubted the possibility of reconciling Blackstone’s apparent ideas about natural law with his conception of an “uncontrolled” sovereign (Parliament).¹¹⁶ Recourse to the reason of the law was confined by Blackstone to the cases “when the words [were] dubious” (i.e. the cases that could not be resolved under the plain meaning rule).

Finally, a comparison of the following passages from the writings of Pufendorf and Blackstone reflects further differences in their approaches to interpretation. While Pufendorf considered the reason or spirit of the law to be “that which helps us most” in interpretation, Blackstone resorted to the same only “when the words [were] dubious”.

Pufendorf	Blackstone
“But that which helps us most in the Discovery of the true meaning of the Law is the Reason of it, or the Cause which moved the legislator to enact it”. ¹¹⁷	“But, lastly, the most universal and effectual way of discovering the meaning of the law, <i>when the words are dubious</i> , is by considering the reason and spirit of it” ¹¹⁸

113 PUFENDORF (1717), p. 315. Emphasis added

114 Section 2.2 above.

115 BLACKSTONE (1783), p. 91.

116 JONES (1973), p. xxxviii.

117 PUFENDORF (1717), p. 397.

118 BLACKSTONE (1783), p. 61. Emphasis added.

This difference is remarkable. Throughout his chapter Blackstone was clearly following Pufendorf's text. However, on arriving to Pufendorf's discussion of the spirit of the law, Blackstone took special care to explain that the use of the same should be limited to the cases where the words were dubious, thereby adding a requirement that was *not* present in Pufendorf.

To summarize, Guzmán Brito is entirely right in recognizing the extensive use that Blackstone made of Pufendorf's writings on the subject of interpretation. However, there was a *crucial* difference between the works of the two theorists: Blackstone was more inclined to the literal method of interpretation, as a consequence of his deference to Parliament-made law, while Pufendorf was prepared to disregard literal interpretation, where it would result in a violation of natural law. For Blackstone, recourse to the reason of the law or the intention of the legislature, was a merely subsidiary method. That was also the approach adopted by the Louisiana Civil Code (Article 18). Thus, contrary to Guzmán Brito's opinion, Blackstone did not merely transcribe Pufendorf's texts, he also contributed other and different ideas.

3.5. French Law

Within French legal ideas, there was a difference between the French *Projet* of a Civil Code of 1800, never enacted, and the French Civil Code, enacted in 1804. While, the French *Projet* did include provisions concerning judicial statutory interpretation, the French Civil Code (1804) did not. Therefore, only the French *Projet* could have served as an inspiration for the Louisiana Civil Code. Moreau Lislet did not mention it in the *De la Vergne Volume*, but the similarities between Article 13 of the Louisiana Code and Article V Title V of the Preliminary Book of the French *Projet* have reasonably led legal scholars to postulate that influence.¹¹⁹

Article V, Title V, Preliminary Book of the draft of a French Civil Code of Year VIII (1800) ¹²⁰	Louisiana Civil Code
Article V. When the law is clear, its letter is not to be eluded under the pretext of pursuing its spirit; and in the application of an obscure law, its more natural, and less defective, sense shall be preferred.	Art. 13. When a law is clear and free from all ambiguity the letter of it is not to be disregarded, under the pretext of pursuing its spirit.

The parallelism between the first part of Article 13 of the Louisiana Code and Article V of the French *Projet* is obvious. Both provided that, when the meaning of a

¹¹⁹ GUZMÁN BRITO (2009).

¹²⁰ Commission nommée par le Gouvernement le 24 Thermidor an VIII, *Projet de Code Civil* (Chez Emery, Ventôse an IX-1801). The translation into English was done by the author of this article.

statute was clear, this meaning ought not to be eluded under the pretext of looking for the statute's spirit. Furthermore, as much as Article 16 of the Louisiana Civil Code, Article VI of the French draft Civil Code prescribed contextual analysis.¹²¹ But the coincidences ended there. For instance, unlike the Louisiana Civil Code, the French *Projet* was silent on the question of how judges should assign meaning to the words of the statute, and all of the other provisions of the French *Projet* had no parallel in the Louisiana Code. However, while many detailed rules in the two documents differed, the overall conception of statutory interpretation of the French *Projet* was similar to that of the Louisiana Code.

In addition, there was another coincidence with the Louisiana Code: the French *Projet* (1800) did *not* adopt the method of the *référé au législatif*, a cornerstone of French law after the Revolution, the goal of which was the subjugation of the judiciary. An Act of August 1790 obliged the courts "to address themselves to the legislature whenever they think it necessary [...] to interpret a law".¹²² This was not new: under the *ancien régime*, an *Ordonnance de Réformation de la Justice Civile* of April 1667 provided that statutory interpretation was reserved to the sovereign.¹²³ However, in 1800, at the same time of the drafting of the French *Projet* of 1800, the *référé au législatif* had lost its popularity. In that same year, the *référé au législatif* was abandoned, and for a *brief* period the *Cour de Cassation*, considered by French contemporaries to be a "necessary evil", stood as the last word on interpretation.¹²⁴

The model of the French *Projet* (1800), so similar in its philosophy to the Louisiana Code, had a very short life, and never became positive law. First, the French Civil Code enacted in 1804 did not include rules on statutory interpretation. Second, three years later, in 1807, the *référé législatif* was reintroduced into French law under the form of a *référé* to the executive power.¹²⁵ The result was that, by the time that the Louisiana Digest of 1808 was being drafted, French law contrasted strongly with the model adopted in Louisiana.

To summarize, the general philosophy on statutory interpretation of the French *Projet* (1800), which never became positive law, certainly coincided with that of the Louisiana Code, but, apart from that, French positive law had little influence in the Louisiana Civil Code. A few years after the drafting of the *Projet*, French law had adopted a different solution: no rule at all governing judicial interpretation (Civil Code of 1804), and a return to the *référé au législatif* (1807). Naturally, the *political ideal* that the legislature should prevail over the judiciary, had many supporters in France, as much as in Louisiana, throughout the nineteenth century: the French

121 Article VI: "Pour fixer le vrai sens d'une partie de la loi, il faut en combiner et en réunir toutes les dispositions".

122 DAWSON (1968), pp. 375-6.

123 PLANIOL and RIPERT (1997), p. 25.

124 GHESTIN and GOBEAUX (1994), pp. 372-3.

125 GHESTIN and GOBEAUX (1994), pp. 372-3; DAWSON (1968), p. 379. After a subsequent reform in 1828, the *référé au législatif* was in force until derogated by an Act of 1st April 1837.

exegetic school as a whole is clear evidence of that.¹²⁶ The crucial difference with Louisiana, was not one of political philosophy, but of the form of implementation of that ideal into the law.

3.6. Summary

In the preceding sections, I argued that Blackstone was the most significant inspiration for the rules of the Louisiana Civil Code on statutory interpretation, by showing that none of the other alternatives could have a similar influence. Blackstone's *Commentaries* provided the wording of the provisions, and *also* the broad conception of interpretation adopted by the Louisiana Code. That model had three main characteristics: (a) it was a hierarchical approach: the literal or plain meaning rule unconditionally prevailed over interpretation based on the spirit of the law or the intention of the legislature, in a manner different from the approaches of Domat and Pufendorf, (b) it did not adopt the method of the *référé législatif*, in contrast with the approaches of Domat, Spanish law, and French Law, and being, thus, more coherent in its respect for the principle of separation of powers,¹²⁷ and (c) it included detailed legal rules that guided judicial interpretation, unlike the French Civil Code of 1804 and Spanish law (though, quite like Blackstone, Domat and Pufendorf).

Among the sources considered above as potential influences for the Louisiana Code, the model most similar to Blackstone's was that of the short-lived French *Projet* of 1800. First, both were motivated by the political objective of constraining judicial discretion. Second, the French *Projet* inspired one of the articles of the Louisiana Code (Article 13). Lastly, even bearing in mind that almost all the other rules were different from those of the Louisiana Code, it is undeniable that, in general terms, Blackstone and the French *Projet* took a similar approach to statutory interpretation. However, historically speaking there is a key difference between them. While the French *Projet* represented a short lived phenomenon within French legal ideas, Blackstone's ideas became a central characteristic of English law.

Thus, the Louisiana Civil Code, through Blackstone, adopted a central characteristic of nineteenth century English law (the plain meaning rule) which stood in sharp contrast to both the civilian tradition (Pufendorf, Domat and Spanish law) and the lack of regulation of interpretation in the recent French Civil Code (1804). The same can be said of the Chilean Civil Code and its sequel, (Ecuador, Uruguay and Colombia) that were inspired by the Louisiana Civil Code.

Contemporaries were aware that Blackstone and English law coincided on the subject of statutory interpretation. By the beginning of the nineteenth century, James Kent, an Anglo-American author widely read in South America, had written that absolute deference to Parliament-made law was a "principle of English law", and identified Blackstone as its champion.¹²⁸ Through Kent, many South-American

¹²⁶ DAWSON (1968), pp. 392-4.

¹²⁷ In the case of French law, except for a brief period between 1800 and 1807 as explained above in Section 2.2.

¹²⁸ KENT (1854), p. 493.

legal actors could have become aware of this central characteristic of English law, and that Blackstone could be used as a relevant source of inspiration in that area. For instance, Bello and Narvaja, the drafters of the Chilean and Uruguayan Codes were both readers of Kent, and convinced partisans of literalism in matters of statutory interpretation. In the following section we turn to those aspects, while exploring the indirect influence of Blackstone in some South-American Civil Codes.

4. BLACKSTONE'S INDIRECT INFLUENCE IN SOUTH-AMERICAN CIVIL CODES

4.1. Statutory Interpretation in the Chilean Civil Code

Articles 19 to 22 of the Chilean Civil Code (1855) dealt with statutory interpretation. As Andrés Bello, the drafter of the Code, explicitly acknowledged,¹²⁹ those rules were inspired by the Louisiana Civil Code (1825). In the following table the correlative articles of the Louisiana Civil Code and the Chilean Civil Code are compared and the differences highlighted:

Louisiana Civil Code	Chilean Civil Code ¹³⁰
Art. 13. When a law is clear and free from all ambiguity the letter of it is not to be disregarded, under the pretext of pursuing its spirit.	Art 19. (First Part). ¹³¹ When the meaning of the law is clear its literal tenor is not to be disregarded under pretext of consulting its spirit.
Art. 14. The words of a law are generally to be understood in their most known and usual signification, without attending so much to the <i>niceties of grammar rules</i> as to the general and <i>popular</i> use of the terms.	Art. 20. The words of the law are to be understood in their obvious and <i>natural</i> sense, according to the general [<i>popular</i>] use of the same words [<i>niceties of grammar</i>]; but when the legislator has defined the words expressly for certain subject matters, they are to be given in those subject matters their legal meaning.
Art. 15. Terms of art, or technical terms and phrases, are to be interpreted according to their received meaning and acceptance with the learned in the art, trade or profession to which they refer.	Art. 21. Technical terms of any science or art are to be taken according to the meaning given to them by those who profess the same science or art; unless it clearly appears that they have been taken with a different meaning.

¹²⁹ BELLO (1981), pp. 41-42.

¹³⁰ In italic: Louisiana text omitted by Bello. In bold: text added by Bello.

¹³¹ In the table above Art. 19 of the Chilean Code is divided into its two parts in order to confront it with the different Louisiana articles which were its sources: 13 and 18.

Art. 16. Where the words of a law are dubious their meaning may be sought by examining the context with which the ambiguous words, phrases and sentences may be compared in order to ascertain their true meaning.	Art. 22 Inc. 1°. The context of the law shall serve to illustrate the meaning of each of its parts, so that there is between all of them the due correspondence and harmony.
Art. 17. Laws in <i>pari materia</i> , or upon the same subject matter, must be construed with reference to each other; what is clear in one statute may be called in aid to explain what is doubtful in another.	Art. 22 inc. 2°. The obscure phrases of a law might be illustrated by means of other laws particularly if they refer to the same subject matter.
Art. 18. The most universal and effectual way of discovering the true meaning of a law, when its expressions are dubious, is by considering the reason and spirit of it, or the cause which induced the legislature to enact it.	Art 19 (Second part). But it is possible, in order to interpret an obscure expression of the law, to have recourse to its intention or spirit, clearly manifested in itself or in the trustworthy history of its enactment.

Thus, as much as the Louisiana Code, the Chilean Civil Code did *not* oblige the judge to consult the legislature in cases of doubt: there was no *référé au législatif*. Both Codes adopted a *hierarchical* model under which the literal method prevailed, and both included a series of *detailed rules* on interpretation, in an attempt to narrow judicial discretion.

According to the first part of Article 19, interpretation should be focused on the meaning of the letter of the statute (“literal tenor”). The second part of the same article provided that recourse to the intention or the spirit of the law was *only* permitted if some expression of the statute remained ‘obscure’. There was a clear coincidence between the Chilean Code’s rules, and those contained in Articles 13 and 18 of the Louisiana Civil Code. The other articles of the Chilean Code provided detailed rules on how the letter of the statute should be interpreted, and in doing so, also followed the language of the Louisiana Code: the ordinary meaning of the words was to be preferred, unless they had been used in a technical sense. Furthermore, the context (including the statute within which the words were contained and other statutes concerning a similar subject matter) should be taken into account.

All of these rules were concerned with *literal* interpretation: *what* meaning should be assigned to isolated words (ordinary, technical or legal), and *what* aspects of the context were to be taken into account (the provisions included in the same statute, and those included in statutes about similar matters). The Chilean rules exhibited a marked preference for a literal method of interpretation. The exploration of the intention of the legislature or the reason (or spirit) of the law, was of secondary priority. The prevalence of the literal method was accompanied by a series of detailed rules that were aimed at further constraining the judge. Except for some differences, which will be explained below, the Chilean Civil Code followed the Louisiana one.

It is understandable that the drafter of the Chilean Civil Code took inspiration from the Louisiana Code, as he was convinced that the literal method was the most

adequate solution in matters of statutory interpretation. Writing in 1842, Bello explained:

We believe that confining [interpretation] to the letter is [the] safest [method of statutory interpretation]; that we should not extend or restrict it, except when evident absurdities and contradictions derive from that,¹³² and that any other system of interpretation opens the gates to *arbitrariness*, and destroys the *empire of law*.¹³³

According to Bello, the literal method was a means to avoid “arbitrariness”, something that was against the rule of law (‘empire of law’). Perhaps with some irony, Bello referred to the antagonists of the literal method as those who believed that “‘interning oneself into the mind of the legislator was the most sublime aspect of legal hermeneutics’.”¹³⁴ Writing in 1836, long before the Chilean Code was enacted, Bello expressed an obvious distrust towards the judiciary, and wrote that the judge should be “a slave of the law”.¹³⁵ Moreover, as much as Blackstone and the drafters of the Louisiana Code, Bello believed that the *référé au législatif* was a “huge inconvenience” as “statute[s] will *degenerate* into (...) judicial decision[s]”.¹³⁶

Following the enactment of the Chilean Code, its rules of statutory interpretation were understood by Chilean legal scholars to be an endorsement of the literal method. The law professors of the Universidad de Chile teaching in the 1850s (Enrique Cood and José Clemente Fabres) were of this opinion, which was later endorsed by their successor, Paulino.¹³⁷ While Guzmán Brito has rightly argued that the opinion of those professors was based on an oversimplification of the civil law tradition,¹³⁸ the same scholar agrees that the Chilean Civil Code had effectively *departed* from that tradition.¹³⁹ This departure was not only the result of the indirect influence

132 The expression “except when evident absurdities and contradictions derive from that” was clearly similar to the golden rule of English law (see Section 2.2 above). Note that, as much as in English law, the golden rule is restricted by Bello to cases of *absurdity* and *contradictions* (i.e. logical problems), but it does *not* apply where the judge believes that a literal interpretation would lead to *unreasonable* or *unjust* results.

133 BELLO (1981), pp. 41-2: “Nosotros creemos que lo más seguro es atenerse a la letra; que no debemos ampliarla ni restringirla, sino cuando de ello resultan evidentes absurdos o contradicciones; y que todo otro sistema de interpretación abre anchas puertas a la arbitrariedad, y destruye el imperio de la ley”. Emphasis added.

134 Andrés Bello in *El Araucano* (Santiago de Chile, 30 September 1842), quoted in BELLO (1981), pp. 41-2: “mientras unos adhieren estrictamente al texto y tratan de licenciosa la inteligencia de sus antagonistas, otros creen que lo sublime de la hermenéutica legal es internarse en la mente del legislador [...] Por este medio, según conciben, se toman por guía, no las palabras de la ley sino su intención, su idea”.

135 Bello quoted in SQUELLA (1982), p. 72.

136 BELLO (1954), p. 35.

137 GUZMÁN BRITO (1992), pp. 41 and following.

138 GUZMÁN BRITO (1992), pp. 41 and following.

139 GUZMÁN BRITO (1992), p. 81.

of Blackstone, but it also reflected an essential conviction of Bello. Furthermore, when dealing with Bello's opinions on this subject, we must keep in mind that he was (and still is) one of the most connoted grammarians of the Spanish language, and probably, therefore, the most sophisticated actor dealing with this matter among the ones that we are analyzing in this article. In his *Grammar of the Castilian Language for the use of Americans*, first published in 1847, Bello argued:

[T]he *utility of grammar* cannot but be huge, either to speak in a way that what we say is well understood [...] or to establish accurately the sense of what others have said; which includes nothing less than the correct enunciation and *genuine interpretation of the laws, contracts, wills* [...].¹⁴⁰

The paragraph illustrates Bello's preference for the grammatical approach, an approach which was described by him as being the one which allowed "genuine" interpretation of the laws. No matter whether, from the internal point of view of the theory of interpretation, we can accept or not the idea of a genuine method of interpretation, this passage clearly illustrates the opinion of the author of the Chilean Civil Code, and what he was trying *to do* with his ideas about it. As it has been rightly argued, for Bello, clarity and unity in *language* and *law* was a *political* aim.¹⁴¹

4.2. Differences Between the Chilean and the Louisiana Civil Codes

As he himself acknowledged, Bello was inspired by the Louisiana Code, but there were three differences introduced by him.

a) Legal definitions of words

First, the Chilean Code provided that if a word had been defined in a statute as having a meaning different from its ordinary and technical meaning, then the *legal definition* should be followed.¹⁴² In his notes, Bello admitted that he had "introduced limitations" to the articles of the Louisiana Code dealing with the sense of ordinary and technical words,¹⁴³ and explained that "a word, technical or not, could be improperly used in a statute" asking rhetorically if it "would (...) be reasonable to assign that word a different meaning from that assigned by the legislator".¹⁴⁴ This limitation was not present in the Louisiana Civil Code.

b) Context not as a subsidiary tool

The second dissimilarity concerned the use of context for interpretative purposes. While the Louisiana Code¹⁴⁵ provided (like Blackstone, and English law) that the context of words should only be consulted when the meaning of words was dubious,

140 BELLO (1847), p. 1. Emphasis added.

141 HILBINK (2007), p. 50.

142 Articles 20 and 21 of the Chilean Civil Code.

143 Articles 14 and 15 of the Louisiana Civil Code

144 BELLO (1954), pp. 42-43

145 Article 16 Louisiana Civil Code.

under the Chilean Civil Code¹⁴⁶ words were *always* to be interpreted in their context, even when their meaning was clear.

c) Legislative history

Third, and finally, recourse to the intention of the legislature or the spirit of the law, was permitted by the Chilean Code only in case of obscurity. This was identical to the Louisiana Civil Code, and to Blackstone. However, Bello added a further provision: the intention of the legislature was to be inferred *only* from “trustworthy” (*fi-dedignas*) sources. The intention should be “clearly manifested in [the statute] itself or in the trustworthy history of its enactment” (e.g. parliamentary discussions).¹⁴⁷ In his comment on that article, Bello added: ‘imaginary intentions should not be attributed’ to the legislature.¹⁴⁸ This marked a divergence from English law in which recourse to legislative proceedings (Hansard) had been resisted since the 1760s.¹⁴⁹ Only in 1993, did the House of Lords allow recourse to Hansard, and even then, the decision was met with intense debate. One of the most traditional arguments against resorting to legislative history was the difficulty in reconstructing that process, a difficulty which could only be surmounted when the Hansard Report assumed its modern form in the twentieth century. Bello had similar concerns when insisting that the intention should be “clear”, derived from “trustworthy” sources, and not “imaginary”. However, contrary to English law, the Chilean Code allowed the consideration of the legislative history for interpretative purposes.

4.3. Inspiration for the Dissimilarities

The differences between the Chilean Civil Code and the Louisiana Civil Code were not crucial in the sense that the central idea of restricting judicial discretion was reflected in a similar way in both Codes. However, those variances are worth exploring as they show some divergence from the *strict* literalism of English law. In the Chilean Code, the use of context for interpretation even when words were clear, and the legitimacy of recourse to legislative proceedings, made textualism more flexible than English strict literalism.¹⁵⁰ Furthermore, the exploration of these differences will bring to light further Anglo-American inspiration in this area: the ideas of James Kent.

In the following sections, I will first trace back the influence of Kent. For this purpose, we need to turn to the Uruguayan Civil Code, enacted in 1868, in relation to which that inspiration was explicitly acknowledged by Tristán Narvaja, the drafter of the Code. Finally, in the conclusions I will return to the distinction between these two varieties of literalism: English strict literalism and the South-American more flexible version of it.

146 Article 22 Chilean Civil Code.

147 Article 19 of the Chilean Civil Code, Second Part.

148 BELLO (1954), pp. 43.

149 For this paragraph: VOGENAUER (2005), pp. 629-74.

150 Section 2.2 above.

4.4 The Uruguayan Civil Code and Kent's Influence

4.4.1. Borrowing from the Chilean Civil Code

Articles 17 to 20 of the Uruguayan Civil Code reproduced the rules of the Chilean Code on statutory interpretation, with only one slight (and irrelevant) omission.¹⁵¹ The drafter of the final version of the Uruguayan Civil Code, Tristán Narvaja, acknowledged the influence of the Chilean Code, an inspiration that was also made obvious by the identical language of the corresponding provisions.

Like Bello, Narvaja held strong views about the matter of statutory interpretation.¹⁵² First, he linked the literal method of interpretation to stability. In this respect, in one of his works, he favourably quoted a French politician (Vaublanc) talking to the National Assembly in 1792: “Establish [...] the despotism of law, or fear the development of all the causes of disorder that France hides in its breast”. Second, Narvaja was explicitly critical of the approach adopted by the French Civil Code (1804) which, as mentioned earlier,¹⁵³ did not include rules on statutory interpretation. Narvaja argued that,

[I]t may happen in some cases that the law [...] due to the imperfection of language be obscure [...] [T]he Uruguayan Code which anticipated the problem, and *has been more explicit in this part than the French one* [...] has desired to provide for the judge in this embarrassing situation, consigning [...] hermeneutic rules.¹⁵⁴

Narvaja considered that the inclusion of rules governing statutory interpretation was to “impose on everyone the obligation to obey them” in order to prevent those rules from just being mere “philosophical theses”, as they were in France.¹⁵⁵ Thus, just as Bello departed from the civilian tradition, Narvaja departed from the French Civil Code. This information will be relevant when we try to make sense of Anglo-American influences on statutory interpretation.

4.4.2. Kent Used by Narvaja

One of the interesting aspects of the borrowing of the rules of statutory interpretation from Chile to Uruguay, were the comments of Narvaja. Articles 18 to 20 of the Uruguayan Code were a literal transcription of articles 20 to 22 of the Chilean Code. As already mentioned, those Chilean articles were inspired by the corresponding rules of the Louisiana Code, but bore some differences with them. Among those differences were the allusion to the *legal definition* of words, and the provision for the consideration of *context* even for interpreting clear words (i.e. not as a subsidiary tool). Narvaja explicitly mentioned Kent in relation to each of those two provisions.

151 Laws *in pari materia* were not mentioned.

152 For all references contained in this paragraph: NARVAJA (2008), pp. 360-361.

153 Section 3.5 above.

154 NARVAJA (2008), pp. 360-361.

155 NARVAJA (2008), pp. 360-361.

a) Legal definitions

As just mentioned, the Chilean and the Uruguayan Codes provided for the *legal* definition of a word to prevail over its ordinary or technical meaning,¹⁵⁶ an idea that was *not* present in the Louisiana Code. In his notes to the corresponding articles of the Uruguayan Code (18 and 19), Narvaja quoted the following paragraph from Kent:

If technical words are used, they are to be taken in a technical sense, unless it clearly appears from the context, or other parts of the instrument, that the words were intended to be applied differently from their ordinary or their legal acceptance. Kent's *Commentaries*.¹⁵⁷

The last part of Kent's sentence cited by Narvaja was almost identical to the addition introduced by Bello in article 21 of the Chilean Code, and borrowed by Narvaja in article 19 of the Uruguayan Code. Kent's expression "unless it clearly appears" was translated *verbatim* into Spanish as "a menos que aparezca claramente". In the table below Kent's paragraph and the corresponding Uruguayan and Chilean articles are compared, with similarities being emphasized in bold letters:

Kent's Commentaries ¹⁵⁸	Chilean Code	Uruguayan Code
If technical words are used, they are to be taken in a technical sense, unless it clearly appears from the context, or other parts of the instrument, that the words were intended to be applied differently from their ordinary or their legal acceptance.	Art. 20. The words of the law are to be understood in their obvious and sense, in accordance with the general use of the same words; but when the legislator has defined the words expressly for certain subject matters, they are to be given in those subject matters their legal meaning. Art. 21. Technical terms of any science or art are to be taken according to the meaning given to them by those who profess the same science or art; unless it clearly appears that they have been taken with a different meaning.	Art. 18. The words of the law are to be understood in their obvious and <i>natural</i> sense, in accordance with the general use of the same words; but when the legislator has defined the words expressly for certain subject matters, they are to be given in those subject matters their legal meaning. Art. 19. Technical terms of any science or art are to be taken according to the meaning given to them by those who profess the same science or art; unless it clearly appears that they have been taken with a different meaning.

156 Articles 20 and 21 of the Chilean Civil Code, and the identical Articles 18 and 19 of the Uruguayan Civil Code.

157 NARVAJA (1910), p. 5. "Legal acceptance" in Kent, is to be understood as "technical meaning".

158 KENT (1851), p. 511.

Thus, in addition to Narvaja's *explicit* mention of Kent, there was a clear similitude of wording between the Uruguayan and Chilean Civil Codes, and Kent's paragraph, which, as Narvaja accurately indicated, was taken from Part III, Lecture XX of Kent's *Commentaries on American Law*. Thus, the idea that legal definitions should prevail over the ordinary and technical meaning of words was associated by Narvaja with Kent's ideas, and Kent might well have been Bello's source of inspiration, as will be explained below.

b) Context as more than a subsidiary tool

The drafter of the Uruguayan Civil Code, also alluded to Kent's *Commentaries* in relation to article 20 of the Uruguayan Code. That Article was a *verbatim* transcription of Article 22 of the Chilean Civil Code. As mentioned earlier,¹⁵⁹ differently from the Louisiana Code, that article of the Chilean Code provided that the use of context for interpretative purposes was *not* subject to the words being of dubious meaning. Regarding this particular rule, in his notes, Narvaja referred to Kent Part III Lecture XX,¹⁶⁰ but did not mention a specific paragraph. Nonetheless, it is not difficult to find references in Kent's work to the idea that the use of context was not subject to the existence of doubts about the meaning of words. For instance, in the same paragraph referred to above, Kent indicated that even when the ordinary or technical meaning of a word was clear 'the context, or other parts of the same instrument' could indicate that a different meaning should be applied.¹⁶¹ Similarly, in another paragraph, Kent suggested that "the intention of the lawgiver is to be deducted from the whole and every part of a statute, taken and compared together".¹⁶² However, this idea is not attributable only to Kent. In his comments, Narvaja also quoted Law 24 Title 3 Book 1 of the Justinianic Digest and Article VI of the French *Projet* (1800), which provided the same. Thus, the use of context even when words were clear, can be seen as a characteristic of the civil law approach, which the Chilean and Uruguayan Civil Codes retained, and Kent adopted, rather than as a significant Anglo-American influence. This marked a difference with the strict literalism of English law which, as already mentioned, until the 1950s, only permitted the consultation of the context in cases of ambiguous language.¹⁶³

c) Legislative proceedings

Narvaja made *no* mention of Kent regarding the use of legislative history. However, it should be noted that Kent was more open to the use of legislative history than English law was. Kent, as much as Bello, was aware of the difficulties of recons-

159 Section 4.2 above

160 NARVAJA (1910), p. 5.

161 KENT (1854), p. 511.

162 KENT (1854), p. 510.

163 See Section 2.2 above

tructing legislative intent,¹⁶⁴ but did not discard the possibility. Thus, Kent wrote that in cases of doubt, the preamble of an act may “assist in removing ambiguities where the intent is not plain”.¹⁶⁵

By way of summary, it is not surprising that Kent’s influence contributed to the relaxing of English strict literalism in the United States, and indirectly in South America. From the beginning of his analysis of statutory law, it is clear that Kent’s approach was not the same of English law. For instance, contrary to Blackstone, Kent provided that the judge could not apply a statute that contradicted the Constitution, and that the intention of the legislature ought to prevail over the literal meaning, when such intention could be clearly ascertained.¹⁶⁶ Thus, Kent did *not* endorse a hierarchical model, nor subscribe to the radical deference for Parliament-made law which characterized the English approach. In a certain sense, the Chilean conception of statutory interpretation occupied a position in between those of English law and Kent. It was more flexible than the strict literalism of English law, but stricter than Kent’s ideas.

4.4.3. Why did Narvaja Refer to Kent?

Andrés Bello, the drafter of the Chilean Code, was very familiar with Kent’s works.¹⁶⁷ However, he did not mention Kent as being among his sources of inspiration regarding statutory interpretation. Why then did Narvaja in Uruguay refer to Kent? There are two possible explanations. First, Narvaja discovered for himself that there was an interesting coincidence between the Chilean Code rules and Kent’s works, but Narvaja did not suspect that Bello had used them in this area. Second, he had access to evidence indicating that this was not just a fortuitous coincidence, but rather that Bello had been inspired by Kent’s ideas, and Narvaja just acknowledged that. In my opinion, the second is the most likely interpretation, though there are arguments for both explanations.

Regarding the first hypothesis (i.e. Narvaja *himself* discovered the coincidence with Kent in this field), there are two considerations in support of this view. The first, and most obvious, is Bello’s silence on Kent. The second is not so obvious: the passage Narvaja cited from Kent,¹⁶⁸ was *not* present in the first *three* editions of Kent’s *Commentaries*. It appeared for the first time, in the fourth edition of 1840. This would have given Bello enough time to know of it before he started drafting the rules of statutory interpretation for the first time in 1853.¹⁶⁹ However, this interpretation is pro-

164 KENT (1851), p. 509: the title and preamble of a statute “*generally* [...] are not safe expositors of the law”. Emphasis added.

165 KENT (1851), p. 509.

166 KENT (1851), p. 510.

167 References to James Kent are found, for instance, in BELLO (1885); BELLO (1954); BELLO (1955); BELLO (1832).

168 See Section 4.4.2 (a) above.

169 Bello (1955), p. 1066. In the 1853 draft the rules were numbered 17 to 19.

blematic because, in relation to another topic in his 1853 draft of the Chilean Code, Bello referred to Kent's *second* edition of his *Commentaries*,¹⁷⁰ edition in which the passage cited by Narvaja did *not* exist. This would tend to support the theory that Narvaja, rather than Bello, consulted the writings of Kent on this subject. However, that option would leave unexplained the already mentioned coincidences of wording between Kent and Bello.

On the other hand, there are several factors in support of the second possible explanation (i.e. instead of just asserting a coincidence found by him, Narvaja was indicating that Bello had been inspired by Kent). Bello was quite interested and familiar with Kent's works, which he consulted on several areas (including intestate succession, international law, etc). It is perfectly possible that he had access to, and consulted, later editions of Kent's work, which were readily circulating in South America, without quoting them as such. A second question then arises: if Bello used Kent's fourth (or later) edition, and did not publicly mention that in relation to statutory interpretation, how could Narvaja have known that Bello had been inspired by Kent, and why Bello did not acknowledge that? For the first question, there is quite a simple explanation: Narvaja lived in Chile between 1845 and 1853, during the period when the successive drafts of the Chilean Civil Code were being discussed,¹⁷¹ so that he could have known about the use of Kent by Bello in this area. In fact, Narvaja's cousin, Gabriel Ocampo, a prominent lawyer also living in Chile, was one of the members of the commission which, jointly with Bello, reviewed the 1853 draft of the Chilean Civil Code. We have already seen that during the works of the commission Ocampo took notes on the subject of statutory interpretation, marking a difference with Domat's ideas.¹⁷² That shows an interest on the topic, and, it is likely, that there was some debate about it in the commission. Moreover, we know that Ocampo was in "frequent" contact with Narvaja.¹⁷³ Therefore, it is possible that Narvaja was aware, through Ocampo, of Bello's use of Kent, even though Bello did not publicly acknowledge it. All of these are just possibilities which make the hypothesis only plausible. However, the key evidence in my opinion is the coincidence of language between the passage of Kent cited by Narvaja, and Article 21 of the Chilean Code. The expression, "unless it clearly appears" in both texts, points into the direction of Bello borrowing directly from Kent. In my opinion this last point, taken together with the interest of Bello and other Chilean lawyers in Kent's works at that time, makes it very likely that Bello himself was inspired by Kent, and that Narvaja (who was in a position to know that) merely acknowledged this influence.

As to why Bello was silent on the use of Kent, there are two hypotheses: a neutral, and a political one. The first explanation might be that he considered that

170 Bello's note to Article 593 of the Chilean Civil Code, on an aspect of international law, explicitly refers to Kent's second edition. BELLO (1954), p. 417.

171 For this and the following references to Narvaja's stay in Chile: PEIRANO FACIO (2008), pp. 35-36.

172 See Section 3.2 above

173 KLEINHEISTERKAMP (2006), p. 7.

Kent's idea was something not as relevant as the use that Bello had made of the Louisiana Code, which provided the core of the rules that influenced the Chilean Civil Code. Thus, Bello perhaps thought that Kent's minor contribution did not merit being mentioned on this subject. The second explanation might be that, knowing that Kent's ideas on statutory interpretation differed from his own literalist approach, Bello did not want to call attention to him as a valuable source of inspiration. Kent was a critic of Blackstone's and the English deference to Parliament-made law, and favoured judicial review of statutes by judges, in cases in which the statutes were in breach of the Constitution.¹⁷⁴ This distinctive aspect of Kent's thinking would not have been welcomed by Bello, who was much more interested in making the judge a "slave of the law", as we have already seen.¹⁷⁵

To summarize, it is quite likely that Bello made use of Kent's works in order to amend some of the Louisiana Code's rules on statutory interpretation. He did not acknowledge that use, either for political or non-political reasons, but Narvaja disclosed the existence of that inspiration.

All things considered, in spite of Kent's not being the core influence at stake, this episode reveals, in my view, an overarching general interest in Anglo-American ideas in the field of statutory interpretation, and most probably, more than that. At the very least, Narvaja was quite interested in them. This in itself is telling: uneasiness with the French solution¹⁷⁶ led Narvaja, and most probably also Bello, to an inquiry into the Anglo-American ideas on the subject.

4.5. Transplant to Ecuador and Colombia.

Blackstone's ideas inspired the Louisiana Civil Code, as showed in the previous sections. From the Louisiana Code those ideas travelled to the Chilean Civil Code of 1855, and were complemented by Kent's ideas. In a final step, Blackstone's ideas travelled to the Civil Codes of Ecuador (1858), Uruguay (1868) and Colombia (1887). As already mentioned, the Chilean rules on statutory interpretation were borrowed by the drafter of the Uruguayan Civil Code.¹⁷⁷ In the case of Ecuador and Colombia, there was an outright transplant of the Chilean Civil Code as a whole.¹⁷⁸

Article 18 of the Ecuadorian Civil Code of 1858 was a copy of the rules on statutory interpretation of the Chilean Civil Code: the four paragraphs of article 18 reproduced Chilean articles 19 to 22. The same happened with the Colombian Civil Code of 1887: its articles 27 to 31 reproduced *verbatim* the rules of the Chilean Code on statutory interpretation.

Therefore, in a three-step process of indirect influence, Blackstone inspired the rules on statutory interpretation of the Louisiana Digest (1808) and Louisiana

174 KENT (1854), pp. 493-4.

175 Section 4.1. above.

176 See Section 4.4.1 above.

177 Section 4.4 above.

178 MIROW (2004), p. 137.

Civil Code (1825). Louisiana law inspired the Chilean Civil Code (1855), and thereafter, the Chilean rules were transplanted to Ecuador (1858), Uruguay (1868) and Colombia (1887).¹⁷⁹ Thereby, four jurisdictions in South America came to adopt in their Civil Codes a conception of statutory interpretation inspired by Blackstone. That conception was very similar to English law in the predominance they accorded to the literal or plain meaning rule, though the strict literalism of English law was somehow softened due to civil law and Kent's influence.¹⁸⁰

5. WAS BELLO CONSCIOUS OF THE INFLUENCE OF BLACKSTONE?

The questions that remain to be answered are those of whether Bello was conscious that Blackstone was the source of the rules on statutory interpretation of the Louisiana Civil Code, and if the answer is in the affirmative, why he did not acknowledge it.

I have found no indication of Bello or Narvaja explicitly acknowledging a link between the Louisiana Code and Blackstone on this matter. Moreover, the connection between Blackstone and the Louisiana Code on statutory interpretation was only ascertained by Rodolfo Batiza in the 1970s, and, even then, it was seen as "surprising".¹⁸¹ In Chile, as late as 2004, the view still prevailed that, most probably, the source of inspiration for the rules of statutory interpretation of the Louisiana and the Chilean Civil Codes, was Domat through the French *Projet* of 1800.¹⁸² Considering all of this, it would seem reasonable to infer that Bello remained unaware of this connection between the Louisiana Code and Blackstone. How could he have known what was only acknowledged so recently and hesitantly? My claim is that it would be a mistake to make a retrospective judgment based on *our contemporary* frame of mind, as we may be relatively conditioned by the traditional view about the sources of inspiration of South-American private law.

The breadth of reading of Anglo-American legal actors in nineteenth century South America is something which has been often underestimated by contemporary legal historians. The standard perception is that South-American lawyers may have had one or two volumes of Bentham, Blackstone or Kent on their shelves, but that they took nothing concrete or relevant from their reading of these volumes. However, in South-American there was a consistent pattern of reading and putting to use Anglo-American legal ideas for academic and legislative purposes. Nineteenth century's South-American lawyers were more familiar with Anglo-American law

179 The Venezuelan Civil Code of 1862, a transplant of the Chilean Code of 1855, also adopted the rules of statutory interpretation of the latter. However, it was a short-lived Code, and when it was supplanted by the Venezuelan Civil Code of 1867 those rules on statutory interpretation were not reproduced.

180 Section 4.2 above.

181 BATIZA (1971), p. 29.

182 GUZMÁN BRITO (2004), p. 41.

than their successors. We have consistently ignored or, at best, underestimated that acquaintance. Taking all this into account, we should adjust our lens in order to evaluate whether Bello or his South-American contemporaries could have been aware of the link between Blackstone and the Louisiana Code in this area.

For instance, it is noteworthy that Bello had lived in England for twenty years, where he had spent some of his time learning English law. He was familiar with Blackstone's works, which he quoted in relation to other to other themes and, as we just saw, most probably Bello also consulted Kent on matters of statutory interpretation. It must further be noted that Kent referred to Blackstone from the beginning of his chapter on statutory interpretation. Kent's mentions of Blackstone were intended to highlight a key dissimilarity between the English and the American approach to the interpretation of statutes: Blackstone was presented by Kent as the champion of the English principle of deference to Parliament-made law. Even if Bello had not consulted Blackstone directly on this topic, Kent's allusion would have led him to the English author. Furthermore, the reading of Bentham, an author with whom Bello was also well acquainted, could have also alerted Bello. Bentham praised Blackstone as one of the legal scholars more respectful of the authority of Parliament. What is more, in Bentham's opinion, Blackstone had the honor to be only second to Bentham himself. Given Bello's interest in ensuring that the judge was a "slave of law",¹⁸³ all this would not have fallen into deaf ears.

Bello owned a copy of Blackstone's *Commentaries on the Laws of England*, as we know from the inventory of his library,¹⁸⁴ and made use of it many times.¹⁸⁵ Bearing in mind all of these factors, we can reasonably accept at least one of the following two conclusions: Bello was aware of the similarity in language *and* substance between Blackstone and the Louisiana Code, or, at least, he realized that the conceptions of statutory interpretation in Blackstone and the Louisiana Code were very similar, providing, as they did, for the predominance of the literal rule, and embodying a distrust for the discretion of the judge.

If Bello was conscious of the Blackstonian pedigree of the Louisiana Code's rules on statutory interpretation, why did he not mention it? I think that the explanation is the same tactical one that we have found on other instances of legal borrowing. In Chile, for example, the debate through the Chilean press between Andrés Bello and Miguel María Güemes in the 1840s about intestate succession law¹⁸⁶ revealed that some legal actors, such as Güemes, preferred civil law sources. Anglo-American sources of inspiration only came into scene when the civil law failed to support the reforms suggested by the drafters of legislation, and they were in need of some cre-

183 See Section 4.1 above.

184 A manuscript catalogue of Bello's library is held by the Universidad de Chile: <http://biblio.uchile.cl/client/search/asset/92351> accessed on February 8th, 2015.

185 For instance, there are references to Blackstone in Bello's notes to the Chilean Civil Code, and in his *Principios de Derecho de Jentes* published in 1832.

186 BELLO (1885), pp. 304-400.

dentials for the same, as happened, in another field, when Bello tried to improve the situation of the surviving spouse.¹⁸⁷ In that context, the Louisiana Code was always a better credential than Blackstone. Its liberal adequacy could not be doubted, and its civil law origin provided a shield to the attacks of narrow-minded practitioners. When dismissing English or United States law as commendable sources of inspiration, Güemes only excluded Louisiana law from his attack.¹⁸⁸

In my opinion, it is highly likely that Bello was conscious of the Blackstonian origin of the material he was handling, as much as he was aware that, tactically speaking, it was much better to mention the Louisiana Civil Code, rather than Blackstone. A similar situation occurred with regards to the use by Bello of the rules concerning corporations or legal entities of the Louisiana Civil Code. They were clearly influenced by Blackstone, but that fact remained unrecognized by Bello.¹⁸⁹

Finally, even if the influence of Blackstone was not conscious, it *existed*. An idea can influence even those who are unaware of its origin. The path backwards from the Chilean Civil Code to Blackstone is clear. Furthermore, the similarity between Blackstone's ideas, and English literalism, shows us that ultimately there was an indirect influence of English law on the Chilean Code (and its sequel) on the subject of statutory interpretation.

6. CONCLUSIONS

6.1. From Blackstone to Chile, Ecuador, Uruguay and Colombia

The previous sections of this article were concerned with Blackstone's influence on the subject of statutory interpretation in four South-American Civil Codes. They showed that, first, the rules on statutory interpretation of the Louisiana Civil Code (1825) were clearly inspired by Blackstone. Not only was the language of Articles 14 to 18 of the Louisiana Code clearly taken from Blackstone, but also the broader approach to judicial interpretation embodied in that Code.

Second, there *was* some "originality" in Blackstone's ideas which demarcated them from the civilian tradition. Thus, his work was not just an adaptation of civil law ideas taken from Pufendorf. Blackstone developed the central idea that characterized the English approach to statutory interpretation in the nineteenth century: *strict literalism*.

Third, the Chilean Civil Code (1855) was inspired by the Louisiana Civil Code on the subject of statutory interpretation, as acknowledged by its drafter, Andrés Bello. Hence, the Chilean Civil Code was indirectly influenced by Blackstone and by English law.

187 BELLO (1885), pp. 304-400.

188 Miguel María Güemes' untitled article is included in BELLO (1885), pp. 362-366.

189 KNÜTEL (1995-1996), pp. 1458-9.

Fourth, a number of modifications to the Louisiana model introduced by Bello were, most probably, inspired by Kent's *Commentaries*, resulting in the Chilean Code's adoption of a relatively flexible approach to literalism, when compared with that made use of in English law, the key differences being related to the interpretative use of context, and legislative history.

Finally, the rules on statutory interpretation of the Chilean Civil Code (1855) travelled to other three Civil Codes of South America: Ecuador (1858), Uruguay (1868) and Colombia (1887), where they were adopted without any relevant modification.

6.2. Republican Arrangements and Unsatisfactory Civil Law Models

The four mentioned South-American Civil Codes adopted a formalistic legal model of statutory interpretation¹⁹⁰ which I will refer to as *South-American Literalism*. That model, like the approach developed by Blackstone and English law, prioritized the literal or plain meaning rule according to which the judge could only take into consideration the *legislature's intent* or the *reason (spirit)* of the law if some doubt persisted *after* the application of the literal rule.

That approach to statutory interpretation can be contrasted with that of the civil law tradition represented by Domat and Pufendorf, which are usually regarded as the most relevant sources of inspiration in this area by the time the Louisiana and Chilean Civil Codes were enacted. Put simply, these authors did *not* advocate a hierarchical model which gave priority to the literal rule. Instead, in their opinion, the judge *could disregard* the clear letter of the statute, if giving effect to that meaning would run counter to the "public good" or "natural law", or if the legislative intention differed from the statute's literal meaning. Regarding the intention of the legislature, those authors represented what, still today, is seen as the characteristic civil law position on this matter: the predominance of the intention of the legislature over the letter of the law.¹⁹¹ Some Chilean contemporaries, like Gabriel Ocampo, were aware that the model adopted by the Chilean Civil Code implied a departure from Domat's writings.¹⁹² What is more, South-American literalism can be contrasted also with Spanish law which followed the method of the *référé au législatif*.¹⁹³ Finally, if we consider other Codes from the civil law tradition, the *specialness* of the Louisiana and Chilean Codes can again be seen. For example, Article 6 of the Austrian Civil Code of 1811, and Article 4 of the Sardinian Civil Code of 1837,¹⁹⁴ did *not* adopt a hierarchical model. Those Codes provided that the "meaning of the words" and the "intention of the legislature" were to be taken *simultaneously* into account. Therefore,

190 As much as the short-lived Venezuelan Civil Code of 1862.

191 FREEMAN (2008), p. 1555.

192 Section 3.2 above.

193 Section 3.3 above.

194 Mentioned by Narvaja in his notes to the Uruguayan Civil Code. See: NARVAJA (2008), p. 5.

South-American literalism bore *coincidences* with Blackstone and English law, but *diverged* with the civil law tradition, with the only exception of the French *Projet* (1800) to which we will now turn.

The only civil law model which could provide inspiration to this South-American branch of literalism was the French *Projet* (1800), one of the articles of which, as we saw,¹⁹⁵ inspired Article 13 of the Louisiana Civil Code. This unsuccessful draft accorded priority to the literal rule and contained detailed rules on interpretation, though these were quite different from those of the Louisiana Civil Code. However, the *Projet* was soon discarded. Instead, the French Civil Code (1804) did *not* regulate judicial interpretation at all, and shortly thereafter, in 1807, French Law reintroduced the mechanism of the *référé au législatif*. The French solution was viewed negatively in Louisiana and South America. Narvaja, the drafter of the Uruguayan Civil Code, was explicitly critical of the absence of rules on statutory interpretation in the French Code.¹⁹⁶ The *référé au législatif* was not considered a viable possibility for a number of reasons. First, by the time codification began to progress in South America, the French *référé* had already failed in practical terms, and was abandoned in 1837. Second, like Blackstone, both the Louisiana and Chilean drafters of the Civil Codes, expressed negative opinions about the legislature assuming the role of interpreter of the law in concrete judicial cases. As much as judicial discretion could turn the judiciary into a legislature, the *référé au législatif* could turn the legislature into a judge. The *référé*, was considered as serious a violation of the principle of separation of powers as judicial discretion.

When all the factors analyzed in the previous paragraphs are taken into account, an explanation of the events that led to this “surprising” convergence with English law finally emerges. South-American legislatures needed to adapt old Spanish law to “new republican political arrangements”.¹⁹⁷ These arrangements obviously included a commitment to the principle of separation of powers on which there was a wide consensus: liberalism was “the dominant political discourse in Latin America”.¹⁹⁸ The French Civil Code was a preferred model. However, in the absence of an acceptable French solution, South-American drafters of legislation turned to the two other countries, England and the United States, which were seen as possessing liberal institutions.¹⁹⁹

6.3. English and South-American Literalism

The influence of Blackstone and English law on statutory interpretation in Chile was not a mere passive imitation but the result of a reflective enterprise, where

195 Section 3.5 above.

196 Section 4.4.1 above

197 JAKSIC (2001), p. 174.

198 RIVERA (2016), pp. 1 and 10.

199 BELLO, “Publicidad de los Juicios”, in BELLO (1885), p. 6.

the original model was critically assessed and creatively adapted to South-American reality. The solution devised by Bello drew inspiration from many disparate sources. It did not follow “slavishly” civil or English law approaches. In the previous section I have stressed the differences between South-American literalism and the civil law tradition. Now we should turn to its divergences with English *strict* literalism. In fact, this article showed the influence of the English model, but also some differences with it. There were two *main* dissimilarities:²⁰⁰ in South America, the *context* of words was postulated as a *primary* element of interpretation, and the use of *legislative history* for interpretative purposes *was allowed*.

Regarding the use of context, the explanation for the divergence can be technical. Bello was a legal actor but, as we said, also a prominent grammarian. He would have understood that the Louisiana Code and Blackstone had gone too far. As Endicott suggests, “every *sensible* technique of legal interpretation includes a version of the context principle”.²⁰¹ It is a general characteristic of languages, not only of legal texts, that “variations in contexts make it appropriate to extend the application of a word in diverse ways”.²⁰² My claim is that Bello, with his more sophisticated perception of linguistics, realized that if judges flouted the context principle they would be capable of “making a hash of the words used in legislation”.²⁰³ In other words, Bello perceived that the meaning of words could not be ascertained if they were taken out of their context. This perception, in addition to the tradition in civil law, and Kent’s opinion, of *always* considering the context,²⁰⁴ can explain this difference between the two versions of literalism.

With regards to the second difference (use of legislative history), South-American literalism assumed a position similar to the North American approach.²⁰⁵ The Chilean Code and its sequel provided two rules on the use of legislative history. First, the judge could inquire into the legislature’s intent only if the text of the statute was not clear. Second, inquiries into legislative intent should be focused on the statute itself, or other ‘trustworthy’ sources. As Bello put it, judges should not invent “imaginary” intentions. These rules can be seen in two different lights when compared, first, with the Louisiana Civil Code and Blackstone, and second, with English law through its development during the nineteenth century.

If we compare the Chilean provision with that of the Louisiana Code or with Blackstone, the Chilean Code can be seen to be more *rigid* and *formalistic*. While the Louisiana Code and Blackstone permitted the search for the legislature’s intent in

200 The third difference with the Louisiana Code (i.e. the reference to legal definitions in the Chilean Code, inspired by Kent) seems purely technical, and not much important for the purpose of contrasting the two models herein considered.

201 ENDICOTT (2002), pp. 949-50. Emphasis added

202 ENDICOTT (2002), pp. 949-50.

203 ENDICOTT (2002), pp. 949-50.

204 For example: DOMAT and Article VI of the French *Projet* (1800).

205 WALDRON (1999), p. 119.

case of doubts, they did not limit the sources from which that intent could be elucidated. Bello seemed to be aware of a problem that Blackstone and the Louisiana Code did not consider. There has always been a discussion in Anglo-American law about the difficulties of reconstructing legislative history.²⁰⁶ Kent, for example, referred to this pragmatic obstacle. The requirement of “trustworthy” sources in the Chilean Code, was based on this problematic consideration. Thus, that requirement makes the Chilean Code *more* formalistic than its sources (Louisiana Code and Blackstone).²⁰⁷

However, when we compare the Chilean Code with English law concerning the use of legislative history, the Chilean Code looks more *flexible*. English law rejected the use of legislative history even after Hansard was firmly established as an official and “trustworthy” report at the beginning of the twentieth century. Only in the 1990s, the House of Lords did permit the consultation of legislative history.²⁰⁸ What prevented English judges from consultation until this point? And why did that same reason *not* prevent South-American drafters of legislation from permitting consideration of legislative history? It must be something more than the mere *practical* difficulties. There should be some principled reason. Lord Steyn recently suggested that the principle of separation of power was at stake. Given the relationships between government and Parliament in the United Kingdom, statements of legislative intention are in fact “statements of ministers” made in Parliament, and thus there is a concern that consideration of legislative history might amount to a shift in law-making power from Parliament to the executive.²⁰⁹ These kind of reservations do not apply to North America and South America, due either to the different structure of the relationships between government and Parliament, or to a lack of concern with this sort of interference on the part of executive with the meaning of statutes.

Differently from England, for some nineteenth-century South-Americans, the intervention of the executive in the legislative process, and the admission of the statements of ministers as a relevant consideration in the interpretations of statutes did not seem problematic. Indeed, I will suggest that they could be welcomed. The liberal ideal of separation of powers, widely accepted in South America, can explain the interest in restricting judicial discretion, as well as the rejection of the *référé au législatif*. It can also explain why South-American drafters of legislation turned to Louisiana and Anglo-American legal ideas for inspiration, in the absence of an

206 *Millar v Taylor* (1769), p. 2332 (Willes, J).

207 Someone may argue that the requirement of the Chilean Code is merely redundant. In other words: which judge would postulate a certain intent of the legislature, and following that argue that his/her conclusion is based on *untrustworthy* sources? However, once more, I am not analyzing the internal logical coherence of the requirement, but the practical preoccupation of the historical actors that it reveals.

208 *Pepper v Hart* (1993).

209 LORD STEYN (2001), p. 70. The same argument was made in *Black-Clawson International Ltd. V Papierwerke Waldhof-Aschaffenburg AG* [1975] AC 591 at 629 (Lord Wilberforce), quoted by VOGENAUER (2005), pp. 632 and 647.

acceptable French solution. However, the South-American context in which these ideas were implemented might explain the difference with English law on the matter of the relevance of legislative history. We turn to that in the next section.

6.4. Looking for Separation of Powers or for Order and Certainty?

After independence, the vast majority of South-American politicians and intellectuals shared a common liberal ground,²¹⁰ and agreed on republican government, and separation of powers. However, in the middle of the nineteenth century, differences began to emerge between those who were called Liberals and Conservatives, in a *specific South-American terminology*. Both shared common principles, but had divergences on degrees: conservatives preferred a *stronger and centralized rule*.²¹¹ Their main goal was to recover *order* after a chaotic post-independence period.

Bello's attempts at subjugating judges (making them "slaves of the law")²¹² have been interpreted by some South-American historians as not being part of a liberal agenda but instead, as the expression of his conservative conviction on the need for centralized authority. Bello's adoption of interpretative literalism has been explicitly connected with his concern for "securing order and stability in Chile", rather than with the ideas of "Enlightenment thinkers".²¹³ It has been argued that his greatest fear was not that judges would subvert popular will, but that they would erode the authority of the state.²¹⁴

The same could be said of Narvaja in Uruguay. In the peculiar South-American terms of his days, he was *not* a Liberal,²¹⁵ even if he shared the liberal grounds commonly held by his time. The Uruguayan Civil Code was enacted by a Dictator (General Venancio Flores), though later ratified by Parliament, and the preoccupations of Narvaja and his contemporaries were mainly focused on installing order and economic progress in Uruguay along liberal economic lines.²¹⁶ In Uruguay, during the second half of nineteenth century, the shift to centralized control "dominated narratives about legal reform".²¹⁷ Political leaders with legal training pressed for reforms of the legal system as part of the solution to the disruptive politics of the *caudillos* (local unofficial militia leaders).²¹⁸ Therefore, in Uruguay too, the subjugation

210 BUSHNELL and MACAULAY (1994), p. 12; RIVERA (2016), p. 10.

211 RIVERA (2016), p. 10.

212 SQUELLA (1982), p. 72.

213 HILBINK (2007), p. 49.

214 HILBINK (2007), p. 49.

215 ODDONE-BLANCA PARIS (2010), p. 129.

216 CHASTEEN (2011), p. 194. This was a common characteristic of all economic liberals from the 1870s onwards in South America. The implementation of a liberal economy was usually done through authoritarian governments.

217 BENTON (2001), p. 507.

218 BENTON (2001), p. 507.

of judges could be seen as part of a widespread attempt to consolidate the central authority of the state, as much as part of a liberal effort to implement the separation of powers.

Most probably, the idea of the limitation of judges' discretion was actually inspired by both concerns: securing order, and implementing republican arrangements.

Furthermore, it is interesting to note that this crucial matter was addressed in the *Civil Codes* and *not* in the *Constitutions* of the South-American new republics. This may be in itself an indication that the main concern was related to providing order and certainty at the economic level. The argument is classic: if you want to attract players to a new market, first of all provide clear rules. In a newspaper article published in 1869, the drafter of the Uruguayan Civil Code expressed that idea: "the Code (...) regulates the civil freedoms... to attract the population, the capitals, and the industries that our country lacks".²¹⁹ In Chile, Andrés Bello and other legal actors were convinced that if certainty in the interpretation of legal rules was ensured, economic growth will follow.²²⁰ From that perspective, South-American literalism was part of the enterprise of achieving order and stability for the sake of economic development. Stability was to be achieved not only through codification, but also through the discouragement of the judicial distortion of the Codes by means of its interpretation.

In other words, if we adopt a contextualist approach²²¹ about what South-American actors were *doing* with the idea of literalism, we find that in the context of the mid-nineteenth century, subjugating an already powerful judiciary could not be the objective (differently from revolutionary France, for example), as the judiciary could not be powerful at all. The problem faced by South-Americans was the lack of authority of the new states that emerged after independence. *Separation* of powers within the government was, perhaps, the ostensible debate, but creating a proper framework for the *imposition* of the authority of the government was, most probably, the actual objective.

219 Narvaja "La Nación tiene Código Civil", in PEIRANO FACIO (2008), p. 251.

220 HILBINK (2007), p. 45.

221 Section I above.

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