16 Constitutional interpretation

What can Europeans learn from US debates?

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16.1 Introduction

We live in a constitutional age, an age in which the role of the Constitution in regulating the political life of the nation-state has never been greater. The growing influence of the Constitution is attributable to many factors but, whatever the causes, the effect has been to expand remarkably the power of constitutional courts. Across the world, constitutional courts are today determining disputes on highly charged political questions that a generation or two ago would have been regarded as beyond the court's jurisdiction. One consequence of this extension of judicial power is that many of the basic concepts of constitutional review, including doctrines of justiciability, standing and remedial powers, have had to be revised.

Of these various revisions, none is of greater significance than the change that has taken place in methods of interpretation. I will examine this issue of constitutional interpretation by addressing a series of questions, the most basic of which is: according to what methods are constitutions to be interpreted? But that question cannot adequately be answered without also addressing some of the underlying questions. How is the authority of the constitution established and maintained? Are there limits to constitutional interpretability? And, crucially, what is meant by a constitution?

Such questions are of universal significance, but I will address them more narrowly by considering how the American experience can help throw into relief some of the issues that European constitutional courts, especially those established post-1989, presently face. The reasons for considering the American example are not difficult to identify. The US Federal Constitution, drafted in 1787 and coming into force in 1789, is the world's first modern written constitution. Having been amended only seventeen times (if one excludes the Bill of Rights, the ten amendments adopted in 1791), it is also the world's longest surviving constitution and is now commonly regarded as being fixed and permanent. These features of the US Constitution, of course, might suggest that the American experience is thoroughly exceptional, not least in the way that their Constitution has acquired a status as one of the main symbols of national political identity. But it is precisely because of the status acquired by the Constitution that there exists such an

unrivalled depth of intellectual energy and scholarly literature devoted to the issue of constitutional interpretation on which to draw.

16.2 What is a constitution?

All states are constituted, but not all have a Constitution. The distinction is significant. Dieter Grimm explains it by stating that constitution in the former sense 'refers to the nature of a country with reference to its political conditions', whereas in the latter it is 'a law that concerns itself with the establishment and exercise of political rule'. And he suggests that whereas the former meaning offers a descriptive account of the conditions of ruling authority, the latter connotes a normative concept.[1] Grimm is right to highlight the significance of these differences in meaning but is on less sound footing when suggesting that it rests on a descriptive-normative distinction. It is surely more accurate to say that although there are evident differences between the constitution of a regime and the regime's adopted Constitution, both are normative phenomena. The critical point is that these two conceptions of constitution derive their normative power from different sources.

A regime, it has been suggested, 'is the order, the form, which gives society its character'. It connotes simultaneously 'the form of life of a society, its style of life, its moral taste, form of society, form of state, form of government, spirit of laws'.[2] Regimes take a variety of forms and rest their authority on such sources as the customs, practices and historic experiences that go to make up a sense of collective identity of a people. From this perspective, the regime's normative authority, its sense of rightness, is a product of the degree to which the will of the ruling power is accepted by its subjects. Normative authority is therefore generated by the political and cultural practices of the regime, the relationship that evolves between the government and its subjects, and the degree to which a sense of political unity of a people is derived. These factors go towards establishing a sense of the constitution of the regime or, we might say, the constitution of 'the state'.[3]

The Constitution, by contrast, is a text that is drafted and adopted within the state at a particular moment in its development. This Constitution generally establishes the institutions of government, regulates their relations, and regulates relations between those institutions and the citizens of that state. The Constitution acquires its normative authority in part through the coherence of the governmental scheme it establishes and in part by virtue of the process by which, through an exercise of the people's constituent power, the Constitution is drafted and ratified.

What we refer to as the state's Constitution, then, is not to be equated to the constitution of the state. The distinction has a particular importance

1 Dieter Grimm, *Constitutionalism: Past, Present, and Future* (Oxford University Press 2016), 3.

2 Leo Strauss, 'What Is Political Philosophy?' in his, *What Is Political Philosophy? and Other Studies* (Free Press 1959), 9–55 at 34.

3 See Martin Loughlin, *Foundations of Public Law* (Oxford University Press 2010), ch. 8.

for my task because the difference between these two conceptions of constitution reveals why constitutional interpretation remains such a contested activity. The point may be highlighted by consideration of the political theory of constitutionalism. Constitutionalism, it might be said, aims to realise a state of affairs in which the written Constitution becomes consonant with the constitution of the state. This is a highly ambitious objective which, if it ever were to be realised, depends on time, experience, political action and the generation of a constitutional narrative that runs through that text and eventually is able to shape the political reality of the state. And only once realised could it be said that the Constitution has made 'a people'.

This relational claim is particularly important in helping us appreciate the significance of the American experience. Americans, it would appear, have come closest to realising the idea that the Constitution is constitutive of the political character of a people.

The ambition of the exercise on which they were embarked was signalled by Marshall CJ in the early phase of American state-building. In the landmark case of *Marbury v Madison*, Marshall stated that 'the whole American fabric' has been erected on the idea that 'the people have an original right to establish for their future government such principles as, in their opinion, shall most conduce to their own happiness'. This original right, he elaborated, requires 'a very great exertion' which cannot be 'frequently repeated', and it is for this reason that the basic principles it expresses are 'deemed fundamental' and 'are designed to be permanent'.[4]

When Marshall wrote, it was not self-evident that the Constitution had incorporated that ambition, let alone could achieve that status.[5] But a century later, another great American jurist felt able to claim that that ambition had since been realised. 'When we are dealing with words that also are a constituent act, like the Constitution of the United States', Holmes J stated, 'we must realize that they have called into life a being the development of which could not have been foreseen completely by the most gifted of its begetters'. He continued: 'It was enough for them to realize or to hope that they had created an organism; it has taken a century and has cost their successors much sweat and blood to prove that they created a nation'.[6] The US Constitution, Holmes was suggesting, had become an expression of the constitution of the American state.

This type of claim lends a heightened significance to the issue of interpretation within American constitutional practice. It explains in particular why

4 *Marbury v Madison* 5 US 137 (1803), at 176.

5 Consider, e.g., the 9th Amendment: 'The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people'. This would appear to indicate that there are certain rights vested in the people (i.e. that form part of the constitution of the state) that are prior (in time, if not in authority) to the rights prescribed in the Constitution. Recent American constitutional scholarship now contests that claim: see, e.g., John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* (Harvard University Press 1980), 34–41.

6 *Missouri v Holland* 252 U.S. 416 (1920), 433.

the constant refrain in contemporary American constitutional scholarship is that faith in 'the constitutional project' must be maintained. That project might have been initiated by the enactment of a Constitution, but it can be advanced only by subsequent political action. However liberal, democratic and rights-protecting the scheme laid down in the Constitution might be, that text is drawn into alignment with the constitution of the state only through nurture and the investment of a considerable amount of political capital.

Consider, by way of contrast, the Constitution of the Weimar Republic. Adopted in 1919, it established a model social democratic constitution for the German people, but in the thirteen or so years of its life it remained 'an idea seeking to become reality'.[7] The German people may have given themselves a Constitution, but it remained a Constitution without constitutionalists, a republic without republicans, and a democracy without democrats – at least in sufficient numbers to be able to establish the regime's authority as a constitutional and democratic republic. And it was brought to an end by the establishment, through constitutional means, of an evil dictatorship.

The amount of political investment required to establish the Constitution's authority is invariably huge. In the case of the United States, for example, the cost included the bloodiest civil war in modern history. But what is of significance for my task is that the gains made by that political investment must be consolidated through the means of constitutional (re)interpretation. Bruce Ackerman is therefore right to maintain that 'it is not the case that every important constitutional question ends up in the courts for full-dress resolution' because often the courts simply acknowledge the constitutional conclusions reached by others after long and bitter years of argument'.[8] The political work must first be carried out through more explicitly political processes that bring about changes in the constitution of the state which are subsequently recorded by the judiciary. But to achieve that consolidation, those changes generally need to be authorised through a judicial exercise in constitutional interpretation.

The challenges faced by this interpretative venture are indicated by the circumstances that invariably surround the enactment of a Constitution. Constitutions are most commonly drafted in the immediate aftermath of turmoil occasioned by such events as the collapse of the old order following defeat in war, the disintegration of empires, or revolutionary overthrow. Constitutional renewal without these fundamental breaks are exceptional, even though their incidence may be increasing.[9] But whatever the precise political circumstances, the constitution-making moment signals a break with the old order. If the aim is, through interpretation, to bring the Constitution into alignment with the constitution of the state, then the enormity of the challenge should not be underestimated. The Constitution is invariably drafted

7 Peter Gay, *Weimar Culture: The Outsider and Insider* (Norton 1968), 1.

8 See Bruce Ackerman, *We the People, vol.2: Transformations* (Belknap Press 1998), 252.

9 See, e.g., the modernising revisions of the constitutions of Finland (1999), Switzerland (1999) and Hungary (2011).

in the name of 'we, the people' but the political reality is that what some (the majority) experience as liberation in the adoption of the new Constitution, others (the minority/the old order) experience as defeat.

If the constitutive moment has strong emancipatory dimensions, as for example, in post-Apartheid South Africa, the circumstances leading to the enactment of the Constitution might yield a positive narrative on which to try to rebuild the constitution of the regime. But in other cases, as in the German Revolution of 1918–1919, it may be born of disillusionment. As Walter Rathenau wrote in 1919:

> It was not that a chain was smashed by the swelling of a spirit and a will, but that a lock rusted through. The chain fell off and the freed men stood dazed, helpless, disconcerted, and had to take action against their will.[10]

In these less elevating circumstances, building the Constitution's authority may be an insurmountable task.

The US is often regarded as a singular case, but the American experience of the founding and its aftermath might not actually deviate much from the general pattern of modern constitutional development. That this is not obvious today is attributable mainly to the work of the Constitution's great ideologues – the constitutional lawyers. American constitutional lawyers commonly treat the Constitution as a sacred text whose authority is not to be questioned, even in the course of investing it with new meaning through novel interpretation. Even sophisticated analysts, such as Jack Balkin, who accept that constitutions are 'flawed, imperfect compromises with the political constellation of the moment' and who recognise that the struggle is to improve the Constitution over time, still conceive the interpretative task as one of 'redemption'.[11] Redemption, it should be stressed, does not entail reform so much as realising past promises. Redemption, argues Balkin,

> does not mean discarding the existing Constitution and substituting a different one, but returning the Constitution we have to its correct path, pushing it closer to what we take to be its true nature, and discarding the dross of past moral compromise.[12]

Balkin here conveys two powerful messages. The first is the need to put political resources into bolstering the theory of constitutionalism and to work to try to ensure that the Constitution can be equated to the constitution of the state. The Constitution, Balkin writes, 'is not merely a document; it is also part of – and embedded in – a set of institutions and a cultural and political

10 Walter Rathenau, *Kritik der dreifachen Revolution* (Fischer 1919), 9–10; cited in Rupert Emerson, *State and Sovereignty in Modern Germany* (Yale University Press 1928), 211.

11 Jack M. Balkin, *Constitutional Redemption: Political Faith in an Unjust World* (Harvard University Press 2011), 5.

12 Ibid. 5–6.

tradition'.[13] The second is that once the Constitution is accepted as framing the entire regime, future political action might no longer be seen to be directed primarily towards achieving reforms through legislative initiatives; they might more appropriately come to focus on constitutional litigation designed to institute the 'correct' theory of constitutional interpretation, one that reinforces the Constitution's ambition.

These types of arguments flow from the exercise of investing the founding with sacred significance. They are expressions of what might be called 'aspirational constitutionalism'. Consequently, it is not surprising to find Balkin arguing: (i) that the Declaration of Independence is 'the constitution that our Constitution exists to serve'; (ii) that the 'Constitution creates a structure of government; but the Declaration tells us why governments are instituted'; and (iii) that the Revolution 'was not merely a political revolution' but also 'a social revolution' because, in addition to overthrowing imperial government, it 'threw off a form of society as well'.[14]

These claims highlight the tendency of constitutional lawyers to provide ideologically infused interpretations of political events. This type of claim about American history, for example, takes no account of incompatibilities in regionally differentiated conceptions of liberty espoused in revolutionary discourses,[15] or of the analysis of historians who maintain that 'the Constitution was intrinsically an aristocratic document designed to check the democratic tendencies of the period'.[16] Historians might now have jettisoned the idea of political history as a great and singular narrative (what in Britain is called 'the Whig interpretation of history'), but it most surely lives on in the works of constitutional lawyers.

16.3 The limits of interpretability

Once the distinction between the Constitution and the constitution of the state is highlighted, we are able to see more clearly what is at stake in competing theories of interpretation. Many jurists assume that the purpose of interpretation is to bring the relationship between these two conceptions into a closer alignment. But it should not be assumed without question that the Constitution actually has the capacity not just to establish a basic framework of government but also to give expression to the basic values on which the constitution of the state is founded. 'The legitimacy of our Constitution', notes Balkin, 'depends … on our faith in the constitutional project and its future trajectory'.[17] Or, as he put it earlier, the aim must be to discard 'the dross of past moral compromise'. But what if the Constitution is, of its nature, a document of compromise? Compromise, the obverse of aspiration,

13 Ibid. 114.

14 Ibid. 19, 20, 21.

15 See David Hackett Fischer, *Albion's Seed: Four British Folkways in America* (Oxford University Press 1989).

16 Gordon S. Wood, *The Creation of the American Republic, 1776–1787* (University of North Carolina Press, rev edn 1998), 513.

17 Balkin (n 11) 2.

is far removed from redemption. Conceived as a document of compromise, there may be distinct limits to the Constitution's interpretability.

The idea that the Constitution should be treated as the outcome of a set of political compromises – that is, that it enables a people to live together despite basic disagreements about the collective good – tends nowadays to be suppressed within American constitutional scholarship. Once the Constitution is treated as a sacred text, the idea that it is a document born of compromise is supplanted by faith in the wisdom and virtue of its framers. And following on from this, we get Balkin's faith in a moral project. After *Marbury v Madison*, this type of approach leads us to conceive the court as the institution 'charged with the evolution and application of society's fundamental principles',[18] and to treat it as the institution 'that calls some issues from the battleground of power politics to the forum of principle'.[19] But does this provide a faithful depiction of the foundation on which the American republic was established? 'Just what our forefathers did envision or would have envisioned had they foreseen modern conditions', Justice Jackson remarked in *Youngstown Sheet*, 'must be divined from materials almost as enigmatic as the dreams Joseph was called upon to interpret for Pharaoh'.[20] The fact of the matter is that, in order to form 'a more perfect union', Americans had to engage in compromise on basic principles. That is, they were obliged to obscure the nature of the regime that they were establishing.

The American Constitution was, in actuality, a document made through compromise. Specifically, it was drafted to achieve a compromise over slavery, and it was able to maintain its authority only to the extent that that compromise, institutionalised through its articles, could be preserved. The silences and ambiguities of the text were deliberate aspects of its design. It may not have established constitutional protection for slavery explicitly, but it ensured that the governing authorities would not be able to regulate or abolish slavery without the consent of slave-owning states. Provisions such as the fugitive slave clause (Art. IV, s. 2, cl. 3), the moratorium on federal legislation banning the international slave trade until 1808 (Art. I, s. 9), and the provision counting every slave as three-fifths of a person for the purpose of legislative representation (Art. I, s. 2, cl. 3) were all designed to achieve this purpose. And as Daniel J noted in the *Dred Scott* case, slavery 'is the only private property which the Constitution has *specifically recognized*, and has imposed it as a direct obligation both on the States and the Federal Government to protect and *enforce*'.[21]

This overriding purpose of holding a compromise over slavery was maintained during the early decades of the republic. It was held in place mainly because of the political dominance of southern states, with slave-owning Virginians controlling the presidency for all but four of the first 36 years and every presidential election bar four between 1788 and 1848 putting

18 Alexander Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (Yale University Press [1962] 2nd edn 1986), 109.

19 Ronald Dworkin, *A Matter of Principle* (Harvard University Press 1985), 71.

20 *Youngstown Sheet & Tube Co v Sawyer* 343 US 579 (1952), 592.

21 *Dred Scott v Sandford* 60 US 393 (1857), 490.

a southern slaveholder into the White House.[22] The compromise lasted until the mid-nineteenth century. It then became strained largely because of changing demographic patterns that resulted in the northern states gaining greater political power. And it is at this point that the question of whether the original constitutional compromise could be maintained came to the fore.

In the analysis of today's constitutional lawyers, there is an overwhelming consensus that the court's decision in *Dred Scott* flowed from the application of an incorrect theory of constitutional interpretation and stands as the single worst decision in Supreme Court history.[23] Yet what the Court decided in that case in fact maintained fidelity to the Constitution's original settlement. *Dred Scott* has acquired such notoriety because, having now apparently become constitutive of the political character of the people, the Constitution must today be (re)interpreted both as the expression of founding wisdom and the embodiment of the nation's fundamental values. It would be truer to say that in the mid-nineteenth century, because of social, economic, political, demographic and technological change, the nation was faced with an emerging conflict between constitutional obligation and the requirements of social justice. President Lincoln chose justice over constitutional obligation and, in order to vindicate that choice, chose war over peace. Whatever the rights and wrongs of that choice – and it was a choice that led to the death or injury of millions in the ensuing civil war – to say that this turned on a matter of constitutional interpretation is to adopt winner's history and, with it, the ideology of aspirational constitutionalism.

In a compelling account, Mark Graber argues that 'Lincoln failed the Constitution by forgetting that his obligation to adopt a plausible interpretation of the Constitution that preserved the social peace was constitutionally higher than his obligation to adopt an interpretation of the constitution the best promoted justice'.[24] Graber also draws certain conclusions from his study that touch on more general questions of constitutional interpretation. The first is that theories of constitutional interpretation are not adequate to address issues of what he calls 'constitutional evil'. Such evils can be adequately addressed only by a 'constitutional politics that persuades or by a nonconstitutional politics that compels crucial political actors to abandon an evil practice'.[25] Legal theories, in short, provide no substitute for practical politics. Secondly, that, like all Constitutions, the American Constitution was drafted at a particular moment in time, in the face of certain pressing conditions,[26] and inevitably was the product of compromise. And with so many different interests to be accommodated, there are distinct limits to the ability to construct a comprehensive theory of the values and principles on which

22 Domenico Losurdo, *Liberalism: A Counter-History* (Verso 2011), 12.

23 *Dred Scott v Sandford* 60 US 693 (1857); see Mark A. Graber, *Dred Scott and the Problem of Constitutional Evil* (Cambridge University Press 2006), 15–17.

24 Graber (n 23) 251.

25 Ibid. 18.

26 Note, e.g., Graber (n 23) 9: 'The various compromises reached in 1787 enabled Americans with diverse beliefs to form a state strong enough to forestall foreign invasion'.

that regime can be assumed to rest.[27] Thirdly, contrary to the orientation of aspirational constitutionalists who discover values in abstract expressions of principles, many constitutions achieve their purposes through more prosaic mechanisms of an institutional design that provide checks and balances. Fourthly, with respect to the American case, 'the Constitution caused the Civil War by failing to establish institutions that would facilitate the constitutional politics necessary for the national government to make policies acceptable to crucial elites in both sections of the country'.[28] Finally, that 'those responsible for creating and maintaining new constitutions in heterogeneous societies cannot be Lincolnians'.[29]

The logic of this argument is that we should not assume that the main purpose of the Constitution is to institute and promote a particular conception of social justice. The main purpose of the Constitution is surely to establish the authority of the state's system of government and that might dictate as its main function the necessity of maintaining social peace among a people who hold different visions of the good society. In a world in which Constitutions are commonly conceived as 'aspirational constitutions', this aspect of their role is in danger of being overlooked.

16.4 Methods of interpretation

The considerations that Graber identifies which are illustrative of the treatment of the American Constitution as an instrument of compromise impose significant limitations on the pursuit of interpretative fidelity. Yet they have not prevented the evolution of a huge industry involved in the business of constitutional interpretation. The US Constitution, at fewer than 8,000 words, is a relatively short text, but over the years Supreme Court justices 'have written tens of thousands of pages … explicating those words' and the Court has created 'a vast amount of meaning that is not contained in the text of the document or its original understanding'.[30] To which one might add that the Supreme Court's tens of thousands of pages have been glossed in commentaries by American constitutional law professors that cover hundreds of thousands of pages. From the outside, this seems to verge on

27 See, e.g., Madison's contortions in trying to explain the principle underpinning the provision that assesses slaves as three-fifths for the purpose of allocating legislative representation: James Madison, Alexander Hamilton, & John Jay, *The Federalist Papers* (Penguin, 1987), No 54: 'Let the compromising expedient of the Constitution be mutually adopted which regards them [slaves] as inhabitants, but as debased by servitude below the level of free inhabitants; which regards the *slave* as divested of two fifths of the *man*. … Such is the reasoning which an advocate for the Southern interests might employ on this subject; and although it may appear to be a little strained in some points, yet on the whole, I must confess that it fully reconciles me to the scale of representation which the convention have established' 333–335).

28 Graber (n 23) 167.

29 Ibid. 251.

30 Jeffrey M. Shaman, *Constitutional Interpretation: Illusion and Reality* (Greenwood Press 2001), 4.

madness, especially once we note Judge Posner's observation that, since most Supreme Court decisions 'are written by law clerks a year or two away from graduation', American constitutional law professors are spending their considerable intellectual energies in writing critiques of the work of their recent students.[31] The question is: what is at stake?

The first point to note is that the US Constitution may be the product of political deliberation and compromise, but once it had been adopted, it was quickly conceived to be 'fundamental law'. Its meaning, it was soon established, must be determined as a matter of legal interpretation. In the *Federalist Papers*, Alexander Hamilton noted that 'there can be few men in the society who will have sufficient skill in the laws' to qualify for the judicial role and fewer still 'who unite the requisite integrity with the requisite knowledge'.[32] Since the Constitution can establish its authority only when it is accepted as transcending partisan politics and setting out the basic rules of political engagement, Hamilton was alert to the danger that those impressed with these special interpretative responsibilities might be tempted to shape the text according to their own political views. Emphasising that they must never be disposed 'to exercise will instead of judgment',[33] he maintained that this danger is averted by professional discipline. A consistent body of constitutional knowledge must be built up, so that when engaging in interpretation, judges 'should be bound down by strict rules and precedents'.[34]

The problem here is that this attempt to fix one type of threat to the establishment of its authority (that those entrusted with interpretative responsibilities will impose their own political beliefs) exposes another: that the Constitution will be unable to establish its authority unless it is somehow perceived as expressing the basic principles, values and aspirations of the regime. Its instrumental function, that of providing a clear, consistent and objective structure of rules regulating the exercise of political power, sits in tension with its symbolic function, that of presenting certain general, abstract and ambiguous principles around which the regime's identity can be negotiated. This dilemma was clearly expressed by Dieter Grimm who noted that 'a constitution's symbolic power increases with its interpretative ambiguity, although its legally determinative power decreases to the same degree'.[35]

These tensions pervade the task of constitutional interpretation. The Constitution must seek symbolically to express the basic values of the regime but, as a device of political compromise, these values of necessity must remain at the level of abstraction and ambiguity.[36] At the same time, the fact that the

31 Richard A. Posner, 'Democracy and Distrust Revisited' (1991) 77 Virginia Law Review 651.

32 *The Federalist Papers*, No 78 (Hamilton) (n 25) 442.

33 Ibid. 440.

34 Ibid. 442.

35 Dieter Grimm, 'Integration by Constitution' (2005) 3 International Journal of Constitutional Law 200.

36 See Sanford Levinson, *Constitutional Faith* (Princeton University Press 1988), arguing that no institution has a monopoly of authoritative meaning of the Constitution and that its legitimacy rests on this continuous openness to contestation by citizens.

Constitution is expected also to establish a relatively clear and impartial set of rules of political engagement makes the enterprise of realising these symbolic aspirations doubly challenging. In *McCulloch*, Marshall CJ propounded that: 'We must never forget that it is a constitution we are expounding'.[37] The ambiguities of the document, Marshall was suggesting, mean that generally it cannot be the subject of strict construction. But he otherwise offers few clues as to appropriate interpretative method.

These tensions highlight the extent of the gulf between the two main schools of constitutional interpretation: those of the strict constructivists and the aspirationalists. The former exist under a variety of designations, including textualists, originalists and doctrinalists, but the common core of their method is that the Constitution, as a type of law, must be interpreted in accordance with the canons that are applied to all legal texts. They therefore maintain that the text should be accorded its plain meaning, that special attention should be given to the original meaning intended by its drafters, and that adhering to judicial precedents is essential to the task of ensuring consistency and stability of constitutional meaning.

Whereas the strict constructivists accentuate the value of *stability* – the fixity of the Constitution through time[38] – the aspirationalists emphasise *change*. Aspirationalists, sometimes called 'living constitutionalists', argue that the meaning of the text changes in accordance with changing social and political conditions of the time. They argue that the Constitution must be the subject of re-interpretation in accordance with the prevailing conceptions of social justice of the day.

A good illustration of this interpretative method is provided by Kennedy J's opinion for the Court in *Lawrence v Texas* 539 US 558 (2003), a case holding that a Texas statute that made it a crime for two persons of the same sex to engage in intimate sexual conduct was unconstitutional. In reaching its determination, the Court overruled its previous ruling in *Bowers v Hardwick* 478 US 186 (1986). With respect to this aspect of the case, Kennedy J noted that while the 'doctrine of *stare decisis* is essential to the respect accorded to the judgments of the Court and to the stability of the law', it is not 'an inexorable command'.[39] He also referred specifically to the work of the framers, those who drafted and adopted the 5th and 14th Amendments, stating that: 'They knew times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress'. Consequently, he elaborated: 'As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom'.[40] Having disposed on the issues of precedent and original meaning of the framers, Kennedy then explained that 'our laws and traditions in the past half century are of most relevance here' and these 'show an

37 *McCulloch v Maryland* 17 US 316 (1819) at 407.

38 Antonin Scalia, *A Matter of Interpretation: Federal Courts and the Law* (Princeton University Press 1997), argues that the main purpose of the Constitution is to prevent change.

39 539 US 558 (2003) 577.

40 539 US 558 (2003) 579.

emerging awareness that liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex'.[41]

This distinction between the two schools of strict constructivism and aspirationalism is – confusingly – sometimes referred to as one between 'interpretivism and noninterpretivism'.[42] This makes sense only to the extent that interpretivism is equated to textual exegesis. Consequently, interpretivists argue that, far from engaging in interpretation, 'non-interpretivists' confer new meaning on the text. We might note that its main proponent, who was not an 'interpretivist', seems now to have abandoned the distinction.[43]

Seeking to transcend the basic differences between constructionists and aspirationalists, Balkin has argued for what he calls 'living originalism'.[44] He claims that 'originalism' and 'living constitutionalism' are complementary rather than antagonistic concepts. Originalism expresses the point that the semantic meaning of the words in the constitutional text remains fixed, resulting in some rules (such as the requirement that the President must be 35 years old) having a fixed and determinate meaning. But others, the abstract principles such as the requirement that no person shall be denied 'the equal protection of the laws', may be interpreted differently in different times. Since almost no one doubts the existence of certain specific rules (such as Presidential age limits, or the provision providing for each state to elect two senators), he argues that even living constitutionalists accept originalism with respect to basic rules and that originalists recognise that the meaning of some of the more abstract general principles does evolve through interpretation.

Balkin's attempt to reconcile these two different methods of interpretation is inventive, but it underplays the extent to which these different methods are expressions of two fundamentally antagonistic theories of law. Constructionism and its varieties express a legal positivist jurisprudence that conceives rules as the basic conceptual building blocks of law, whereas aspirationalism expresses a rights-conception that argues that principles (which acquire weight through their moral authority) are higher-order items that shape the meaning even of basic rules. This jurisprudential dimension opens up a set of more complex distinctions that are not so easily susceptible of reconciliation.

This jurisprudential aspect provides one clue to the proliferation of theories of constitutional interpretation. These various theories range beyond those of these two basic schools. They include process theories as is illustrated in John Ely's influential work which, concerned that aspirational theories are open to the broadest forms of interest balancing, aims to replace them with an intent-based analysis that focuses on constitutionally forbidden

41 539 US 558 (2003) 571–572. Cf Scalia's dissent: 'It is clear from this that the Court has taken sides in the culture war, departing from its role of assuring, as neutral observer, that the democratic rules of engagement are observed'. 602.

42 Thomas Grey, 'Do We Have an Unwritten Constitution?' (1975) 27 Stanford Law Review 703. This nomenclature was taken up by Ely (n 5); see chapter 1: The Allure of Interpretivism.

43 Thomas Grey, 'The Constitution as Scripture' (1984) 37 Stanford Law Review 1.

44 Jack M. Balkin, *Living Originalism* (Belknap Press 2011).

legislative intentions and claims that legislation should be struck down only when it is necessary to ensure equal access to the political process.[45] They also comprise more pragmatic approaches such as Cass Sunstein's methods of overlapping consensus and judicial minimalism,[46] and Richard Posner's claim that, since no theory of constitutional interpretation has the power 'to command agreement from people not already predisposed to accept the theorist's policy prescriptions', judges should be much more attentive to the social implications of the decisions they make.[47] We conclude, then, with a proliferation of methods, none of which come close to commanding authority within the field.

16.5 Imitative constitutionalism

The final issue I want to address is: what lessons might we draw from this account of the American experience to assist Europeans in thinking about appropriate methods of constitutional interpretation? Specifically, what insight does the American experience offer those regimes of central and eastern Europe which since 1989 have established a Constitution on the liberal democratic model?

I began by suggesting that we are living in a constitutional age. It might now be added that this is also an age in which many judges and scholars now seek to interpret contemporary Constitutions according to the canons of aspirational constitutionalism. In conceiving the Constitution as a vehicle for expressing the rights of citizens and the duties of government, jurisprudential theories derived from the American literature have been influential. But the point of my argument is to emphasise that American constitutionalism is a unique achievement which has been the product of a singular historical experience. Americans began their collective journey with a Constitution crafted as a device of political compromise. Later, in the post-civil war period of reconstruction, the Constitution took the form of negative constitutionalism, that is, one that was directed towards the constitutional protection of individual autonomy *from* the government. And only since the mid-twentieth century has it become a battleground of aspirational, or positive, constitutionalism, that is, of a theory that asserts that the Constitution should be interpreted as imposing duties *on* government through the advancement of constitutional claims to autonomy.

Whatever the merits or otherwise of this development, the general point is that American constitutionalism can properly be understood only when situated in the context of a history of struggle. And for this reason, its contemporary

45 Ely (n 5).

46 Cass R. Sunstein, *The Partial Constitution* (Harvard University Press 1993); 'Incompletely Theorised Agreements'.

47 Richard A. Posner, 'Against Constitutional Theory' (1998) 73 New York University Law Review 3; Richard A. Posner, *The Problematics of Moral and Political Theory* (Harvard University Press 2002).

practices cannot easily be imitated. If that claim is correct, then the attempts by those who seek to use recently enacted Constitutions to promote aspirational constitutionalism by imitation are likely to face an uphill struggle.

This point has a particular relevance with respect to the post-1989 European revolutions. Jürgen Habermas has maintained that the these were 'rectifying revolutions', in that the purpose of these was to bring eastern Europe into alignment with the models of liberal democracy that had already been established in the west.[48] But 'rectification' remains a hugely ambitious undertaking. It required these newly independent nation-states without having much prior historical experience on which to draw, simultaneously to establish functionally effective market systems, vibrant civil society networks, and democratic governmental arrangements. When the Federal Republic of West Germany had been constituted after the Second World War, a huge amount of energy (and US capital) was invested in strengthening the political stability of the regime, and this included the need to maintain a degree of continuity (of practice and personnel) with the discredited Nazi regime. The post-1989 responses have generally been different; following the end of the Cold War, in many regimes former communists were excluded from governing positions and, in accordance with the dominant economic philosophy of the time, industries were rapidly privatised and market mechanisms instituted. In some cases, these practices seemed closer to Naomi Klein's 'shock doctrine' than an incremental transition to a new type of constitutional order.[49]

These new liberal democratic Constitutions were enacted alongside these radical social and economic changes. Hungary's experience is exemplary. As Gábor Halmai explains, 'Hungary was one of the first and most thorough political transitions after 1989' and it 'provided all the institutional elements of constitutionalism'.[50] A powerful Constitutional Court was established which, under the influence of its first President, László Sólyom, promoted the philosophy of aspirational constitutionalism. Sólyom and many academics, Halmai notes, 'argued that the text of the 1989 constitution and the jurisprudence of the Constitutional Court made a new constitution unnecessary'.[51] In a case in 1990 concerning the death penalty, Sólyom made explicit the basis of his constitutional jurisprudence. The Constitutional Court, he declared,

> must continue its efforts to explain the theoretical basis of the Constitution and of the rights included in it and to form a coherent system with its decisions, which as an 'invisible Constitution' provides for a reliable standard of constitutionality beyond the Constitution.[52]

48 Jürgen Habermas, 'What Does Socialism Mean Today? The Rectifying Revolution and the Need for New Thinking on the Left' (1990) 183 New Left Review 5.

49 Naomi Klein, *The Shock Doctrine: The Rise of Disaster Capitalism* (Henry Holt 2008).

50 Gábor Halmai, 'A Coup against Constitutional Democracy: The Case of Hungary' in Mark A. Graber, Sanford Levinson, & Mark Tushnet (eds), *Constitutional Democracy in Crisis?* (Oxford University Press 2018) 243.

51 Ibid. 245.

52 Decision 23/1990; cited by Halmai (n 50) 245.

Aspirational constitutionalism, according to which the Court was motivated by the Constitution's 'spirit' or underpinning moral principles rather than by closely adhering to the text, was promoted. That these liberal aspirations did not fully take root is indicated by the election in 2010 of a Fidesz government on the back of growing dissatisfaction by ordinary citizens with the effects of the post-1989 transition. Since then, not only have the jurisprudential advances made by the Court been put into reverse; Fidesz has also moved directly to undermine the Court's independence, has effectively nullified many of its rulings and has taken action to institute a self-styled regime of 'illiberal democracy'.[53] The Hungarian government's policies are now threatening to extend into a pan-European crisis of constitutional democracy.[54]

Hungary is not a unique case, as other essays in this volume demonstrate. My point is that, as the American study indicates, the task of establishing constitutional government requires much more than adopting a liberal Constitution and establishing a Constitutional Court as its guardian. As Hamilton explained in *Federalist* No 78, lacking the power of the purse and the sword, the judiciary relies on neither force nor will but only on its judgment. And if that exercise of judgment is not in accordance with the popular sentiment and with those holding governmental power, it is unlikely to carry authority.

The post-1989 revolutions are in certain respects different from all other modern revolutionary movements. And it is not just, as Habermas suggested, that these are rectifying revolutions. Whereas the losers – American empire loyalists, French aristocrats or White Russians – were the ones required to leave the country in the aftermath of the American, French and Bolshevik Revolutions, those who left the country after the post-1989 velvet revolutions were the winners. Finding that 'changing countries is easier than changing one's country', Ivan Krastev and Stephen Holmes have argued that, after 1989, it was the young educated intellectuals who left to study, work and live in the west.[55] Between 1989 and 2017 Latvia lost 27% of its population, Lithuania 22.5%, Bulgaria 21% and 14% of GDR residents moved to West Germany. Since Romania joined the EU in 2007, 3.4 million of its citizens, the great majority of them under 40, have left the country. This exodus has had 'profound economic, political and psychological consequences', and it has left eastern Europe 'home to the fastest shrinking populations in the world'.[56] The question is: what might be the constitutional implications?

53 See Fareed Zakaria, 'The Rise of Illiberal Democracy' (1997) 76 Foreign Affairs 22–43; Marc F. Plattner, 'Illiberal Democracy and the Struggle on the Right' (2019) 30 Journal of Democracy 5–19.

54 Most recently, following the Covid-19 crisis, on 30 March 2020, the Hungarian Parliament passed an emergency law granting the Government broad-ranging powers of indefinite duration to rule by decree. This led to the European Commission, without mentioning Hungary, immediately issuing a statement reminding Member States that the European Union is founded on 'the values of freedom, democracy, the rule of law and respect for human rights' which must be upheld and defended 'even in these challenging times': Statement by President von der Leyen on Emergency Measures in Member States, European Commission Statement 20/567 (31 March 2020).

55 Ivan Krastev and Stephen Holmes, *The Light that Failed: A Reckoning* (Allen Lane 2019), 32.

56 Ibid. 33–38.

Presently, one can only speculate, though it does not seem controversial to suggest that, under such conditions, any attempt to build constitutional authority on the foundation of an emancipatory narrative will be very challenging. It is symptomatic of that failure that regimes have retreated from universalist aspirations and sought to bolster their authority by falling back on some ethnically based sense of national identity. Once this type of narrative is promoted, fear of mass immigration into the country by foreigners is touted as posing a threat to identity. Given the low levels of immigration into eastern European countries, this might seem ill-founded, but it can serve a purpose. 'Hysteria about non-existent immigrants about to overrun the country', Krastev and Holmes argue, 'represents the substitution of an illusory danger (immigration) for the real danger (depopulation and demographic collapse) which cannot speak its name'.[57] Populist expressions of national identity become the basis of constitutional identity in place of a cosmopolitanism that has taken the form of a constitutional patriotism, as is expressed today (by liberals) in western regimes like Germany's.[58] But many who condemn this emerging populism fail to appreciate that establishing a bounded political community is a precondition of democracy and securing the loyalty of ordinary citizens is a precondition of establishing a stable constitutional democracy.

16.6 Conclusion

The general argument I have been advancing draws on a distinction between the constitution of the regime and the regime's Constitution. It therefore draws on the differing requirements of constitutional government and those of constitutionalism.

Constitutional government is a historical achievement; it is a practice that evolves through a historic struggle of imposing institutional checks and limits on the powers of public authorities so as to ensure that public power is exercised with due regard to the liberties of the people. Since the practices of constitutional government vary from regime to regime, it is unlikely that we can appreciate the achievement without having regard to the underlying social, political and economic conditions of their success.

Constitutionalism, by contrast, is a political ideology. It is a rationalist project which aims to establish the Constitution as the medium through the authority of governing institutions is determined, citizens are able to speak authoritatively about their public values, and collective political identity understood. Constitutionalism is an ideological project which aspires to make the values and principles laid down in the enacted Constitution constitutive of the political character of a people. And when, as is generally the case, the Constitution is assumed to be 'fundamental law' and constitutional

57 Ibid. 38.

58 See, e.g., Jürgen Habermas's argument that the only patriotism that can be coherently embraced today is what he calls 'constitutional patriotism' (*Verfassungspatriotismus*), an allegiance to the principles inscribed in the constitution: Jürgen Habermas, *Between Fact and Norms* (Polity Press 1996).

lawyers present themselves as possessors of special knowledge of the Constitution's true meaning, it is also a decidedly elitist project.

This paper is directed towards the attempt to establish constitutionalism as a governing ideology in those regimes of central and eastern Europe that experienced 'rectifying revolutions'. I have, however, focused in this chapter on American debates on the status and meaning of the Constitution. I have done so because within constitutional studies, Americans are the original people of the book, by which I mean that they have travelled much further than any other regime in absorbing the ideology of constitutionalism. American constitutional lawyers readily accept that the Constitution founded their state, that their civil war was a war over constitutional interpretation and that justice is to be achieved not primarily through political action leading to legislative enactment, but through the peddling of an interpretative technique that is able to convince a majority of the Justices of the Supreme Court that they have discovered the ideals implied by the text (section II). But I have also sought to show the limits of interpretability, of how in reality the US Constitution, like all Constitutions, are documents born of compromise. This is not to undervalue the significance of Constitutions, but rather to emphasise that their real value may lie not in establishing substantive values but in establishing a framework through which political differences can be negotiated (section III). Nevertheless, I have also argued that the ideology of constitutionalism is so powerful in the US that it has now itself become highly politicised: that is, it has given rise to intense disputes about constitutional interpretation that are no longer able to mask the fact that they are expressions of major differences in political beliefs (section IV).

Finally: what might Europeans learn from the American experience? One message is that, given the contemporary power and influence of American-style constitutionalism, there is a real danger in adopting constitutionalism as a technology of governing rather than being attentive to the conditions that are needed to advance the task of establishing practices of constitutional government. This is the danger alluded to in the section on 'imitative constitutionalism' (section V). The reasons for the rise of populism are undoubtedly complex. But, as Krastev and Holmes argue, 'they lie partly in the humiliations associated with the uphill struggle to become, at best, an inferior copy of a superior model', especially one promoted by consultants 'with an anaemic grasp of local realities'.[59] Alternatively, as Michael Ignatieff has expressed it, one of the reasons might be that there has an over-reliance on universalist values in preference to 'the ordinary virtues'.[60] That some regimes which have gone through a rapid and radical process of constitutional renewal are now experiencing a populist backlash may therefore be because they have seriously underestimated the challenges entailed in establishing and maintaining the practices of constitutional government.

59 Krastev and Holmes (n 55) 22.

60 Michael Ignatieff, *The Ordinary Virtues: Moral Order in a Divided World* (Harvard University Press 2017).