WHAT IS CONSTITUTIONAL INTERPRETATION?

Gonçalo de Almeida Ribeiro*

Work in progress. Footnotes Omitted. Do not cite.

Constitutional interpretation is usually considered a special case of legislative interpretation – special because constitutions have peculiar characteristics, yet still a case of legislative interpretation because they are written laws enacted by a supreme political authority. This essay argues that the legislative paradigm is ill-suited to constitutional interpretation – an encroachment of the ontology of legality in the realm of constitutionality. Making sense of an object as a constitutional norm presupposes the a priori *category of the constitution, as intimated in in the tradition of liberal democratic constitutionalism. The constitutional* a priori *is the condition of the possibility of constitutional meaning, vindicating a unique conception of constitutional law and interpretation, and downplaying the significance of contingencies of form, language, structure, and history in constitutional argument.*

I. Introduction

Mainstream accounts of constitutional interpretation take it to be a special case of *legislative* interpretation. It is a special case because constitutions, unlike statutes and regulations, are characteristically single, basic, rigid, vague, and enduring laws. Nevertheless, it is still legislative interpretation because constitutions properly so called are supposedly written laws enacted by a supreme authority. Their content is for the most part determined by the political choices of the constitutional lawmaker, notwithstanding the fact that the *object* of those choices is to some extent determined by the very nature of the task – namely, to establish a government, not the legal regime of electronic invoicing, tariffs on imports or corporate taxation – and that the *content* of those choices is open to critical scrutiny – namely, judgements concerning its legitimacy or expediency and the desirability of amendment. On that view, constitutional content is contingent upon the

* Judge of the Constitutional Court of Portugal. Professor of Law at Universidade Católica Portuguesa (Lisbon).

decisions of the constitutional lawmaker and constitutional law is essentially enhanced legislation. It follows that the problems of constitutional interpretation are *continuous* with those of statutory interpretation.

I will argue against that view. My basic claim is that the legislative paradigm is ill-suited to constitutional interpretation – a mischievous encroachment of the ontology of legality in the realm of constitutionality. Making sense of an object as a constitutional norm presupposes an *a priori* category of the constitution, just as for Kelsen making sense of an act of will as constitutional law – the highest in the hierarchy of positive laws − presupposes a non-posited basic norm. But whereas the *Grundnorm* in the Pure Theory of Law is formal – making no demands over the substance of constitutional norms −, the category of the constitution is *substantive*, as intimated in Article 16 of the Declaration of the Rights of Man and of the Citizen of 1789, which reads: 'any society in which the guarantee of rights is not assured, nor the separation of powers determined, has no Constitution.' Although the substantive concept of the constitution evolved and continues to evolve within the tradition of constitutionalism, that is an *immanent development* of the late 18th century prototype instead of a series of radical breaks. That is why we speak of 'generations of fundamental rights' or 'the new separation of powers'.

In his savage critique of the rights of man, which he regarded as 'anarchical fallacies' and 'nonsense upon stilts', Jeremy Bentham mocked the French for suggesting that only they had a genuine constitution. 'The constitution – the blessed constitution, of which this matchless declaration forms the base – the constitution of France – is not only the most admirable constitution in the world, but the only one'. So wrote sarcastically Bentham. And yet the French were essentially right: within liberal democratic constitutionalism, a political tradition embodying and prescribing a certain ideal of political association, neither social facts nor acts of will, only the constitutional *a priori*, is the foundation of constitutional normativity. In other words, the *a priori* category of the constitution *communicates* constitutional value to a positive object such as a document drafted by an assembly or a convention created by longstanding practice. It is hence the condition of the possibility of objects such as documents and conventions having

constitutional *meaning*. That in turn supports *distinctive* principles for their interpretation – the canons of constitutional interpretation proper.

I acknowledge at once that these remarks are quite abstract and somewhat obscure. I am afraid that some of it has to do with the fact that the argument is sketchy – this is all very much work in progress. Yet some of it is in the nature of the beast. Constitutional interpretation is a difficult and slippery subject, and it implicates a great deal of what we ordinarily call constitutional theory. In order to manage the challenge of addressing the topic, I shall build the argument from the bottom up, taking an exemplary case as a starting point.

II. An Exemplary Constitutional Case

In September of 2019 – about a year ago −, the Portuguese Constitutional Court ruled on the constitutionality of legislation that, under specific circumstances verifiable by the Supreme Court, authorizes access by the secret services to the so-called metadata of private communications for the purposes of preventing certain forms of criminal activity, notably espionage and terrorism.

The notion of metadata is quite broad, encompassing all but content data, including information about the location of a device (which could be a cell phone, a laptop or a GPS navigator) and traffic data (which in turn comprises the participants, location, and length of an instance of communication). The data is mandatorily retained *en masse* by service providers under legislation that operated the transposition of a EU Directive. The regime of retention arguably raises a number of complex constitutional problems in itself, not the least of which the fact that the Court of Justice annulled the Directive in question in the already famous *Digital Ireland* judgment of 2014. The issue before the Constitutional Court, however, was not the regime of retention but the *regime of access* by the secret services to previously retained data.

I want to draw attention to a couple of provisions of the Portuguese Constitution. Article 34-4 reads: 'public authority is prohibited from interfering in any way with correspondence, telecommunications or other means of communication, save in the cases in which the law so provides in matters related

to criminal procedure.' Article 35-4 reads: 'third-party access to personal data is prohibited, save in exceptional cases provided for by law.'

It appears that access to metadata by the secret services falls within the scope of application of *both* provisions: on the one hand, it is an interference by public authority with telecommunications and other means of communication; on the other hand, it is a form of third-party access to personal data. The constitutional prohibition seems nonetheless to be far more stringent in the former than in the latter case: there the prohibition is subject to a narrow or qualified reservation clause, that enables interference solely within the domain of criminal procedure; here the prohibition is subject to a broad or unqualified reservation clause, enabling all manner of restrictive measures so long as provided for by law.

That does not mean that the permission to restrict is a *carte blanche* just because it is unqualified. It goes without saying that all restrictive measures are subject to proportionality scrutiny, in the broad sense that comprises the tests of suitability, necessity, and proportionality in the narrow sense; that is a *general* constitutional restraint on any form of state interference with defensive rights. The qualified or unqualified character of a reservation clause makes a difference not with respect to the permitted *intensity* of the interference but in what concerns the *scope* of its admissibility. So the Court was faced with the issue of how to interpret the relationship between these provisions in order to determine whether and to what extent the constitutionality of the regime of access to metadata by the secret services could be assessed on general proportionality grounds.

The interpretation endorsed by the majority was that the provisions stand via-a-vis one another as rule and exception. The general rule is that third-party access to personal data is prohibited unless it is provided for by law that survives proportionality scrutiny. However, the data of communications – a particular source of personal data −, comprising not just content data but traffic data as well, is subject to more stringent constitutional protection: state interference is only tolerated, as always subject to the conditions that it is provided for by law and that it survives proportionality scrutiny, within the context of criminal proceedings; outside of that context, it is simply proscribed.

A great deal obviously depends on what the majority understood 'communication' to mean, since the concept carves out the exception. It was defined as any successful or attempted intersubjective or person-to-person exchange of information, including calls, e-mails, and texting, but not browsing the web or carrying around a device with location services turned on. Bringing these distinctions to bear on the issue before it, the majority argued that the Constitution ruled out access by the secret services to the traffic data of person-to-person communications under the stringent provision of Article 34-4, since such public authorities operate by their very nature outside of the context of criminal proceedings; even where it relates to criminal activity, their role is to produce information relevant to prevent crimes from being committed, as opposed to investigating and punishing already committed crimes. At the same time, the majority held that the Constitution, under the more lenient provision of Article 35-4, tolerates access to location and traffic data as long as there is no person-to-person communication – say, the data generated by the GPS signal of a smartphone or traffic data generated by visiting websites. In what concerns these, the fate of the regime was decided by proportionality analysis.

The decision was closely contested. Some of the dissents took issue with the narrow understanding that the majority held of the notion of 'matters related to criminal procedure.' They argued that the wording makes no reference to pending criminal proceedings, and that for a variety of purposive and structural reasons the conduct of the secret services aimed at the prevention of criminal activity should be taken as an integral part of the matters related to criminal procedure.

That is not what interests me though. What I want to point out is that both the majority and most of the separate opinions interpreted the constitutional text no differently from the way a legislative text is ordinarily interpreted. At a crucial juncture, the judgement explains that 'Article 34-4 leads us to the inevitable conclusion that the constitutional lawmaker settled explicitly, in the constitutional document, the direction in which the collision between constitutional values and fundamental rights ought to be resolved. The constitutional lawmaker denied the constitutional interpreter the margin to find…a different outcome for the

balancing task at stake.' It added that the Constitutional Court ought to defer to the judgement of the constitutional lawmaker, as it 'expresses the choice of the democratically legitimated constituent power.'

In order to reach that conclusion, the majority invoked traditional canons of legislative interpretation. It argued that not only the textual element, but also the historical, systematic, and purposive elements − all of the canonical elements of interpretation in the civilian tradition −, pointed in the direction that the constitutional lawmaker meant to rule out access to communication data outside of the context of criminal proceedings. The majority acknowledged that the constitutional text, particularly when it comes to the protection of rights as opposed to the frame of government, is on the whole far more open textured than statutes, leaving many issues that require a balancing judgement unsettled. The point, however, is that in this particular domain the balancing was deliberately carried out at the constitutional level, as evinced by the text, structure, history, and purpose of the particular constitutional provision at stake.

III. Four Startling Consequences

I am not going to discuss whether the conclusion follows from the premises or whether the judgement may be supported on different grounds. I mean to question *the premises* themselves. My concern is not the ruling but the conception of constitutional law and constitutional interpretation underlying it. At this point, however, I want to do so indirectly, by pointing out four startling consequences of the position the majority took as to the constitutional protection of privacy interests related to personal data.

The *first consequence* is that the constitutional order affords radically different levels of protection to interests that are not only rooted in the same value – privacy – but that one would have a hard time grading or weighing differently in abstract terms, that is, regardless of the circumstances. It might seem superficially plausible that communicational self-determination lies closer to the heart of privacy and freedom than informational self-determination, perhaps even that communication alone is both intimately related to and is an indispensable

companion to freedom of expression and the democratic values it instantiates. But that turns out to be wrong at least where access to metadata is concerned. There is no reason to think that the traffic data generated by web browsing or concerning the location of the possessor of an electronic device is any less sensitive in light of the relevant constitutional values than the *traffic* data of successful or attempted person-to-person communication. Both interfere seriously with cherished dimensions of privacy and may have a chilling effect on personal self-determination; and none implicates public speech directly, since they concern personal data. It follows that it is arbitrary, indeed contradictory, to proscribe interference with the data of communications while enabling interference with other types of personal data, subject to the requirement of proportionality.

The *second consequence* is the paradox of ruling out proportionality analysis in a broad area – in this case, any state interference with communications beyond the domain of criminal procedure. The doctrine or proportionality entails that fundamental rights may be limited for the sake of competing rights or collective goods the importance of which justify, under the circumstances in which the law applies, the limitation therein established. Indeed, a certain degree of limitation is not just constitutionally tolerated but mandatory. That is because rights do not merely place the government under *duties to abstain* from certain courses of action; they create as well state *duties to protect* individual interests or *duties to promote* social goods. Proportionality comprises therefore both the prohibition of excessive interference with defensive rights and the prohibition of insufficient protection of positive rights. I do not mean to suggest that there are no absolute rights, in the sense that legal interference with some rights – the prohibitions of slavery and torture come to mind – is out of bounds in a liberal democracy. But if that is so, it is because, upon careful consideration of the relevant reasons, there are no circumstances in which it would be proportionate to sacrifice such rights, and not because we put the cart ahead of the horse and refuse to even consider all the relevant reasons. The same applies to laws that enable state access to personal data outside of the context of criminal proceedings. Only proportionality analysis can determine that the duty of the state to protect security never prevails over its duty

to respect privacy and liberty. And unlike the cases of slavery and torture, that proposition is, to say the least, doubtful and contentious.

That leads me to the *third consequence*. A constitutional order that claims the last word on the balancing of conflicting rights and values, instead of devolving to the ordinary political process the democratic management of the disagreement about such issues, compromises its ability to assemble the plurality in a common house. That is so because of the *reasonable pluralism* characteristic of our liberal and democratic societies. People disagree reasonably and obdurately not only about religious, metaphysical, and ethical issues that modern social arrangements largely confine to the private realm but also about matters of unavoidably public concern, such as the scope of basic liberties, the demands of social justice, the direction of economic policy, the design of collective institutions, and the like. Library bookshelves, academic seminars, public debates, social networks, and other *fora* of discussion provide an eloquent testimony of that reality. Moreover, the diversity of views is headquartered everywhere in civil society, from the dinner table to the lecture room, such that it cannot be explained away as a symptom of thoughtlessness; it is, as John Rawls puts it, the 'normal result of the exercise of human reason within the framework of the free institutions of a constitutional democratic regime'. In a liberal democracy, therefore, we expect the balancing judgements that divide the community to be carried out not by the constitutional lawmaker but through procedures of collective decision-making that treat citizens as political equals.

At last, the *fourth consequence* of the majority interpretation of the prohibition of state interference in communications is that it undermines the ability of the constitution to preserve its normative force across generations, by binding its fate to historical contingency, the prospect of amendment, and the vagaries of ordinary politics. The more a constitution looks like an entrenched statute or a detailed regulation, the more likely it is that a wide gulf between norm and reality will open over time, rendering constitutional normativity essentially nominal. It is especially worrisome if the constitutional order is understood to prevent the very balancing judgements that enable its ever-renewed adaptation to changed circumstances, particularly in an area – the tension between liberty and

security – where that is ultimately a necessary condition for the preservation of the liberal democratic form of collective life.

IV. General Grounds of Legality

These are the consequences of the majority view that in the realm of state interference with communications, the balancing of conflicting values is performed at the constitutional level. But that, one might say, misses the point. The role of the Constitutional Court was not to discuss the merits of the constitutional choice; it was to determine its content. In other words, the task was to divine legislative intent with the assistance of the ordinary canons of legislative interpretation, only the intent in question is not that of the ordinary lawmaker but that of the constitutional lawmaker. That the law, including constitutional law, is open to critical scrutiny, and in cases of serious injustice might even justify resistance, is no license to conflate what it is and what ought to be. On the contrary, such distinction is analytically necessary and morally liberating.

When it comes to statutory interpretation, we search for *legislative intent*. The term requires caution. In his classic treatment of the subject, Savigny defined legislative interpretation as the 'reconstruction of the thought dwelling in the law'. That suggests legislative intent is a mental state causing the enactment of the statute, which is why his doctrine is usually charged, albeit in my judgement unfairly, with radical subjectivism. In fact, legislative intent is a normative concept and a necessary postulate of statutory interpretation. The words that go into a provision serve a *prescriptive* function – they are meant to express a rule or part of a rule −, and therefore we have to assume an intention to make sense of them. That does not mean that any *actual* intention went into the passing of a statute, let alone that the goal of interpretation is to grasp a psychological event; perhaps the absolute monarch was drunk when he signed the decree placed in front of him by a sinister counsellor or a sizeable number of MPs were doing online purchases or texting their lovers when they cried 'Aye!' to a legislative proposal. What matters is that, once the statute is passed, making sense of it requires the assumption that it is the vessel of some intelligible purpose.

Consider as an example a warning placed in the restrooms of the law school where I studied as an undergraduate that read 'no substances should be dropped in the toilet.' It is obvious to any sane person that the intent is not to prevent the use of the toilet, as would inevitably result from following the warning to the letter. We know it on the basis of a background understanding of what a toilet is for and what kinds of reasons could inform the regulation of its use. That is precisely why the letter of the law is always insufficient to determine legal content – even when it coincides with legislative intent, the condition of a statute that Savigny labelled as 'healthy', we reach that comforting conclusion upon consideration of the various canons of interpretation.

Therefore, legality means the conformity of behavior with legislation and the legal content of legislation is determined by the interpretive quest for legislative intent. But what is the point of legality – why defer to legislative intent in the first place? We can imagine a legal system in which judges would decide cases upon their sense of justice or their understanding of what a fair or sensible outcome would be. They would not take statutes to be binding sources, but merely persuasive ones: fallible attempts to externalize or express the demands of justice in the circumstances of their application, hence carrying a heuristic value commensurate with the wisdom of their drafters. I suppose that was the legal status accorded to the *Corpus Juris Civilis*, at least in those parts of medieval Europe beyond the reach of the Holy Roman Empire. The jurists claimed that the opinions of Ulpianus, Gaius, Celsus, and other outstanding Roman jurists were part of the legal materials not *ex ratione imperii* but *ex imperio ratione* — not on account of imperial authority but on account of the authority of reason. They were legally relevant only because and insofar as they were persuasive.

That is patently not the way we understand the legal force of legislation. Judges owe allegiance to statutes for reasons other than their heuristic or persuasive excellence. Moreover, the latter are at least doubtful, as Bismarck flagged with the cynical aphorism that statutes are like sausages in that it is better not to see them being made. The principle of legality rests mainly on two values: legal certainty and political legitimacy.

On the one hand, social predictability or coordination would be impossible if individuals could not count on any guidance but that which is provided by trying to figure out by themselves how they ought to act as citizens or by trying to foresee judicial rulings. This is true for at least two reasons. First, people disagree about the requirements of justice, meaning that two reasonable individuals are unlikely to come to the same conclusions as they engage with the issues of justice and fairness entangled in their ordinary affairs. Moreover, the mental burden of unrestrained moral reflection about each and every issue of justice and fairness would prove exhausting even to the most resilient citizen. Second, there are numerous collective action or coordination problems that cannot be settled rationally but only through the *fiat* of some authority — say, decisions about whose vehicle should be given priority at an intersection, concerning the maximum time after a legally relevant event to initiate the corresponding proceedings, or to create administrative agencies devoted to the provision of public goods. In most circumstances, binding general laws are necessary to secure these collective advantages.

On the other hand, legality is based on the *political legitimacy* of the legislature. That legitimacy falls into two categories. The first concerns the right to settle obdurate, reasonable, and sincere controversies of political morality. The political branches are endowed with a comparatively strong title to decide which among several conceptions of justice should be given preference because they enjoy the democratic legitimacy bestowed upon them by electoral representation and accountability. The second category comprises considerations of functional propriety. The political branches are comparatively well-equipped to make certain types of judgment, namely empirical assessments involving complex prognoses and judgments of public welfare, and to set up complicated institutional arrangements and make them work effectively, such as a health care system, a social security system, an income tax system, or a system of military defense. Law-applying officials have good reason to defer to the decisions of the elected branches in such domains either because the latter are more likely to get things right or because only they control the conditions required to make things happen.

V. The Paradoxes of Constitutional Legality

If the problems of constitutional interpretation are regarded as continuous with those of statutory interpretation, it is because the constitution is regarded as essentially *jumped up legislation*. On that view, constitutionality is a species of the genus 'legality' – it means nothing more and nothing less than *constitutional legality*. The constitution embodies the political choices of a qualified or enhanced legislator – the constitutional lawmaker – whose intent is largely determined by the canonical procedure of interpretation applicable to statutes. That informs us, among other things, about which issues were left open to ordinary political settlement subject to proportionality analysis and which were settled immediately at the constitutional level.

Alas, the extension of the category of legality to the constitutional realm generates five intractable and interconnected *paradoxes*. These are either restatements or variations of familiar problems of constitutional theory. My claim is that they flow specifically from the *legislative* conception of constitutionality. Let me go over them briefly.

The generational paradox. How can it be that a constitution-making generation binds future generations to its political choices? Thomas Jefferson wrote that 'no society can make a perpetual constitution, or even a perpetual law. The earth belongs always to the living generation.' History teaches us that constitutions are not perpetual, but their drafters invariably aspire them to live a very long life. In the debate over the draft of what would eventually become the French Constitution of 1791, the member of the National Assembly Thouret declared passionately that '*une constitution fondamentalement bonne*' would have to be amended only with respect to minutia because it would be '*fondée sur les bases immuables de la justice et les principes eternelles de la raisón*.' Monsieur Thouret's optimism turned out to be misguided: France had a baffling 16 constitutions in the period of 69 years following the French Revolution. Jefferson's own suggestion was that constitutions should expire after 19 years. But that is at once a very rough index of generational cohorting in matters constitutional and a source of the very political instability that constitutional arrangements are expected to thwart.

It is no doubt true that constitutions can be repealed. As Jefferson noticed, however, that is hardly the same as each generation having an equal chance to adopt its own constitution. He writes that 'the power of repeal is not an equivalent. It might be indeed if every form of government were so perfectly contrived that the will of the majority could always be obtained fairly and without impediment. But this is true of no form. The people cannot assemble themselves. Their representation is unequal and vicious. Various checks are opposed to every legislative proposition. Factions get possession of the public councils. Bribery corrupts them. Personal interests lead them astray from the general interests of their constituents: and other impediments arise so as to prove to every practical man that a law of limited duration is much more manageable than one which needs a repeal.'

The democratic paradox. How can it be that a minority favorable to a political choice entrenched in the constitution prevails over the majority? Imagine a constitutional provision that reads 'no person shall be obliged to pay retroactive taxes', interpreted as a categorical prohibition, as opposed to a principle that merely operates as a *prima facie* prohibition or a *pro tanto* reason to be balanced against countervailing considerations relevant in the circumstances. The Portuguese Constitution contains such a provision, and the Constitutional Court, relying essentially on the historical element, has interpreted it as a categorical prohibition subject to the proviso that its scope is confined to cases of so-called genuine retroactivity as opposed to retrospectivity.

The adoption of that rule expresses the choice of the constitutional lawgiver. But once the constitution is enacted, the constitutional lawgiver is no more – all we have left are the branches of government, including the legislative body. Now imagine the majority in the legislature wishes to get rid of the constitutional rule, arguing that while retroactive taxes are in principle unfair, since they frustrate the legitimate expectations of the taxpayers, they may be justifiable, all-things-considered, in outrageous cases of tax avoidance or in sovereign debt crises. One may or may not agree with this position, but it is undoubtedly reasonable. Yet so long as there is a minority in a position to veto an amendment

to the constitution, the rule will stand. From the *diachronic* perspective, that reveals the generational paradox – the dead ruling over the living. From a *synchronic* perspective, it reveals the democratic paradox – the few ruling over the many.

The amendment paradox. How can it be that a constitution may be enacted by a simple majority while requiring a qualified procedure to be amended? Constitutions may be adopted in a variety of ways documented in political history: monarchical concession, expert committees, popular referendums, foreign imposition, corporatist bargaining, legislative voting, and so forth. Nevertheless, the most democratic procedure is usually taken to be a constitutional convention or assembly elected specifically for that purpose. When that is the case, the constitution is enacted by a simple majority – half of the votes plus one in the constitutional body. It may be, of course, that the proposed draft is supported by more than half of the members; from a legal standpoint though, half plus one is all that is required for the adoption of the constitution. Moreover, a possibly broad consensus on the constitution as a whole does not necessarily extend to each of its parts – it may be that a general vote yielded robust support for the constitution while a particular provision made it to the final version with the support of a simple majority.

That generates a fresh paradox: the paradox of amendment. The procedure to amend the constitution is typically – whenever the constitution is rigid – far more stringent than the procedure for its adoption. Even in the less stringent and simplest of scenarios, that of a constitution that can be amended solely by a qualified majority in a single chamber, it is always harder to change than to make a constitution. A simple majority is all that is required to entrench a political choice that can never be repealed by a simple majority. That discredits the notion that, from a procedural standpoint, the constitution-making power is democratically superior to the constitution-making power. It also puts a question mark over the claimed authority of the constitutional lawgiver to demand a qualified procedure for the amendment of the constitution.

The identity paradox. How can it be that the amendment power can be used to subvert the identity of the constitutional order? You may tell me that the practical response to the amendment paradox is to make the constitution amendable by a simple majority in the legislature or any other procedure that mimics that which led to the adoption of the constitution itself. That, however, is tantamount to making the constitution *flexible* – and procedural rigidity is precisely one of the two principal mechanisms, the other being judicial review of ordinary state action, put in place to protect the constitutional order. Thus, the amendment paradox cannot so easily be set aside.

To make things worse, we also face the reverse problem. The point of enabling constitutional amendments is to prevent the constitution from wearing down. Yet nothing prevents the amendment power, so long as the procedural requirements for its exercise are met, from subverting the very constitutional order that it was instituted to safeguard. Over time a whole new substantive constitution may be established in this way, its only continuing element being the regime that regulates the exercise of the amendment power. If we use all the stones of the Cathedral of Milan, one by one over a long period of time, to build a massive wall to keep migrants at bay, is it still the Cathedral of Milan? If the amendment power is used to turn a liberal democratic regime into a fascist dictatorship or a dictatorship of the proletariat, is it still the same constitution? These are rhetorical questions.

Some constitutional documents contain clauses setting substantive limits to the power to amend – Article 79-3 of the GG is paradigmatic. But these clauses are known to be paradoxical in themselves. For either these limits are regarded as absolute, in which case they exacerbate the paradox of amendment, or they are regarded as disguised procedural limits, in the sense that the amendment power may be used to change the provision that establishes the limitation clause, clearing the way for the subversion of the constitutional order. One way or another, the aporia is seemingly inevitable.

The ideological paradox. How can it be that the heightened legislative form is the essence of constitutional law? When we teach our students constitutional history,

we tell them that modern constitutional law has three parent traditions: the English, the American, and the Continental. We draw their attention to the rich variety of historical paths that underpins each of these traditions: the Glorious Revolution and the Scottish Enlightenment; the War of Independence and the Philadelphia Convention; the French Revolution and German Idealism. At the same time, we stress the affinity among these traditions, the common seeds used to sow the soil of each of them. Those are the intellectual and political seeds of *constitutionalism*.

Yet if the essence of modern constitutional law lies in its written and rigid form it would seem that the constitutional systems of the United States and of the member states of the European Union belong in the same family as those of countries like the Russian Federation, the Popular Republic of China, the Islamic Republic of Iran, or for that matter the former Soviet Union, in contrast with the Commonwealth countries, particularly the United Kingdom with its unwritten constitution. That is plainly absurd. What defines membership in the family of constitutional democracies is adherence of the ethos of constitutionalism, not contingencies of form. Indeed, the legislative form is an accidental quality of modern constitutional law – just one way, albeit the overwhelmingly dominant way, for the becoming of a liberal democratic constitution.

VI. The Normative Conception of Popular Sovereignty

The five paradoxes of constitutional legality are meant to show that constitutional law cannot be squared with the legislative paradigm. One might argue nonetheless that the paradoxes dissolve in the face of a *dualist account* of law-making, an account stressing that the constitution embodies the sovereign will of the people.

Although these days it is most often associated with the American constitutional theorist Bruce Ackerman, the theoretical foundations of democratic dualism lie in the continental distinction, drawn by Sieyès in the wake of the French Revolution, between *pouvoir constituant* and *pouvoir constitué*. Political authority lies originally with the people, holder of the foundational right to organize itself politically in whatever form it sees fit; this is its *pouvoir constituant*.

The authority of the various branches of government instituted by the people in its constitution-making capacity, on the other hand, is derivative and precarious; they are mere *pouvoirs constitués*.

Therefore, we must be careful to distinguish between two senses of 'democracy' in constitutional discourse. There is, on the one hand, democracy as a *form of government* enabled by constitutional norms, notably the process of legislative decision-making. On the other, there is democracy as *popular sovereignty*, the supreme authority of the people to establish a constitution. It is in the very nature of constituent power, as the primeval embodiment of democracy, that it can do as it pleases, and that includes the entrenchment of political choices that reduce the scope of ordinary democratic deliberation.

The argument rests on the notion that the constitution is a law made by 'the people' and that popular sovereignty is the ultimate source of political legitimacy. But what is 'the people', this mysterious person bearing ultimate political authority? Surely we are not talking about an observable instance of willing, a person endowed with agency; indeed, to think of the people as an empirical legislator is to incur in something akin to the naturalistic fallacy. Popular sovereignty is a doctrine as elusive as divine omnipotence, which reminds us of Carl Schmitt's famous assertion that 'all significant concepts of the modern theory of the state are secularized theological concepts.'

It should not surprise us, then, that appeals to a latent popular will have served as many different and rival worldviews as have appeals to a divine will. There is a charismatic notion, according to which the people manifests itself in a leadership sanctioned by popular acclamation. There is a romantic notion, which defines the people in terms of a national culture whose custodians are the academic elite. There is a revolutionary notion, which identifies the people with the vanguard of the social class that fulfills at each historical moment the universal aspiration of human emancipation. Yet another notion is populist, and sees the people in the workings of social movements, street protests, revolutionary struggles, and other spontaneous or inorganic phenomena. So extremely varied and politically abused are these notions of popular will, that one is tempted to

paraphrase Alf Ross's quip about natural law: like a harlot, the people is at the disposal of everyone.

In *Die Diktatur*, Carl Schmitt interpreted Sieyès as having laid down the foundations of a radically 'decisionist' account of the constitution, according to which the site of constituent power – normally a constitutional assembly − is a sovereign dictator whose will is identified with that of the people itself. That is as theological as it gets: a secular appropriation of the miracle of transubstantiation with the constitution-makers in the place of the priesthood. Schmitt went on to put that conception to brilliant and unsettling effect in his *Verfassungslehre*, an ominous attempt to demonstrate the irresolvable contradiction between democracy and liberalism – that is, as he understands these terms, the rule of the people and the rule of law − at the heart of the constitutional arrangements of the Weimar Republic.

The alternative interpretation of the constituent phenomenon is *substantive*. It tells us that the constitution is legitimate on account of the values it embodies as opposed to the political force behind it. Hence, popular will is not identified with the constitution-making majority but with *a priori* values, principles, or reasons. In the liberal democratic conception, the people is an association of free and equal individuals living in close proximity under a common system of laws. That is the conception of popular sovereignty that underlies both classical social contract theory and the tradition of modern constitutionalism. This conception furnishes a standard to determine whether a given constitutional document expresses the will of the people or merely the contingent will of a faction that claims to act on its behalf. The standard is the united will of the citizenry, imagined for such purposes as the individuals in a state of nature, the denizens of an original position, the interlocutors in an ideal speech situation, or the actors staging some other 'purely hypothetical situation characterized so as to lead to a certain conception of justice'. Hence, it is not the intent of the constitutional legislator that determines constitutional content but the other way around: certain values identified *a priori* with the will of the people *communicate* constitutional dignity to the document or practice regarded as the source of constitutional law. In sum, the will of the people is a *normative concept*.

That is the point of Article 16 of the Declaration of the Rights of Man and the Citizen of 1789. Only a constitutional law that protects fundamental rights and establishes the separation of powers can be ascribed to 'the will of people' as liberal democracy conceives it – only then can it be regarded as a genuine *constitutional foundation* of a political community among free and equal individuals. It follows that it is illegitimate for the constitutional lawmaker, acting as an agent of the people, to bind ordinary lawmakers to balancing judgements. That is so because a plurality of free and equal individuals is reasonably and ineradicably *divided* on those issues, such that no particular choice can be traced back to its will. A constitutional lawmaker that brings a particular policy to the constitutional level is hence no longer acting on behalf of its sovereign principal but as a usurper of the *pouvoir constituant*. For when the individuals that make up the people are divided at the policy level, their united will can only be to manage their differences *democratically*, devolving the decision to institutions and procedures through which either they are to be consulted periodically as political equals or their views can be heard and judged by an impartial third-party.

Does the argument prove too much? If constitutional decisions are legitimate only insofar as they can be traced back to the united will of a plurality of free and equal individuals, it would seem that it is impossible to establish a constitution in a pluralist society. Surely the constitution cannot devolve to ordinary political institutions and procedures the decision to create the very institutions and procedures of ordinary decision-making. These *presuppose* constitutional norms, and yet political disagreement extends to those choices as well, as evinced by longstanding controversies over the best political system (parliamentary *versus* presidential), the best electoral system (proportional *versus* majoritarian), the best system of representation (free mandate *versus* imperative mandate), as well as over many more choices essential to the architecture of collective deliberation. It would be plainly absurd and self-defeating to conclude that these disagreements render any constitutional frame of government illegitimate.

There is in any case a decisive difference between issues concerning the organization of collective deliberation and issues pertaining to the substance of

collective choices – in other words, between the frame of government and the bill of rights. The former is a necessary condition of democracy itself: parliaments, executives, courts, elections, statutes, decrees – these are not natural facts but creatures of the law, without which 'the people' cannot sort out democratically its disagreements. Notwithstanding the importance of finding common ground in these matters, the legitimacy of constitutional choices in this domain is fundamentally a matter of *necessity*: you get no eggs if there is no chicken. The argument does not extend with respect to choices that do not have to be made at the constitutional level – choices that no logical imperative removes from the purview of ordinary lawmaking. That is the case of balancing judgements concerning fundamental rights and collective goods.

VII. The Ontology of Constitutionality

Thus, a constitution is *not* enhanced legislation but a *distinctive type of law*, uniquely suitable to serve as a normative foundation of political community among a plurality of free and equal individuals. And unlike legislation, which is essentially a formal type of law, in the sense that the content of a statute is contingent upon the choice of the lawmaker, the constitution is essentially a *substantive* type of law, in the sense that irrespective of its form the content is at a basic level determined *a priori*. If it is not, if we interpret a constitutional document as if it were a piece of legislation embodying the political choices of the constitutional lawmaker, we will run into the intractable paradoxes examined earlier. Provisions such as 'no one shall be obliged to pay retroactive taxes' of 'no vehicles in the park' have a different *legal meaning* in a statute and in a constitution – there they typically embody rules that can only be defeated in the exceptional circumstances that vindicate teleological reduction or some equivalent form of reasoning; here – in the constitution – they can only establish a principle open to balancing against competing principles. The difference is rooted in the independence of the *ontology of constitutionality* from the ontology of legality,

This notion of ontology is loosely based on the philosophy of Martin Heidegger. In *Sein und Zeit*, Heidegger is chiefly concerned with what he calls Being,

the condition of the possibility of all *beings* − all manner of entities, such as tables and chairs, gravity and neutrons, square roots and irrational numbers, beauty and goodness, norms and rights, unicorns and dragons, so on and so forth. The point is that the being of these entities is dependent on a background, a world to which they belong and which makes their presence possible − a world that at one level is a regional world, specific to some field of experience, such as the worlds of natural science, of the afternoon tea, or of fairy tales, and at the deepest level is the fundamental world of Being itself. Ontology is the attempt to *disclose* the structural features of the background, to bring into broad daylight the *a priori* which makes things intelligible. If it is the ontology of some region, it is regional ontology; if it is the ontology of Being itself, it is fundamental ontology – the grandiose mission of general philosophy. Therefore, chalk is a mineral with certain properties within the world of geology and a tool for writing within the world of teaching, and such different meanings that we grasp intuitively and inform our coping with chalk in the lab and in the classroom can be thematized as we *lay bare* the regional ontologies of geology and teaching.

Likewise, I claim that the meaning of a provision such as the prohibition of retroactive taxation or of interference in communications is different within the regional ontology of legality and that of constitutionality. As the legendary Chief Justice John Marshall put it in a famous opinion: 'We must never forget that it is a Constitution that we are expounding.' So constitutional interpretation – ascribing meaning to constitutional objects – depends on a specific background structure, the constitutional *a priori*, a field of experience in which constitutional interpreters dwell and of which they are dimly aware, and that constitutional theorists are tasked with disclosing. There is also an ontology of legality in which lawyers dwell all the time and which is disclosed by the theory of legislation, and because our legal culture is so intoxicated with the legislative paradigm there is a pervasive and nefarious tendency for the ontology of legality to encroach upon the realm of constitutionality, distorting *constitutional* meaning. It is as if you give a piece of chalk and a blackboard to a geologist and instruct him to use his extensive knowledge of chalk to draw a genealogical tree of the Hohenzollern dynasty.

I am going to give a very rough account of the ontology of constitutionality, that *a priori* structure that is the condition of the possibility of the meaning of constitutional objects – including, of course, that a document drafted at a particular historical moment by a particular set of individuals with the *aim* of being the constitution has indeed the meaning of *being* the constitution. I suggest that the constitutional order that lies in the background of constitutional interpretation comprises three strata.

The first stratum is the *universal* constitution. It concerns the substantive norms contained in the very idea of a political community among free and equal individuals, notably fundamental rights, the separation of powers, and democratic legitimacy. That is the level which Article 16 of the Declaration of 1789 identifies with the constitution. It is a critical level for constitutional lawyers because it shapes and constraints the exercise of constituent power and bestows normative meaning upon constitutional arrangements. It is the condition of the possibility of constitutional law as conceived within the tradition of constitutionalism. I do not mean universal either in the sense that all political communities are organized around these principles or in the sense that there is no opposition to liberal democracy in our own political communities. I mean it in a different way: these are the principles implicated in the very idea of constitutionalism, identified a *priori* with the will of the people as interpreted by liberal democracy. They are universal because they are transcendental. If they are challenged, the constitutional order has to, so to speak, question itself or reflect upon itself. That is no longer a task for constitutional theory but for political philosophy.

The second stratum is the *existential* constitution. For a multitude of free and equal individuals to form a political community and identify themselves with collective deliberation, some existential *a priori* is required. In the political realm, proximity among individuals forming a community is not a matter of geometry but of phenomenology: peoples and territories are not creatures of design but realities of history. It would be tyrannical to re-arrange the political map of the world according to 'enlightened' considerations of the ideal size and composition of population and territory; arguably, democratic deliberation and majority rule presuppose a collective political identity, something more than the unencumbered

selves of liberalism. The universal stratum of the constitutional order tells us that we are to interpret the people as a community of free and equal individuals, but it does not lay down the criteria to identify a people; that is an existential datum. I am not suggesting a primordial account of nationalism, disregarding the role of contingency in the formation of peoples, nor a narrow-minded parochialism, dismissing the idea of supra-national political integration, and the prospect that an association of states may evolve towards an association of peoples and eventually a new instance of collective political identity – though I want to insist that the outcome is phenomenological rather than mechanical. And I do not deny that the existential constitution may not coincide with statehood, either because of geopolitical contingency and deep ideological antagonism – as in the case of Cold War Germany – or on account of the instability of the sense of belonging – Quebec, Catalonia, and Scotland are cases in point. I only mean to stress that a democratic political community always already assumes the constitution of a territorially bounded collective subject.

The third stratum is the *positive* constitution. It comprises the fundamental choices about the frame of government that are not determined by the universal requirements of democracy and the separation of powers, as well as the scores of provisions required for the government to function. Among the fundamental choices are those pertaining to the republican or monarchical form of government; the presidential, parliamentary, or some intermediate system of government; the more or less proportional nature of electoral arrangements; the federal or unitary form of the state (within the limits set by the existential constitution, which may require a federal arrangement), and their various declinations; the scheme of bodies or organs of the state; and so on. Among the detailed provisions are most of those concerning the division of competences, the status of political officials, the form of legal acts, and so forth. The legitimacy of the constitutional lawmaker to make these choices lies solely in the fact that they are instrumental to get ordinary collective decision-making going – they are a necessary condition of the practice of constitutional government. For that reason, constitutional norms regarding the organization and activity of the government have important structural affinities with ordinary legislation – they tend to be strict rules, not

principles open to balancing, for otherwise they cannot serve their function as coordinating arrangements.

It is worth pointing out that much confusion and disappointment in constitutional theory stems from an exclusive focus on one of these strata of the constitutional order to the detriment of the other two. The dominant approach of constitutional legalism – the assimilation of constitutional law to legality – overstretches the boundaries of the positive stratum, falling prey to the paradoxes that we examined earlier. Another approach, increasingly popular among authoritarian nationalists, abuses the notions of 'constitutional identity' and 'popular sovereignty' to smuggle into the existential stratum some of the positive material in the constitutional order and, more ominously, to obliterate the universal dimension of constitutional law, often dismissed as the creed of liberal elites out of touch with the interests and aspirations of ordinary citizens; that involves a mystification of the people all too familiar from the history of fascism. Some extreme forms of cosmopolitan constitutionalism run into the opposite mistake, disregarding or leaving unaccounted for the existential stratum of the constitutional order, and ending up either in a well-meaning yet quixotic and ultimately tyrannical quest for universal federalism by design or unable to bridge the gap between the liberal abstraction of free and equal individuals living in close proximity under a common system of laws and the phenomenology of particular peoples with a claim to political self-determination.

VIII. Canons and Maxims

I argued that the task of constitutional theory is to disclose the constitutional *a priori*, the structure of the constitutional order, or to pursue the ontology of constitutionality. Constitutional interpretation, on the other hand, is a *practical task*: it is a quest for the meaning of constitutional objects, typically for the purposes of adjudication. The same distinction applies to legislation. It is one thing to lay bare the foundations of legality and quite another to interpret statutes. And the specific task of the theory of interpretation is to lay down canons and propose maxims for the practical task of interpretation.

So *which* are the *canons* of constitutional interpretation?

It is pointless to announce a definitive list. It is in the nature of the task, as a practical one, that the canons are as many, open, and flexible as their function of enabling constitutional meaning justifies. Here we are reminded of Aristotle's dictum: 'it is the mark of an educated man to look for precision in each class of things just so far as the nature of the subject admits.' In any case, I will not shy from stating and exploring four canons that strike me as particularly congenial to the foregoing account of constitutional ontology.

The principle of unity. Contradictory commitments and judgements of value are possible in ordinary law; indeed, to the considerable extent tolerated by the principle of equality, they are a trivial feature of a democratic legal order inhabited by laws enacted over time by different political majorities and coalitions. Yet constitutional law, most notably the bill of rights, must possess an intrinsic coherence of value, not in the sense that there are no *competing* principles – for that is a pervasive feature of liberal political morality – but in the sense that there are neither irreconcilable *commitments* of value (such as equal dignity and natural aristocracy) nor contradictory *judgements* of value (such as varying levels of protection for traffic and location data). It is startling, therefore, that one and the same constitutional order is interpreted as dispensing substantially different levels of protection to rights and interests of comparable nature and weight – say, protecting privacy with respect to the traffic data of person-to-person communications far more stringently than the location data generated by the GPS signal of an electronic device. That could only be intelligible if we were to think of a constitution as the storehouse of discrete political choices generated by the contingencies of bargaining and compromise. On the contrary, if we think of the universal stratum of the constitution along Kantian lines as 'a coalition of every particular and private will within a people into a common and public will', we necessarily postulate the unity of the constitutional order.

The principle of balancing. To the extent that it takes the form of principles as opposed to rules, constitutional law cannot prescribe disproportionate outcomes

that sacrifice unilaterally some of its constitutive values. A principle, right, interest, or value – let me use these terms interchangeably here – is worthy of protection in a range of cases only to the extent that the sacrifice of a competing principle, right, interest, or value is suitable, necessary, and all-things-considered proportionate. The proposition that the constitution disproportionality protects a certain principle is plainly absurd; indeed, as Robert Alexy puts it, 'the principle of proportionality…logically follows from the nature of principles; it is deduced from them.' Consequently, there are no absolute rights *ex ante*, independently of a balancing judgment that takes into account all the relevant considerations and circumstances; the rights not to be enslaved or tortured, for instance, might be absolute *ex post*, if they defeat competing claims in all possible circumstances. The only plausibly absolute constitutional value in the *ex ante* sense is human dignity or the dignity of persons, since that is plausibly the very source of all constitutional values, such that there is nothing of value that could possibly justify its sacrifice. But it is also a value whose independent work in constitutional argument is somewhat limited: although all relevant value-claims are sourced in human dignity, what human dignity requires is that no person be burdened disproportionately, for the contrary would violate the requirement that every person's needs be treated with equal concern and every person's judgements be treated with equal respect.

The principle of integration. Constitutions typically comprise two main parts: a bill of rights and a frame of government. When it comes to the latter, rules are of the essence: organs must be established, powers assigned, procedures outlined, and conduct formalized in order to get a public authority informed by the principles of democratic legitimacy and the separation of powers going. Although they are often contestable, these rules play the vital role of coordinating the myriad individual actions required to make the machinery of government work. They belong in the positive stratum of the constitutional order. A bill of rights, on the other hand, is a *charter of principles* open to the inflow of new generations of rights and open to balancing by a democratic legislature whose judgements are in turn subject to judicial review; it refers directly to the universal stratum of the constitutional order. It is so because the constitutional lawmaker is deprived of the political legitimacy

to seal off the realm of fundamental rights or to settle any of its inner tensions in advance: the constitution can only claim the allegiance of successive generations of free and equal individuals divided by rival conceptions of justice and policy if it lets them sort out their differences democratically, both through *electoral* representation in a popular assembly and *argumentative* representation in the judicial process. Only then can it *integrate* the ineradicable plurality of individuals into a citizenry properly so called. Accordingly, the entrenchment in the bill of rights of value judgements and policy choices beyond statements of principle ought to be regarded as *ultra vires*, an abuse of constituent power. The interpretation of constitutional provisions concerning rights as laying down rules that foreclose balancing is simply misguided.

The principle of stability. The constitutional order of a people of free and equal individuals protects political stability over time, through openness and flexibility in some regards and insulation and rigidity in others. One way in which the apparent tension between these claims is resolved concerns the structure of constitutional norms: on the one hand, fundamental rights and other substantive values are to be interpreted as flexible, both in the sense that no catalogue of them is ever definitive, sealed off from reason and history, and in the sense that they are open to balancing by legislative and judicial actors with one form or another of representative legitimacy; on the other hand, constitutional norms concerning the frame of government are to be interpreted as relatively rigid rules that enable the exercise of public authority within the bounds of the principles of democratic legitimacy and the separation of powers. The other way in which political stability is served by a delicate balance of rigidity and flexibility is through the regime of constitutional amendment. All that belongs in the universal and existential strata of the constitutional order is by nature unamendable, although of course the provisions that refer to them – the particular wording chosen by the drafters – may be modified. Article 79-3 of the GG brings the point home admirably: unamendable are the principles of the federal structure of government (plausibly existential for the German people) as well as of democratic legitimacy, the separation of powers, and fundamental rights (universal values of constitutionalism). Conversely, the positive stratum of the constitutional order on

the whole, notably the manifold choices with respect to the frame of government, is in principle amendable. The requirement of a qualified procedure has nothing at all to do with the supposed democratic superiority of supermajorities; indeed, by granting a veto power to a large enough minority, it is quite problematic from the standpoint of democratic legitimacy. Its justification lies solely in the fact that majoritarian rule cannot earn minority trust if the majority is free to exploit the premium of holding transient power to increase its chances of keeping it in the long run.

These principles or canons of interpretation may be taken to vindicate certain maxims of constitutional law, in the spirit of those regarding Roman Law recorded in the *Digest of Justinian* − e.g., 'law is the art of the good and the equitable'; 'all definitions in civil law are dangerous'; 'the law is not taken from the rule, but the rule made by the law'; 'he who can do more, can do less'; 'he who suffers the inconvenience should enjoy the benefit'; 'good faith gives the possessor the same rights as a valid title'; 'where the law does not distinguish, courts should not distinguish'; and so forth.

Legal maxims of this sort are not universal truths established by deductive reasoning from unassailable first principles. In the tradition of Aristotelian dialectic, they are best understood as *topoi* or *loci* – starting points for arguments premised on commonly held opinions and yielding more or less probable (as opposed to demonstrable) truths. While they may be challenged in the course of argument and are in any case subject to qualification and refinement, their value as sparkers of dialectical reasoning and parsimonious routes to provisional conclusions is uncontestable.

The following are some maxims of constitutional law: 'a constitution is a unique type of law'; 'the written form is not an essential quality of constitutional law'; 'the process by which a constitutional document came to be is legally irrelevant'; 'positive constitutional law is only binding in a derivative way'; 'provisions concerning fundamental rights are strictly declaratory'; 'provisions concerning the frame of government are usually constitutive'; 'fundamental rights are universal and frames of government are particular'; 'constitutional provisions

concerning rights contain principles'; 'balancing substantive values is the province of ordinary law'; 'constituent power and the power to amend are inherently limited'; 'unamendability clauses over positive constitutional law are void'; 'the universal and existential strata of the constitution are unamendable'; 'the constitution protects fundamental rights whether written or not'; 'social rights are constitutionally protected regardless of entrenchment'; 'substantive policy choices entrenched in the constitutional text are void.'

The list constitutes a heterogeneous bundle, ranging from short hand formulations of my account of constitutionality to perhaps less obvious propositions that I believe are entailed by the former without offering anything by way of explanation. The assorted maxims do, however, touch upon major areas of constitutional law and lift the veil over the far-reaching implications of the approach to constitutional interpretation proposed in this essay.

IX. Conclusion

I have tried to show that constitutional interpretation is radically distinct from legislative interpretation because constitutions and statutes, constitutionality and legality, constitutional lawmaking and ordinary lawmaking, are radically distinct. There is a regional ontology of constitutionality that alone makes sense of things constitutional – documents, provisions, institutions, and the like − and supports distinctive principles of constitutional interpretation. Another way of stressing the point is to say that the *a priori* category of the constitution, as intimated in the tradition of liberal democratic constitutionalism, is the condition of the possibility of constitutional meaning.

Talk of an ontological path and a constitutional *a priori* is nevertheless ambiguous. I have fluctuated more or less unnoticeably from *descriptive* statements about bringing to the foreground or laying bare the structure of the practice of constitutional interpretation and *prescriptive* statements about how constitutional argument ought to be conducted. The very notion of *making sense* of constitutional objects wavers between the descriptive and the normative; a staunch analytical

mind might even be inclined to argue that such an ambiguity fatally pushes the neck of the argument into Hume's guillotine.

The basic problem is seemingly *metaphysical*. It is unclear whether the *a priori* which makes constitutional meaning possible is to be understood in *transcendental* or *hermeneutic* terms. If it is the former, the source of constitutional meaning is the interpretive subject bringing reason to bear on empirical objects and bestowing moral value upon them; constitutionalism is thus conceived as a political theory that gives the right form to constitutional practice and lays down the rational grounds for the exercise of public authority. Although the most familiar and influential versions of this approach are based on Kantian philosophy – particularly the idea of a pure or rational doctrine of law as the condition of the possibility of binding positive law –, with its characteristic stress on the constitutive role of the subject, both a Platonic conception of intelligible forms in which sensible objects partake (positive constitutions participate in and can only be perceived by analogy with the constitution-form) and a Hegelian account of the dialectic of spirit immanent in social practices which becomes self-aware in the phenomenology of consciousness (the actualization of constitutionalism in history) fall into the transcendental camp broadly understood. They are universal in a strong sense, claiming an objective and knowable *normative foundation* for constitutional meaning.

The hermeneutic account, on the other hand, is practice-bound and culturally situated. It stresses that meaning is *constituted* by the social practice of interpretation, which is in turn rooted in a tradition that forms the pre-understanding of competent interpreters. The constitutional *a priori*, according to this view, is the tradition of constitutionalism, a shared background that enables the presence of constitutional objects and furnishes the standards of appropriate argument. While it grounds constitutional meaning, the tradition itself is contingent and groundless: there is no deeper meaning or solid foundation to it, just the fact of its mindless reiteration in the practice of interpretation. One way of conceiving this groundlessness leads to a familiar form of existentialism: once we get clear about the web of beliefs that informs our agency, we stand on the brink of the abyss – our beliefs are arbitrary, which makes our agency meaningless,

prompting feelings of anxiety and despair. A more radical albeit quietist view, whose main exponents are Wittgenstein and Heidegger, is that we cannot get wholly clear about the shared background or objectify the pre-understanding because it does not really consist in beliefs that can be represented by knowing subjects but forms of life or social practices in which existences with coping skills dwell.

The clash between transcendental and hermeneutic conceptions takes place well beyond the scope of constitutional theory. Whichever way we conceive the constitutional *a priori* – ranging from Platonic idealism to Heideggerian phenomenology – what is decisive to answer the question concerning constitutional interpretation is that as an activity it rests on presuppositions that may to a greater or lesser but ever enlightening way be disclosed or laid bare by working ourselves up from within the practice of constitutional argument and appealing to the shared tradition of constitutionalism. From that standpoint, the ambiguity between the prescriptive tone of transcendentalism, summoning foundational categories and principles, and the descriptive tone of hermeneutics, appealing to practices and traditions, is a form of metaphysical agnosticism that keeps the focus on the right place.

There remains, however, an important ambiguity regarding the descriptive and the prescriptive. If, as mentioned before, the ontology of constitutionality lays bare that which makes interpretation possible and of which interpreters are dimly aware, how to explain the recurrent encroachment of legality and its specific categories in the field of constitutional argument? In other words, why do constitutional interpreters deceive themselves into thinking that their task is to engage in a type of legislative interpretation and indeed let that deception lead them astray in many cases? The argument wavers between the descriptive and the prescriptive because it operates at three different levels: unveiling the structure of constitutional practice; exposing a form of self-deception; and eliminating mistakes in constitutional interpretation.

Here I can only provide a sketchy account. There are historical and psychological forces conspiring to cast the spell of legality upon constitutional interpretation. The historical force concerns the supremacy of the legislative

paradigm in modern legal culture, from the sources of the law to legal education; contemporary jurists trade expertly in the realm of legality because they are brought up in the techniques of legislative interpretation and inhabit legal orders dominated by statutes and regulations. The psychological force is more interesting. The realm of legality allows judges – the key protagonists of the legal system – regularly to defer judgement to the legislator, the embodiment of a supposedly self-validating authority, sliding comfortably into the shoes of Montesquieu's characterization of the judiciary as '*un puissance…quelque façon nulle*'. In the realm of constitutionality, on the contrary, there can be no illusion that the comforts of normative closure are gifted to us by unassailable realities of political will, plain meaning, and historical fact. *It is argument all the way down*.

That our constitutional culture persistently and elaborately denies this inescapable truth might be taken to vindicate Nietzsche's famous admonition that the truth is unbearable, followed sententiously by the opinion that some 'judgments must be believed to be true, for the sake of the preservation of creatures like ourselves; though they may, of course, be false judgements for all that!' For my part, I would rather side with Dostoyevsky in *Brothers Karamazov*: 'Above all, don't lie to yourself. The man who lies to himself and listens to his own lie comes to a point that he cannot distinguish the truth within him, or around him, and so loses all respect for himself and for others. And having no respect he ceases to love.'