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Constitucional Interpretation. A realist view

Interpretação constitucional: uma perspetiva realista

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Abstract: Rejecting a normative approach to constitutional interpretation, and also a Kelsenian one, this paper advances a radical or sceptic version of legal realism according to which any decision taken by an empowered interpreter (an "authentic" interpreter) is valid. Within this framework, this paper addresses three questions: Who are the authentic interpreters of the constitution? What are the possible results of constitutional interpretation? Are there specific constraints that bear on constitutional interpretation?

Keywords: constitutional interpretation; legal realism; authentic interpreter.

Resumo: Partindo da rejeição de uma abordagem normativa da interpretação constitucional, e também de uma abordagem kelseniana, este artigo defende uma visão radical ou cética do realismo jurídico em obediência à qual é válida qualquer decisão tomada por um intérprete autorizado (um intérprete "autentico"). Com este enquadramento, este artigo trata de três questões: Quem são os intérpretes autênticos da Constituição? Quais os resultados possíveis da interpretação constitucional? Há limites específicos à interpretação constitucional?

Palavras-chave: interpretação constitucional; realismo jurídico; intérprete autêntico.

1. Introduction

Constitutional interpretation is certainly not a new subject, but one that has too often been approached from a normative point of view. The question that is most frequently asked on the subject is: "how should jurists, especially judges,

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[**] This paper corresponds to the annual lecture of the Lisbon Public Law research center, which was delivered on May 26th 2023.

particularly those of constitutional courts, interpret the constitution?". A normative approach such as this often presupposes that constitutional interpretation is but legal interpretation applied to the constitution. The corresponding assumption is that there is a best way to interpret the constitution and thus find its true meaning.

As I developed elsewhere, these assumptions are problematic[1], and therefore I believe a different approach to constitutional interpretation is required. Instead of asking "how should jurists...", two different questions should be placed. The first question is: "what do jurists actually do when they interpret the constitution?". The second question is: "what is the specificity of constitutional interpretation, which thus makes it different from statutory interpretation or from the interpretation of contracts?"

One can say of course that the very formulation of these questions is indebted to legal positivism, particularly to a branch of legal positivism, legal realism. Indeed, the following considerations shall be made from the perspective of legal realism, more specifically from the perspective of the continental variant of legal realism, as opposed to the American or the Scandinavian variants.

Realism is an instance of legal positivism in the two first senses distinguished by Norberto Bobbio, i.e., as a methodological approach to the law and as a theory about the nature of law. As an approach to the law, positivism maintains a strict distinction between the law as it is and the law as it ought to be. Therefore, it remains ethically neutral, striving to treat the law as an objective phenomenon that can be described by methods akin to those of the empirical sciences. The corresponding theory about the nature of law is that it is a system of rules posited by men. Realism simply adds that these rules can be analyzed as facts.

Continental realism is characterized by a strong emphasis on interpretation. Contrarily to traditional views on the nature of interpretation (which understand it as a function of knowledge, thus aimed at determining the true meaning of a legal text), realism views interpretation as a function of the will. In this vein, the meanings determined by an empowered interpreter (by an "authentic" interpreter, in Kelsen's words) are taken to be valid whatever the substance of the corresponding decision. It is irrelevant for this purpose that the determined meanings are different from received meanings, namely those matching the common use of language or the opinion of expert jurists.

Some realists (for example Guastini) accept a moderate view of interpretation, following Hart or Kelsen[2]. Alongside with Hart, they contend that a legal text has

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[1] M. Troper, *Pour une Théorie Juridique de l'État*, Paris: PUF, 1994, pp. 293 ff.

[2] R. Guastini, *Interpretare e argomentare* (*Trattato di diritto civile e commerciale* a cura di Antonio Cicu et al.), Milano, Giuffrè, 2011, p. 453.

a core meaning, which can be known, and a "zone of penumbra" (Hart), a decision only taking place within the latter. Similarly, Kelsen has drawn a distinction between interpretation as knowledge and interpretation as an act of will. The former amounts to a so-called "scientific interpretation" which consists in the listing of all or of most possible interpretations, a frame of possible interpretations being established as a result. The latter consists in a choice made by an authentic interpreter within the frame[3].

I adopt here a more radical or sceptic version of realism which denies the usefulness of the distinction. In this vein, any decision taken by the authentic interpreter is valid, being indifferent whether he or she has chosen a meaning within or outside the frame. Indeed, "anything goes" as the critics of this approach would say[4].

However, a realist view of constitutional interpretation cannot simply consist in applying a general theory of interpretation to a particular realm. Rather, the question that must be placed is whether there is something specific to constitutional interpretation. In case there is, it must be asked, somehow reversely, whether constitutional interpretation can teach us anything about the general process of legal interpretation.

I will focus on 3 points

– who are the authentic interpreters?
– what are the possible results of constitutional interpretation?
– Are there specific constraints that bear on constitutional interpretation?

2. Who are the authentic interpreters?

An authentic interpreter of the constitution can be defined either as an authority that has been explicitly empowered to decide on the meaning of the text, thus establishing its final interpretation, or as an authority whose interpretation cannot be legally challenged, it being required that the application of the text conforms with it.

Obviously, courts, especially supreme courts or constitutional courts, are authentic interpreters. They do not discover the true meaning of the constitution because there is no such meaning. As Justice Jackson of the US Supreme Court

[3] H. Kelsen, *Pure Theory of Law*, English translation by M. Knight, Clark, New Jersey: The Lawbook Exchange, 2005, pp. 348 ff.

[4] M. Troper, "Legal realism in France", *in*: *Oxford Studies in the Philosophy of Law*, V, edited by Leslie Green and Brian Leiter, Oxford: Oxford University Press, 2023.

once wrote "*We are not final because we are infallible, but we are infallible only because we are final*"[5].

But the same can be true of other authorities that are not jurisdictional. A Parliament, or one of its houses, can also be considered an authentic interpreter in that sense. One example goes back to the beginning of the French Revolution, concerning two treaties concluded between the United States and France. When relations between the two countries deteriorated in 1798, the American Congress considered denouncing them. The Constitution was silent on the question of the authority competent to carry out this denunciation. In this context, some considered that the power to conclude treaties implied the power to denounce them and that it therefore belonged jointly to the President and the Senate. Others maintained instead that this power belonged to the President alone, arguing that while the Congress's intervention is essential regarding the decision to conclude treaties, it is less useful regarding their denunciation, the latter not entailing new obligations. For others still, since an ordinary law prevails over a treaty, it was sufficient for Congress to adopt a law, that being admissible in a matter falling within federal jurisdiction such as the regulation of trade with foreign nations. Now, one of the conventions in question was precisely a trade treaty. The argument was perhaps not entirely convincing since a treaty of alliance was also at issue. In any case, no court had jurisdiction over the matter and the two houses of Congress effectively took the decision to annul the treaties and this interpretation seems to have prevailed subsequently in the following years[6]. Several Presidents have actually withdrawn from treaties and President Trump has just signed an executive order to withdraw the United States from the Paris Agreement[7].

There are also some examples in French constitutional law. The most famous concerns the use of article 11 of the constitution by De Gaulle in 1962 to amend the constitution and thus change the mode of election of the President of the Republic.

De Gaulle deemed this interpretation necessary because article 89 of the constitution establishes a procedure that makes it difficult to pass amendments. In short, a bill must be passed separately by the two houses of Parliament and only then, in a second stage, may the President submit it to a referendum. Thus, in

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[5] Brown v. Allen, 344 U.S. 443 (1953).

[6] D. P. Currie, *The Constitution in Congress: the Federalist period 1789-180*1, Chicago: University of Chicago Press, 1997, pp. 250-253.

[7] M. Bearak, "Trump Orders a U.S. Exit From the World's Main Climate Pact", *The New York Times*, January 20th, 2025.

light of article 89, no amendment could be passed against the will of one of the two houses. In 1962, the Senate was strongly opposed to De Gaulle, who then decided to circumvent the Senate by directly submitting the amendment bill to a referendum. For that purpose, he followed the procedure established by article 11, the application of article 89 being therefore avoided.

Most jurists considered this a gross violation of the constitution, arguing that article 89 organizes a special and exclusive procedure for constitutional amendments. As to article 11, it exclusively concerns the enactment of ordinary statutes of sub constitutional level, a constitutional referendum not falling under its scope. De Gaulle however decided that article 11 allowed him to submit directly a constitutional amendment to referendum. He used a lexical argument, stressing that article 11 refers to "any bill relating to the organization of public authorities". He argued that this expression was synonymous with "constitution", since any constitution is necessarily related to the organization of public authorities. According to De Gaulle, the title of the law of 25 February 1875 – which is part of the constitution of the Third Republic – confirmed this understanding, that title being "law relating to the organization of public authorities".

The referendum was thus organized on the basis of article 11, the bill was adopted by the people, and the provision relating to the appointment of the President of the Republic was amended in the direction of establishing a presidential election by universal suffrage. The Constitutional Council could not block the organization of the referendum. In fact, when the president of the Senate after the amendment had been adopted referred the new constitutional law to the Council, the latter declined jurisdiction, considering that the people had directly exercised its sovereignty.

The use of article 11 in 1962 has all the characteristics of an authentic interpretation: the attribution of a meaning amounts to a decision; it is not liable to be challenged and amended, and must be held to be valid since the legal order gives it effect[8].

There are two kinds of consequences of holding such an interpretation as authentic.

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[8] Indeed, in 1962, politicians were clearly aware of the President's interpretative power. Alain Peyrefitte in his memoirs on De Gaulle reports a statement made by de speaks of the power of interpretation of the constitution by the President of the Republic. It is a fundamental power and, at least implicitly, it is included in the constitution. It is precisely in cases where jurists are divided among themselves that the President of the Republic must use this power. He has the means to do so by appealing to the sovereign people, following the right expressly recognized to him. He notes the discussions between jurists. He gives his opinion, and the people decides.", see A. Peyrefitte, *C'était de Gaulle*, Paris, de Fallois Fayard, 1994, p. 230.

First, on the basis of the president's decision and the interpretation that justifies it, legal norms have been produced, starting with the constitutional amendment itself, and to this date twelve effective elections to the office of President of the Republic have taken place. It is frequently asserted that neither the interpretation nor the decision to call a direct referendum were valid. But however ingenious the arguments usually invoked in support of this thesis may be, they can only lead to an absurd conclusion. Indeed, if one pursues that line of argument, one will be forced to conclude that no French president has been legally elected since 1962, the amendment establishing the corresponding procedure being null and void, and that despite the Constitutional Council's decision to the contrary. If one recognizes instead that the claimed defect affecting the decision to call a referendum under article 11 had no effect on the validity of the amendment (or that the defect in the amendment did not affect the legitimacy of the said presidential elections), then the debate on the validity of the recourse to article 11 becomes moot.

The second type of consequence is that the outcome of such an interpretation is incorporated into the constitutional text and serves as a basis for subsequent interpretations. Thus, a few years after the adoption in 1962 of the election of the President of the Republic by universal suffrage, François Mitterrand, interviewed by Olivier Duhamel, declared that the constitution allows now for two methods of constitutional revision, that established by article 89, and that established by article 11[9].

A similar example is to be found in an interpretation by President Mitterrand of article 13 of the Constitution according to which "*The President of the Republic signs the ordinances and decrees deliberated in the Council of Ministers*". Legal experts disagreed on whether the use of the present tense of the indicative in this provision had the value of an imperative or signified instead a simple authorization, which the president was free to use or not. In 1986, during the first cohabitation, François Mitterrand opposed the Prime Minister who had prepared some ordinances relating to economic and social matters. The President thus chose the second solution and effectively refused to sign the ordinances[10]. Since no legal remedy was available to challenge that interpretation, the Prime Minister had no choice but to accept it.

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[9] F. Mitterrand, O. Duhamel, "Journal – Sur les Institutions", *in*: *Pouvoirs – Revue française d'études constitutionnelles et politiques,* n°45, 1988, pp. 131-139.

[10] Cf. M. Troper, "La signature des ordonnances; Fonctions d'une controverse", *in*: *Pouvoirs*, 1987, pp. 725 (an Italian translation can be found in *Politica del diritto*, a. XVII, n. 4, dicembre 1986, p. 745). See also M. Troper, *Pour une Théorie Juridique...*, p. 275 f.

In all of these cases, the constitutional authorities were clearly aware that they were carrying out an interpretation. In practice, they often provided arguments similar to those used by the courts, thus resorting to literal, generic, systemic or functional interpretation. But it is not this awareness, nor even of the explicit recourse to a textual argument, that allows one to conclude that an authentic interpretation is at stake. We would still be before an authentic interpretation in the case it were merely presupposed by the decision and not declared as such, provided that it had all the characteristics contemplated above. Moreover, interpretation by non-judicial authorities is hardly different in this respect from judicial interpretation. The latter may also be implicit. For example, the famous 1971 decision of the Constitutional Council which included the preamble of the Constitution in the block of constitutionality, is indeed based on an interpretation of the term "Constitution" contained in article 61, but this interpretation remained implicit. The Council limited itself to indicating that "*among the fundamental principles recognized by the laws of the Republic and solemnly reaffirmed by the preamble to the Constitution, lies the principle of freedom of association*".

Particularly striking is the case of article 9 of the Japanese constitution, enacted after the 2nd World War, which states that "*the Japanese people forever renounce war as a sovereign right of the nation…[and subsequently] that land, sea, and air forces, as well as other war potential, will never be maintained*". However, during the Korean war, this provision was interpreted to allow Japan the creation of a 75000 strong army which was renamed as "police force" and later as "Japan Defense Force". Still, a large number of politicians considered it necessary to amend the constitution and rewrite article 9, but this would require a two thirds majority, which seemed difficult to attain in the context and remains so to this day. Considering this, the easiest way to change the constitution without a formal amendment seems to be an official interpretation. It was precisely this solution that was adopted: in 2014, Prime Minister Shinzo Abe issued through a cabinet decision a "reinterpretation" of article 9 which allowed Japan for the first time to engage in collective self-defense[11].

Naturally, political authorities must interpret the constitution, not only when there is no constitutional court, but also when such courts do exist. This can happen either because some interpretive difficulties are not justiciable (i.e. when

[11] J. Richter "Japan's «Reinterpretation» of Article 9: A Pyrrhic Victory for American Foreign Policy?", *in: 101 Iowa L. Rev. 1223 (2016)*. See also Masahiro Akiyama, 2014, "Redefining Self-Defense: The Abe Cabinet's Interpretation of Article 9 | Research", *in: The Tokyo Foundation for Policy Research*, https://www.tokyofoundation.org/research/detail.php?id=536.

they do not come under the jurisdiction of any court in the system), or because no case has been referred to the court by a non-jurisdictional authority claiming that a certain act is unconstitutional on the basis of constitutional interpretation.

We can substantiate here the specificity of constitutional interpretation: in other domains, for example in statutory interpretation, authentic interpretation by non-judicial authorities is extremely rare. Naturally several authorities can offer or use their own interpretation of a statute, for example administrative agencies or civil servants, but in most cases such interpretation is not final and can always be checked by courts.

3. The scope of constitutional interpretation

Constitutional interpretation is not only a decision on the meaning of a particular provision of the constitution. It can also have a formidable impact on the nature of the constitution as a whole and indeed on the whole legal system.

The most obvious consequence of constitutional interpretation, when carried out by courts, is that it enables to favor or block legislation. Since an act of parliament is valid or invalid when confronted to a provision of the constitutional text only after a court has interpreted it, the court becomes a legislator. Already in the 17th century, Bishop Hoadley said that the interpreter is the true law maker, and not those who first wrote the law. There are numerous examples of legislation by a court, which implied the expression of policy preferences in terms that precisely are typical of legislation. Think of the American Supreme Court and its jurisprudence: it was once conservative, then liberal, becoming at this moment conservative again, even reactionary, as can be attested regarding crucial matters such as labor relations, civil rights, financing of elections, abortion, etc.

Some will say that a constitutional court is not a true law maker but only a co-legislator, invoking the fact that it has no initiative and therefore can only validate or invalidate a statute which was first adopted by the official legislative power as empowered by the constitution. However, there are several reasons leading to a different conclusion. Firstly, when a court invalidates a statute and states its motives, it is in fact dictating the way a replacing statute is to be enacted in the future. Secondly, even before the constitutional court has considered the matter, law makers intervening in legislative debates will necessarily take into consideration the probable attitude of the court, basing themselves on precedents. Thirdly, in the absence of legislation, a constitutional court can decide by way of interpretation whether the constitution authorizes or prohibits certain actions. The American Supreme Court has thus decided for example that the constitution

authorizes contraception or abortion, deciding later that it authorizes the states to establish strict limits to women's right to have an abortion.

One can even argue that, since the court decides on the limits of future legislation when writing opinions, it is not only a legislator but a true co-constituent power. Moreover, there are two other ways in which it acts as such. The first way regards, somehow spectacularly, the self- empowerment of the court. A constitutional court is indeed able to decide on its own powers. Marbury v. Madison 1803 is one of the first examples of a court attributing itself a previously inexistent power, in this case the power to review the constitutionality of an act of Congress. Similarly, in 1971, the French Constitutional Council has interpreted the preamble of the constitution to extend considerably its power. The council decided that it could use as a standard of review, not only the numbered articles of the constitution, but also its vague preamble and the even vaguer unwritten principles that are referred to in the same[12]. The Supreme Court of India, followed by several European courts, have interpreted the constitution in terms that empower them to review, not only the acts of Parliament, but also constitutional amendments[13]. The Supreme Court of Israel has managed to interpret the constitution with the same results which is quite striking considering that Israel does not have a formal constitution[14].

Perhaps less visible is the creation or transformation of the hierarchy of norms. The justification of the formidable power of the courts is based on an argument that is only apparently drawn from the hierarchy of norms. In Marbury, Marshall stressed that it is in the essence of a constitution that it is superior to ordinary laws in the sense that it cannot be amended through ordinary legislation but only through a special amending procedure. According to Marshall, the superiority of the constitution implied that the courts could take those laws contrary to the constitution to be null and void.

We may doubt however the validity of this reasoning. Granted, the constitution is superior, but it remains to be determined in what sense it is so. In fact, one ought to distinguish between two types of superiority. In a dynamic sense, superiority means that a norm empowers an authority to produce other norms (*e.g.* the constituent power empowers a law maker). In a static sense, superiority means

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[12] Décision n° 71-44 DC du 16 juillet 1971 See Decision n. 71-44 DC, of 16 July 1971, of the Constitutional Council (*Liberté d'Association*).

[13] See Minerva Mills Ltd. and Ors. vs Union Of India and Ors., 31 July 1980, AIR 1980, SC 1789.

[14] CA 6821/93, United Mizrahi Bank v. Migdal Cooperative Village, Decided: November 9, 1995.

that the legislative power is prohibited from making laws (or commanded to make laws) with this or that substantive content, sanctions being established in case it decides differently. It is not true that every single constitution is superior in the latter sense. As Kelsen rightly stressed, a constitution which does not establish judicial review is not superior in the same sense. Until 1803 therefore, no constitution was superior in a static sense[15]. This shows that the Marbury decision is not a logical consequence of the superiority of the constitution. In fact, it was the Marbury decision that created that superiority.

There are many other examples of courts creating or altering the hierarchy of norms. The mentioned 1971 decision by the French Constitutional Council amounts to one of those examples. Not only did it empower itself to review statutes, but it also converted the preamble of the Constitution and the Declaration of the Rights of Man and of the Citizen into standards of review, promoting them to the level of constitutional norms. Beforehand these were not even regarded as legal documents (in the sense of including legal norms) but as mere philosophical proclamations. Well, new constitutional norms were established as a result of the decision. This is particularly striking as some of those norms have been deduced from ordinary statutes (those envisioned by the Constitutional Council as declarations of the principles referred to in the preamble and therefore not as mere acts posited by Parliament); which means that those statutes have also been promoted to the constitutional level. As a result, French legal scholars agree today that, instead of a constitution, France has a block of constitutionality, which is composed of: *i)* the written document entitled "Constitution of 1958", including the preamble; *ii)* the various texts referred to in the preamble, namely the Declaration; the preamble of the previous constitution, that of the 4th Republic of 1946 and the unwritten principles that are supposed to be implied by these documents; the Charter for the environment.

And, since the Constitutional Council defines the limits of the powers of the other organs of the State, we should add to the block of constitutionality the precedents of the Constitutional Council itself. Thus, it cannot be doubted that constitutional interpretation does produce the constitution.

Yet, when interpreting and recreating the constitution, a constitutional court acts under some very specific constraints.

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[15] Kelsen, Preface to C. Eisenmann, *La justice constitutionnelle et la Haute Cour Constitutionnelle d'Autriche: édition de 1928*, Paris, LGDJ, 1928, Paris, Economica. On the subject, see M.Troper, "Marshall, Kelsen, Barak and the constitutionalist fallacy", *International Journal of Constitutional Law*, *3*, 1, 2005, pp. 24-38.

4. Interpretation as the result of specific constraints

Contrary to what is generally believed, these constraints do not result from the obligation to use specific or general methods of interpretation but from other legal constraints.

There are of course, important and interesting debates and controversies over the methods that interpreters should use. But these debates are largely irrelevant for two reasons.

Firstly, the validity of an interpretation does not depend on the reasoning behind it, but only on the powers of the interpreter, because if an authority is an authentic interpreter, its decision is valid whatever the logical quality of the arguments supporting it.

Secondly, the choice of a method of interpretation is just a mode of justification for a decision which in fact depends on the preferred juridical policy and the interpreter's ideology. For example, Scalia's developments in favor of an interpretation according to the original intent of the founding fathers is only the best justification for a very conservative policy. In case a different method of interpretation was used by the same court, it would generate very different results[16].

But while constitutional courts are not constrained by methods of interpretation, they are subject to other constraints[17].

A constitutional court belongs to a legal and political system in which it engages in strategic relations with other authorities or state organs[18]. For example, a decision can be superseded by a constitutional amendment. Whether the amending procedure is long and difficult or simple places the court in a different situation. Also, the legislature can put pressure on the court by deciding on the retirement age of judges or on the budget of the court. And of course, the necessity not to compromise the legitimacy of the court can be a relevant restraining factor, this being exemplified in some of the actions taken by Chief Justice Roberts in the US.

The nature of constitutional review itself is also a constraint. A recurring objection against the realist theory of interpretation is that if it were true that an

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[16] S. G. Breyer, *Reading the Constitution: why I chose pragmatism, not textualism*, New York: Simon & Schuster, p. 335, and J. S. Rakoff, "The Most Conservative Branch", *in: The New York Review of Books*, 19 September 2024.

[17] M. Troper, V. Champeil-Desplats, C. Grzegorczyk, (eds.), *Théorie des contraintes juridiques*, Paris, LGDJ, 2005, pp. 203.

[18] M. Troper, "A Causal View of Judicial Interpretation", *in:* Bojan Spaic, Pierluigi Chiassoni *Judges and Adjudication in Constitutional Democracies: A View from Legal Realism*, Cham, Switzerland: Springer, 2021 (Law and Philosophy Library), pp. 111-122.

interpreter has complete discretion, then the courts would decide at whim or for purely political reasons. Yet, we can observe that the courts are coherent and maintain some continuity in their jurisprudence.

This can of course be explained by the type of education that is generally received by judges in law schools, which emphasizes the need for logical reasoning and coherent justification, and also by the common ideology of the rule of law. The strategic necessity to remain consistent also plays a role because it signals to other authorities how judges intend to exercise their power, thus indicating the way in which these other authorities can act accordingly when legislating or adjudicating. Deciding on whims instead of showing their power would greatly diminish it.

Conclusion

Constitutional interpretation has all the essential characteristics of legal interpretation in general: it does not consist in capturing a real meaning, it is an act of will and therefore of creation rather than application of higher law. However, it carries some specificities: it allows the interpreter to interpret and naturally to extend its own powers, it allows for changes in the hierarchy of norms. Moreover, whereas other domains of legal interpretation are mostly the business of courts, non-jurisdictional authorities also play an important role in constitutional interpretation.