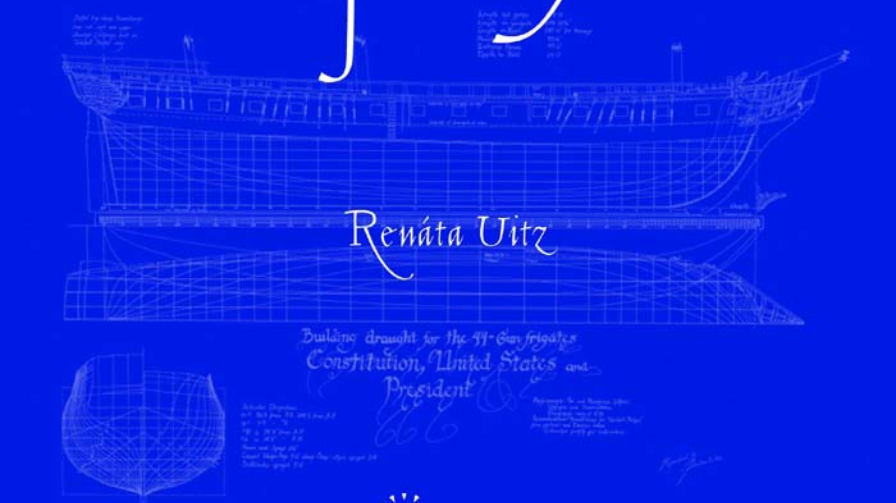
Constitutions, Courts and History



Renáta Uitz

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To my parents

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Preface and Acknowledgements

Intuitively, at least for lawyers, the record book of history appears as a treasury of very sound points of reference. Precisely due to this reputation, constitutional review fora have a tendency to rely on references to history and traditions (historical narratives) in order to clarify or supplement constitutional provisions, to determine their proper scope of application, and sometimes even to substitute constitutional provisions. *Prima facie*, historical narratives look like the ultimate tools of taming indeterminacy in constitutional interpretation. Careful analysis, however, reveals that historical narratives are interpretive and normative, and depend not on objective foundations but on the discretion of the interpreter. Upon this discomforting realization, this volume inquires into factors which make references to the past, history, and traditions attractive to lawyers, despite the potential of historical narratives to perpetuate indeterminacy in constitutional reasoning. An analysis of constitutional jurisprudence reveals that the courts' inclination to establish and preserve constitutional continuity is one such factor, while judicial attempts at reconciliation are another plotline that underlines historical narratives in constitutional cases. To be sure, it would be unrealistic to insist that historical narratives be discarded altogether from the theories or practice of constitutional adjudication. The most serious peril historical narratives pose is not simply that they perpetuate indeterminacy. It is more alarming that this potential of historical narratives in constitutional adjudication is masked so successfully by the judicial rhetorical toolkits of continuity

and reconciliation that the real consequences of the courts' reliance on the past for guidance are not properly accounted for in the course of the search for a better-fitting theory of constitutional adjudication. For this intellectual challenge, the aim of the inquiry in this volume is to attract observers of constitutional adjudication, whether they are reading constitutional jurisprudence from the quarters of constitutional law, constitutional history, political science, or history departments.

This book is the outcome of many years of research and discussion, in the course of which serious intellectual debts were incurred. No words can properly express the gratitude I owe to András Sajó, who followed with untiring guidance, critique, and encouragement the development of the argument first formulated for my doctoral thesis and then refined until it was set out on the pages of this volume. Balázs Trencsényi has been available from the early days, helping me grasp how historians would approach the subject which lawyers often manage to miss. At the University of Toronto David Dyzenhaus, Sujit Choudhry, Alan Brudner, David Beatty, and Patrick Macklem welcomed my interest in Canadian constitutional law and jurisprudence. Students at CEU Legal Studies deserve lasting credit for challenging my understandings and shaping my views. At different times Andy Haupert and Endre Sebők assisted in making my thoughts more accessible. While they should be credited for the strengths of my argument, all mistakes are mine. Without the lasting support and patience of my family and friends, among them Tamás Ferencz and Boldizsár, this project would have been a lot more difficult to accomplish.

INTRODUCTION

Constitutional Adjudication Haunted by Indeterminacy

Theories of constitutional interpretation and constitutional adjudication seek to establish a model of constitutional review which enables courts to respond even to hard cases without transgressing the limits of the legitimate exercise of the review power.[1] In the course of this exercise one of the riddles used to be the countermajoritarian difficulty, as exposed in Bickel's landmark work *The Least Dangerous Branch* (1962). Theories that understand constitutional adjudication in the matrix of the continuing operation of the branches of government respond well to challenges that stem from the undemocratic nature of constitutional review. As Dworkin explains in *Freedom's Law*,. "[w]hen a constitutional issue has been decided by the Supreme Court, and is important enough so that it can be expected to be elaborated, expanded, contracted, or even reversed by future decisions, a sustained national debate begins… That debate better matches [the] conception of republican government, in its emphasis on matters of principle, than almost anything the legislative process is likely to produce on its own."[2] Habermas's discourse theory and its progeny also situate constitutional adjudication in its broader operational context: in the public discourse.[3] The shared characteristic of these approaches is that they presuppose or require other participants in the public discourse to consider and respond to the decisions of constitutional review fora[4] on their merits.

In the meantime, theories explaining and (re)legitimizing constitutional adjudication as one ingredient in the perpetual discourse on public affairs should account for the problem posed by indeterminacy

in constitution adjudication. Indeterminacy as a phenomenon and problem is easily traceable in constitutional review. In the words of Dorf, "if the content of a constitutional right (or other constitutional provision) can only be determined by extensive deliberation, then the Constitution does not entrench rights (or other principles) in the sense of providing foundational assurances."[5]

This is not to suggest that the words of the constitution can be twisted and turned into justifying any outcome, or that the constitutional text provides no guidance at all. Still, the experience of court watchers in most jurisdictions suggests that a particular constitutional provision may not sufficiently warrant (not to mention, compel) a particular outcome in a given case.[6] Instead, the interpreter makes a choice from among more plausible outcomes or options.[7]

At the heart of the problem of indeterminacy in constitutional adjudication rests the realization that it is impossible to select one of several plausible interpretations in a principled manner. An account of indeterminacy with inclinations towards legal theory might distinguish radical (or infinite) indeterminacy from contained indeterminacy (plurality) in constitutional interpretation.[8] Nonetheless, from the perspective of legal certainty it makes little difference whether a constitutional review forum selects from a few, many, or innumerable plausible constructions. Such an indeterminacy of constitutional provisions might be understood as a beneficial factor: vagueness of constitutional language could be seen as a catalyst for public discourse on such terms as speech or due process for the purposes of the application of the constitution in every generation.[9] Nonetheless, defenders of constitutionalism and the rule of law may be less appreciative of these benefits of indeterminacy when they find that the constitution's binding reading of the day shuttles between narrow majorities of disenchanted justices. Participation in the public discourse is conditioned—among other premises—by a criterion of rationality, a condition applicable to constitutional review fora as well. As Sajó points out, "[t]he rationality of law is provided by the administration of justice if the decisions are foreseeable, and modern law is legitimate if it is based on a rights-protective discourse."[10]

The infamous uncertainty (open texture) of constitutional provisions makes this criterion of rationality rather challenging to meet.

Theories of constitutional interpretation can be seen as attempts to tame indeterminacy in constitutional reasoning, thereby simultaneously (re)defining the role proper of a court exercising constitutional review. Before the entry of originalism onto the U.S. scene, the line was drawn between interpretivist and non-interpretivist theories. Interpretivist theories evolved around giving a proper account of the written text of the constitution,[11] while non-interpretivism relied on extra-textual sources, such as neutral principles.[12] In the U.S. an interpretivist approach might find refuge in *Marbury v Madison*,[13] the formative judgment of 1803 in which Chief Justice Marshall attributed overwhelming significance to the fact that the U.S. Constitution was a written document. In response, non-interpretivists can as easily turn to Chief Justice Marshall's words in *McCulloch v Maryland*, cautioning against a narrow interpretation of the language of the Necessary and Proper Clause that "we must never forget that it is *a Constitution* we are expounding."[14] The weakness of interpretivist approaches is that they allow little room for constitutional responses invited by the developments of modern times, whether they result from the advancement of technology or globalization. Non-interpretivist theories, however, allow for such responses by opening the gates before the (arbitrary) value judgments of the constitutional interpreter of the day.

In the wake of originalism, the discourse on constitutional adjudication was restructured by shifting the focus of the exchange onto questions such as "What constitutes the original meaning of a constitutional provision?" "What was the original intent of the framers?" and "How is it possible to ascertain this—if at all—for the purposes of performing constitutional review?" The appeal of originalism is attributable to the fact that originalism in all its variations offers a neat resolution of the ultimate problem of constitutional adjudication by suggesting that "[a]dherence to the text and to original understanding arguably constrains the discretion of decision makers and assures that the Constitution will be interpreted consistently over time."[15] Originalism is capable of delivering on its promise because—as Justice Scalia forcefully submits—it "establishes a historical criterion that is conceptually quite separate from the preferences of the judge himself."[16] This suggests that, in addition to being able to reveal the

proper reading of constitutional provisions, an originalist interpretation will delineate the scope of the legitimate exercise of the constitutional review power. All this is to be achieved by means of an external factor—external since it is not dependent on the value judgments of the constitutional interpreter. The high hopes of originalism are placed in a narrow segment of the historical record that is believed to hold value-neutral, non-interpretive external criteria for constitutional adjudication. Originalist theories made a surprising career, departing from the bench of the U.S. Supreme Court and traveling all the way to Australia where originalism reinvigorated constitutional discourse, plunging into an interpretive tradition heavy with positivism and literalism.[17]

Nonetheless, the virtues of originalism are not accepted by all without reservation. Critics have pointed out the numerous flaws in the originalist methodology. Rakove found that the intention of the ratifiers had been consulted out of "partisan advantage,"[18] while Maltz observed that "originalism itself in some cases counsels an activist role for the judiciary. … Thus, the appeal to democratic theory only makes sense if originalism is combined with a general preference for judicial restraint."[19] In the age of originalism, somewhat impatient responses to the challenges of constitutional interpretation include adherents to textualism and precedent (*stare decisis*). Advocating formalism, Schauer submits that judicial restraint might be achieved by restricting the options available to judges.[20] Lessig calls for interpretive fidelity, preserving something semiotic from the past, "whether one calls that something meaning, or intent, or purpose."[21] Alternatively, pragmatism "unburdens us from having to justify our practices by reference to doctrinal formulae that never quite seem to fit our existential solutions. Instead, we can defend our actions by merely saying that they seem to be the best way to cope to get us what we need at a particular time."[22] Fallon's coherence theory calls for a strategy in constitutional interpretation which is able to fit incommensurable arguments in a single rhetoric via its intellectual integrity.[23] In contrast, Sunstein's minimalism theory advocates "incompletely theorized agreements" in constitutional adjudication[24], while Tushnet is in favor of a "thin constitution."[25] Further attempts call for a comprehensive theory of interpretation based on comparative constitutional law.[26]

Although originalism was rather successful in shifting the focus of the discourse on constitutional review, it did not introduce profoundly new arguments or techniques of constitutional reasoning. As a method of constitutional construction, various genres of originalism emphasize the unmatched significance of arguments pertaining to a very narrow segment of the past (i.e., references to Framers' Intent) for eliminating, or at least reducing, indeterminacy in constitutional reasoning. Indeed, the latter aim is central to any decent theory of constitutional adjudication and constitutional interpretation. The appeal of originalism is best explained as the lasting marriage between a premise shared by many theories of constitutional reasoning which seek to resolve the riddle of indeterminacy in constitutional review, and a misperception commonly shared by lawyers about references to the past, history, and traditions. Edging towards oversimplification, it seems that in a constitutional case, lawyers and courts consult the past for ultimate authoritative guidance in resolving the issue before the bar.[27] References to history and traditions are treated as recitals of data to be taken for what they are, and the past is introduced as a non-interpretive tool of reasoning ("facts speak for themselves"). A court recounting past events in a constitutional case creates the impression that the constitutionality of the challenged norm will be determined on an objective basis. It is true that in many constitutional cases arguments invoking the past do not supply an exclusive means of justification, but are supplementary to other arguments.[28] Yet the promise of references to history and traditions is luring, and instances of courts' relying on this promise are so plentiful that the matter cannot be left at that.

Theories of constitutional interpretation looking to reduce indeterminacy in constitutional adjudication are charmed by the possibility of sticking to an objective and neutral reference point which will then aid the constitutional interpreter in selecting one out of many possible interpretations of the constitutional text. This logic, premised on the quest for objectivity, is certainly traceable behind originalist claims.[29] However, the search for objectivity in constitutional and legal reasoning goes well beyond originalist theories. For a long time there has been considerable disagreement among scholars as to whether, and to what extent, objectivity is possible in legal and constitutional argu-

ment. It has been suggested that, in general, in legal argument objectivity is a claim to establish whether a legal norm was applied correctly.[30] Such an account, however, does not seem to be able to respond to questions such as how it is possible to determine whether vague provisions such as the Due Process Clause were applied correctly. Indeed, a general theory of objectivity might rapidly approach its limits when admitting to indeterminacy in statutory or constitutional interpretation.[31]

For Owen Fiss, the claim that the text of the constitution has numerous meanings is a nihilist one and it is in the very nature of nihilist attempts to turn the law's struggle for objectivity into a futile endeavor,[32] for "[o]bjectivity in the law connotes standards. It implies that an interpretation can be measured against a set of norms that transcend the particular vantage point of the person offering the interpretation. Objectivity implies that the interpretation can be judged by something other than one's own notions of correctness. It imparts a notion of impersonality. The idea of an objective interpretation does not require that the interpretation be wholly determined by some source external to the judge, but only that it be constrained."[33] Thus, in constitutional reasoning, objectivity is intrinsically linked with a promise and expectation of neutrality (impartiality).

And this remark indicates why the misperception about history is so successful among lawyers. Intuitively, at least for the legal mind, in the puzzling maze of constitutional interpretation references to history promise clear-cut, black-and-white answers that are supported by objective data. Trained in the Continental legal hemisphere still conditioned upon the fundamentals laid down by Friedrich Karl von Savigny's enterprise, one might be inclined to attribute this intuition to the (maybe unconscious) preservation of a nineteenth-century historicist belief in objectivity. Savigny's understanding of law as science (*Rechtswissenschaft*)—as opposed to philosophy—was coupled with a methodological revolution, introducing the search for legal principles via a highly systematized analysis of historical data that led to a historical legal science (*geschichtliche Rechtswissenschaft*), a trend-setting move in legal scholarship.[34] A similar turn in history is associated with Leopold von Ranke, who is credited for turning fiction writing into a discipline.[35] The influence of Savigny and Ranke in U.S. constitutional

and legal scholarship is undisputed.[36] Yet, for the most past, it would be an exaggeration to position the curious confidence of contemporary lawyers in the objectivity of history on such high plateaus. Rather, the intuition of lawyers with respect to the historical record reflects a phenomenon of a more profane sort: a preoccupation with facts, data, and numbers. As Mary Poovey describes, "numbers have come to epitomize the modern fact, because they have come to seem pre-interpretive or even somehow non-interpretive at the same time that they have become the bedrock of systemic knowledge."[37]

It has been suggested that arguments in history leave behind a politically altered historical discourse constrained by "brute facts". "Historical interpretations that pretend to complete objectivity or neutrality inescapably conceal a political agenda, usually favorable to the status quo."[38] Most importantly, it follows from this promise that instead of arriving at a completely random (and, therefore, unpredictable) construction of the constitutional text, the interpreter will follow some external guidance and thus arrive at a conclusion which could have been reached by any other interpreter living up to similar expectations of objectivity and neutrality. Arguments in history create the impression that the standard along which the issue was decided is external to the interpreter, thus references to history and traditions imply that the interpreter is neutral (impartial), while at the same time they also carry the promise of constraining indeterminacy in constitutional construction.

Constitutional review fora invoke the history and traditions of the polity in numerous jurisdictions, often not drawing sharp distinctions between the two. As if underscoring this position, Chief Justice Lamer of the Canadian Supreme Court said that "the interpretation of the Charter, as of all constitutional documents, is constrained by the language, structure, and history of the constitutional text, by constitutional tradition, and by the history, traditions, and underlying philosophies of our society."[39] The tendency of courts to present observations about the past and past practices as uncontested findings or facts is also pervasive. For instance, when the constitutionality of legal rules on official holidays was contested before the Hungarian Constitutional Court, the justices insisted that the making of religious holidays into official holidays is not a matter of state preference for cer-

tain religions, but is the result of historical developments and a matter of tradition. Thereupon the Constitutional Court found—unlike with respect to Christmas and Easter—that there is no tradition in the Hungarian polity to observe major Jewish holidays such as Rosh Hashanah and Yom Kippur.[40] Going far beyond the width and depth of the above reference, in its jurisprudence the French Constitutional Council attributes extraordinary significance to a particular segment of the French past that is usually referred to as the "republican tradition". In the field of constitutional rights the "republican tradition" may give rise to such "fundamental principles recognized by the laws of the republic" that are then considered a full-fledged source of constitutional law.[41] Confidence in history and traditions is also present in Judge Bork's argument when he advocates adherence to Framers' Intent in constitutional construction as an approach yielding neutral (apolitical) readings of the constitutional text.[42]

The glaze of neutrality (impartiality) is a thick one, indeed. Historical arguments hint that every observer would have arrived at the same conclusion, and thus they allude to the neutrality (impartiality) of both the decision maker and the decision. In addition, arguments in history suggest that the decision rests on well-set, firmly established grounds. In other words, these decisions seem to preserve the status quo; they create an impression of stability and continuity. Indeed, well beyond the terrain of originalism, virtues such as objectivity, along with stability and neutrality, are routinely associated with references to history. Note that these characteristics are also considered essential components of the rule of law.

In addition, these imagined qualities of references to history and traditions shared by lawyers correspond well to the central challenge in the quest for a theory of constitutional reasoning. After all, if expectations of the basic features of references to the past, history, and traditions were to come true, they would be the perfect means of taming indeterminacy in constitutional adjudication. This match between aims and means as perceived by many lawyers explains, at least in part, the reign of originalist constitutional reasoning. Nonetheless, the consequences of this unfortunate correspondence go well beyond the annoyance of originalism's false promises and take one to a wide range of problems which a sound account of constitutional reasoning

and constitutional adjudication has to handle in order to succeed. A critical inquiry into judicial reliance on references to history and traditions must thus first seek to establish whether these references are really capable of delivering on the promise of curbing indeterminacy. A careful analysis of jurisprudence across continents might provide the best approach to such an inquiry. Furthermore, since lawyers are far from being the only observers with a routine and interest in exploring and telling history, it is important to learn about accounts of history from historians and philosophers of history themselves.

According to the findings of the analysis carried out in the coming pages, the deeper characteristics of references to the past as applied by courts in constitutional cases reveal that, despite their initial promise to this effect, references to the past, history, and traditions are not capable of resolving indeterminacy in constitutional adjudication. This observation echoes not-so-recent developments in the theory of history. Nonetheless, as valid as this point may be in sheer empirical or theoretical terms, it still does not explain the unusual popularity and high acceptance rate of references to the past, history, and traditions in constitutional cases. Thus the inquiry has to focus on other qualities and expectations associated with history that match judicial aspirations which are often masked by the quest for taming indeterminacy.

A careful reading of the judicial decisions analyzed in this volume suggests that judicial attempts at conquering indeterminacy via references to history and traditions are often transformed into endeavors to establish or preserve continuity in a polity via constitutional interpretation, and alternatively, or simultaneously, to foster coming to terms with the past (reconciliation). Judicial attempts phrased in such terms are neither surprising nor prima facie suspicious to most observers. Since such attempts are often presented with a wealth of references to history and traditions, their often overwhelming presence and sometimes troubling constitutional consequences tend to remain unexposed. After revealing how an inquiry into the past is insufficient as a means of reducing indeterminacy in constitutional adjudication, this book seeks to demonstrate the dangers masked by references to history and traditions when courts turn them into a means of preserving continuity and crafting reconciliation in constitutional adjudication.

Thus far this introduction has repeatedly referred to accounts of the past, history, and traditions in constitutional reasoning, language that might be misleading without further clarification. The analysis in the present book does not aim to map mistakes committed by courts or individual judges when reconstructing past events in constitutional cases. Instead, the inquiry focuses on how judicial accounts of the past, history, and traditions affect constitutional reasoning. At the center of this attempt rests not the accuracy of the lawyers' reconstruction of the past, but the *manner* in which lawyers tell a story of the past in constitutional cases. Thus the question is not whether courts get right the bit about "what actually happened". The analysis concentrates on how courts construct their own account of past events and how they use this account in constitutional cases. In the pages to follow, such accounts of, or, more properly, representations of, past events and practices formulated in constitutional cases will be referred to as *historical narratives*.

At least since Robert Cover's "Nomos and Narrative" the term "narrative" has not been foreign to constitutional scholarship.[43] By "narrative", Cover meant interpretive commitments that determine "what law means and what law shall be".[44] References to the past, history, and traditions or, better, still historical narratives, belong among these interpretive commitments. The term "historical narrative" is borrowed from historiography. As one eminent scholar of this discipline, Hayden White, explained, narrative is the *form of the discourse on historical events*. For White, "[t]he form of the discourse, the narrative, adds nothing to the content of the representation, but is rather the simulacrum of the structure and processes of real events. … The story told in the narrative is a 'mimesis' of the story *lived* in some region of historical reality, in so far as it is an accurate imitation it is to be considered a truthful account thereof."[45]

With the exception of those historians who reject such an understanding of narratives in history altogether, several classics of modern historiography rely on more specific definitions of what exactly amounts to a narrative, or what the function of narrative is. In the present analysis the term will be used in a loose sense, without subscribing to any of the more precise understandings with their unique consequences.[46]

This volume explores the operation of historical narratives in constitutional reasoning in jurisdictions where constitutional interpreters are struggling not only with indeterminacy but also with troubled founding myths surrounding the constitutional texts. From among many potential contexts, constitutional jurisprudence in Australia, Canada, the Czech Republic, Hungary, France, South Africa, and the United States were chosen.[47] The primary direction of the inquiry put German constitutional jurisprudence outside the scope of the present inquiry. While German constitutional jurisprudence is a rich depository of the Weimar and Imperial constitutional and legal traditions, the Basic Law's framing moments do not figure that dominantly in the Federal Constitutional Court's decisions.[48]

When analyzed carefully, in these contexts the courts' emplotment of the past relevant for the analysis of the constitution and the constitutional issue of the day highlights reservations and concerns about the role played by references to history and traditions in constitutional reasoning. Furthermore, such an inquiry also reveals numerous unintended consequences pointing to the deeper mechanics of the constitutional review in action. To be sure, the examination of constitutional jurisprudence in many, differing jurisdictions is a challenging task, one which has its own limitations and the potential for error. A systematic overview of all these constitutional contexts can hardly be offered, nor is it necessary for the present endeavor. In the forthcoming chapters, rules of domestic constitutional law are discussed only to the extent demanded for the exposition of a particular problem. Also, for the purposes of the analysis, examples have been chosen from those jurisdictions that best illustrate a problem, often leaving aside cases from other countries that might be relevant yet have dimmer contours. It is important to keep in mind that the discussion of a particular case or judicial opinion is not meant as a comprehensive case note but has a narrower focus and a more direct line tying the analysis to the present inquiry. Furthermore, the analysis is not restricted to decisions that represent the "leading case" of the day: for an inquiry into the techniques of judicial reasoning in constitutional cases, decisions that were overturned on appeal, or the holding of which has since been modified, are just as relevant as judgments reflecting the current state of the law.

It is argued on these pages that the outcome of any attempt at constitutional interpretation fuelled by historical narratives is predominantly dependent on the discretion of the person reading history. This suspicion runs counter to lawyers' intuition on references to history and traditions and therefore warrants further inquiry, which is undertaken in Chapter One. Lessons drawn from a short excursion into the woods of historiography will be applied to judicial accounts of history and traditions in constitutional cases. Thereafter the chapter will discuss the operation of references to history and traditions in common-law reasoning, calling Edmund Burke's *Reflections* to aid. Although common-law reasoning and various doctrines of precedent are highly specific to particular jurisdictions, on a more abstract level, lessons learnt in the common-law context are applicable to practical legal reasoning beyond the common-law hemisphere. Observations in Chapter One shed light not only on the interpretiveness and normativity of historical narratives, but also on the basic premises of their operation in the markedly path-dependent universe of legal reasoning.

Following the diversion to relatively abstract terrains, Chapter Two provides a basic typology of arguments used by constitutional review fora. The classification concentrates on the relationship of the constitutional text and the arguments themselves. It is affirmed that despite the apparent limitations of textualism in constitutional cases, the text of the constitution does preserve an important legitimizing function that should be given weight in any analysis of constitutional reasoning. At the same time, the inquiry reveals that arguments used in constitutional adjudication are heavy with references to the past: this characteristic can be distinguished in legal arguments as well as in extra-legal aids to constitutional construction.

Drawing on the benefits of these findings, Chapter Three explores how constitutional review fora apply historical narratives in various settings. The relationship of the constitutional text and historical narratives in constitutional adjudication may be pictured along a continuum. At one end there are instances in which the text of the constitution contains historical references or directly calls for the analysis of historical evidence. At the other end of the spectrum, history is invoked in lack of constitutional guidance, as a novel point of reference and of legitimation in constitutional argument, and as a genuine

source of rights and obligations. In the middle of the continuum are instances in which constitutional review fora rely on historical narratives to fill the gaps of the constitutional text. The analysis suggests that despite the relevance of the constitutional text in legitimizing courts' moves in constitutional interpretation, the text of the constitution does not compel an inquiry into history, nor does it control the terms of the inquiry. As a result, historical narratives appear to be at a loss in curbing indeterminacy in constitutional interpretation.

Such a sound conclusion does not bring the inquiry to rest, for it does not provide a satisfactory account of the popularity and force of historical narratives in constitutional cases. In search of an explanation, the last two chapters undertake such an exploration into the normative premises (metanarratives) underlying references to the past, history, and traditions in constitutional adjudication. Chapter Four explores the continuity rhetoric underlying courts' accounts of the past in constitutional cases. A continuity rhetoric is an old topos of accounts of history[49] and it corresponds all too well to lawyers' inclination to preserve the integrity of legal rules over long time-spans, a theme explored in Chapter One. Chapter Four maps various uses of continuity rhetoric in constitutional cases, showing how courts' search for value continuity may effectively supplement, if not replace, the constitutional text. At the same time, instances from jurisprudence also reveal that continuity only makes a difference in constitutional cases if a court calls on it to this effect. The wide discretion of courts thus revealed further contributes to reservations about the utility of historical narratives in taming indeterminacy in constitutional cases.

Finally, Chapter Five explores a plotline which has been invoked in constitutional cases in settings where courts became involved with, or hoped to contribute to, coming to terms with the past under the constitution. While intuitively the logic of reconciliation seems to correspond well to the mechanics of a continuity rhetoric, a close examination of cases reveals that there is a significant potential of friction between the two. In addition, the analysis in the chapter reveals that, while coming to terms with past injustice is a most laudable effort, it has limitations which follow not so much from lawyers' difficulties in mastering historical narratives as from intellectual reflexes that preserve centuries-old patterns of constructing the subject of the consti-

tutional discourse. Judicial decisions on such premises not only increase indeterminacy in constitutional reasoning but also undermine the reconciliation agenda pursued by a studious court.

NOTES

1 Farber and Sherry, *Desperately Seeking Certainty*, 140.
2 Dworkin, *Freedom's Law*, 354.
3 Habermas, *Between Facts and Norms*.
4 The phrase "constitutional review fora" stands for courts of ordinary jurisdiction (such as the U.S. Supreme Court or the Canadian Supreme Court), constitutional courts (e.g. the Hungarian and the South African constitutional courts) and other bodies (like the French Constitutional Council) exercising constitutional review.
5 Dorf, "Legal Indeterminacy and Institutional Design", 877.
6 Coleman and Leiter, "Determinacy, Objectivity, and Authority", 561–578.
7 Troper, "Constitutional Justice and Democracy", 282–283.
8 Stoljar, "Interpretation, Indeterminacy and Authority", 470–498.
9 Waldron, "Vagueness in Law and Language: Some Philosophical Issues", 533 et al., relying on W.B. Gallie's concept of "essential contestability".
10 Sajó, "Constitutional Adjudication in the Light of Discourse Theory", 1218.
11 Grey, "Do We Have a Written Constitution?" Cf. Clinton, "Original Understanding", 1187.
12 Wechsler, "Toward Neutral Principles of Constitutional Law"; Bork, "Neutral Principles and Some First Amendment Problems". Also, Tushnet, "Following the Rules Laid Down", and Tremblay, *Rule of Law*, Ch. 5.
13 *Marbury v Madison*, 5 U.S. (1 Cranch) 137 (1803)
14 *McCulloch v Maryland,* 17 U.S. 316, 407 (1819)
15 Brest, "The Misconceived Quest".
16 Scalia, "Originalism, the Lesser Evil", 684.
17 James, "Original Intent", and Kirk, "Constitutional Interpretation and a Theory of Evolutionary Originalism". Also, Goldsworthy, "Interpreting the Constitution".
18 Rakove, "The Original Intention of Original Understanding", 185–186.
19 Maltz, "The Prospect for a Rival of Conservative Activism", 632.
20 Schauer, "Formalism", 521; also Weinrib, "Legal Formalism".
21 Lessig, "Understanding Changed Readings", 401; also Lessig, "Fidelity and Constraint".
22 Morrissey, "Pragmatism and the Politics of Meaning", 641. Also, Farber, "Legal Pragmatism", 1342–1344. On Posner's and Rorty's pragmatism see Rosenfeld, *Just Intepretations*, 150–197.
23 Fallon, "A Constructivist Coherence Theory of Constitutional Interpretation".

24 Sunstein, *Legal Reasoning and Political Conflict*.
25 Tushnet, *Taking the Constitution away from the Courts*.
26 See, e.g., Tushnet, "The Possibilities of Comparative Constitutional Law"; Choudhry, "Globalization in Search of Justification".
27 Gordon, "The Arrival of Historicism", 1025.
28 tenBroek, "Extrinsic Aids of Constitutional Construction, Part 1", 295–296.
29 Crosby, "Worlds in Stone: Gadamer, Heidegger, and Originalism".
30 See, e.g., Stavropoulos, *Objectivity in Law*.
31 This discourse has numerous facets and implications that point way beyond the aspirations of the present analysis and will not be covered here in detail.
32 Fiss, "Objectivity and Interpretation", 742.
33 Fiss, "Objectivity and Interpretation", 744.
34 Reimann, "Nineteenth-Century German Legal Science", 851–852.
35 Rüsen, "Rhetoric and Aestheic of History".
36 See Berman, "Toward Integrative Jurisprudence", 789–792.
37 Poovey, *A History of the Modern Fact*, xii.
38 Spitzer, *Historical Truths and Lies about the Past*, 4.
39 *New Brunswick Broadcasting Co. v Nova Scotia (Speaker of the House of Assembly)*, [1993] 1 S.C.R. 319, 358.
40 10/1993 (II. 27.) AB decision.
41 A detailed discussion of French jurisprudence is to follow in Chapter Four.
42 Bork, *The Tempting of America*.
43 Cover, "Nomos and Narrative".
44 Cover, "Nomos and Narrative", 7.
45 White, "The Question of Narrative in Contemporary Historical Theory", 3.
46 In addition to the overview in White, supra note 46, see also Megill, "Recounting the Past" and Lorenz, "Can Histories Be True?"
47 Unless indicated otherwise, translations from the French and the Hungarian are mine.
48 See the rare exception of the *Elfes* case (6 BVerfGE 32) discussed in Chapter Two. See also Sunstein, *Designing Democracy*, 79.
49 Rüsen, "Rhetoric and Aesthetics of History", 196–197.

CHAPTER ONE

Historical Narratives in Constitutional Reasoning: Intuitions and Myths Revisited

"Historic continuity with the past is not a duty, it is only a necessity"
Justice Oliver Wendell Holmes[1]

References to history and traditions have acquired a curious reputation among lawyers for being objective and neutral points of reference, and thus for being capable of curbing indeterminacy in constitutional adjudication. When inquiring whether a new claim fits within the substantive range of the Due Process Clause, the U.S. Supreme Court sets course to explore whether the right or liberty interest asserted by the petitioner is "deeply rooted in the Nation's history and tradition." It was in *Bowers v Hardwick*[2] where the U.S. Supreme Court, per Justice White, sought evidence to establish whether the "history and traditions of the Nation" favored the right to engage in consensual homosexual sodomy, as the majority in the case framed the issue. After a brief review of various rules outlawing consensual homosexual sodomy, Justice White rejected the claim for want of evidence on past practices, and also because of the failure to show that the claim was "implicit in the concept of ordered liberty."[3] In the case Justice Blackmun concluded his dissent by finding that "depriving individuals of the right to choose for themselves how to conduct their intimate relationships poses a far greater threat to the values most deeply rooted in our Nation's history than tolerance of nonconformity could ever do."[4] These conclusions sound as if they were reached in a different case. Nonetheless, by the end of the 1990s Chief Justice Rehnquist insisted in a different case that the search for traditions has always been central to Due Process analysis.[5]

This concept of substantive Due Process review applied by the U.S. Supreme Court emerged with a line of cases starting with Justice

Harlan's dissent in *Poe v Ullman*[6] and his subsequent concurring position in *Griswold v Connecticut.*[7] It was in the latter case that Justice Harlan spoke of "continual insistence upon respect for the teachings of history, solid recognition of the basic values that underlie our society, and wise appreciation of the great roles that the doctrines of federalism and separation of powers have played in establishing and preserving American freedoms." He continued that "Adherence to these principles will not, of course, obviate all constitutional differences of opinion among judges, nor should it. Their continued recognition will, however, go farther toward keeping most judges from roaming at large in the constitutional field than will the interpolation into the Constitution of an artificial and largely illusory restriction on the content of the Due Process Clause."[8]

Thus Justice Harlan called for consulting history and traditions in the application of the Due Process Clause in order to induce judicial self-restraint. The above words, however, do not outline criteria for evaluating evidence from past practices relevant for the construction of the Due Process Clause. Indeed, these words are the concurring judgment's grand finale. The very phrase "deeply rooted in the Nation's history and tradition" was used by Justice Powell in another case,[9] again more as a fancy formulation than as a standard for judicial evaluation. However, in time these phrases became a familiar test on which the core of substantive Due Process analysis rests. Still, not until the U.S. Supreme Court's recent decision in *Lawrence v Texas*[10] did it become so apparent that the Court regards the inquiry into traditions and history as so crucial for Due Process analysis that the disagreement concerning the analysis in a particular case could ultimately contribute to overturning precedent, as happened recently with *Bowers* in *Lawrence*. In *Lawrence*, Justice Kennedy writing for the majority found that "there is no *longstanding history* in this country of laws directed at homosexual conduct as a distinct matter."[11] In reaching this conclusion, the *Lawrence* majority did provide extensive analysis of the past regulation of sodomy. Thus, in essence, the *Lawrence* majority overturned *Bowers*'s account of the constitutionality of the prohibition of homosexual sodomy because it was erroneously decided.[12] Mistakes were identified regarding both the delineation of the issue and the conclusion drawn from the historical record.[13] Between *Bowers* and

Lawrence not even a mere twenty years had passed, thus one might indeed wonder whether this U-turn in jurisprudence has something to do with courts' or justices' skills in mastering history and traditions.

Indeed, constitutional review fora, and even eminent scholars of constitutional law, are all too often criticized for writing bad history.[14] Numerous scholars argue that the justices in constitutional cases have misunderstood or misinterpreted historical data. In the U.S. the common name for such unfortunate attempts is "law-office history."[15] In the simple and clear terms used by Eskridge, "[l]aw-office history typically searches for historical fragments supporting one side or another of a legal dispute."[16] Furthermore, with the proliferation of references to history and traditions in constitutional cases, justices often condemn one another for applying mistaken conclusions drawn from history. Such judicial exchanges are not infrequent and more and more often tend to have a bitter tone. Disputes on the proper or tainted use of historical sources and data might go well beyond the legal issues that gave rise to the lawsuit, and such disagreements have the potential to divert attention from the substantive problems raised in the case.[17]

Observations about courts' mistakes in writing history call into question the very premises that justify justices venturing into such foreign territory in search of guidance in constitutional cases. Any inquiry seeking to understand the role played by historical narratives in constitutional reasoning has to account for this apparent contradiction. One might assume that it is the difference between history and traditions conflated in judicial accounts of the past that makes courts' write bad history. After all, instinctively, an account of history appears as a factual record of past events, while an account of traditions is a lot more elusive, allowing more room for constructing a proper account of past practices. The analysis in the first part of this chapter reveals not only that such a distinction between references to history and to traditions is largely untenable, but also that any account of the past, whether a record of hard facts or an account of softer practices, is a matter of construction or invention. This conclusion—even if not welcome among lawyers—is soundly supported by ample authority in the (post-)modern theory of history. Calling to aid Edmund Burke's *Reflections*, the second part of the chapter explores how common-law

reasoning, and legal reasoning for that matter, transfers the past and long-preserved traditions in manners that are reminiscent of the techniques for inventing historical narratives. It is hoped that this introduction will create a sound and familiar background for an analysis of the operation of historical narratives in constitutional adjudication to be undertaken in subsequent chapters.

1. 1. History and tradition as accounts of the past: the need for a better distinction, or time to adopt a (not so) new methodology?

The relationship between references to history and accounts of traditions is a complex and somewhat controversial one. On a primary level, the encounter between accounts of history and of tradition can be cast as hard facts meeting potentially unfounded or twisted generalizations. Finding that "[t]radition is a heavily edited anthology of the past, and much of the past fails to participate in it at all",[18] Luban makes an attempt to distinguish between arguments in history and tradition in constitutional reasoning. In exploring the relationship between accounts of history and references to traditions, Barber suggests that "[h]istory can hardly count as tradition, then, for if it did, we could not criticize our historical conduct in the light of our traditions."[19] Drawing an important distinction, Pocock adds that for a narrative invoking traditions to be intelligible there needs to be a factual background. If there is no factual support for the existence of a past or present usage, the narrative is considered to present a myth, and not a tradition.[20] These observations also have important implications for contesting the validity of rules that originate in times immemorial, as an important pillar of the legitimacy of such rules cannot be tested or contested.[21]

Nonetheless, while these points are well taken, they seem more to cloak than to reveal the relationship between historical narratives and references to tradition in constitutional reasoning. While not intending to trivialize the problem of validation, it is important to point out that references to the longstanding practices and commitments of the

polity (traditions) in constitutional adjudication are often identified as value arguments masquerading as empirical (factual) findings. The U.S. Supreme Court's reversal of its position in *Lawrence* concerning the contents of convictions deeply rooted in the Nation's history and traditions with respect to the issue of homosexual sodomy is first-class proof to this effect. As Pocock observes, it is important to see that invoking a tradition is not about giving factual information about a previous performance; instead, invoking tradition is an assumption that previous performance, as presented, is operative. Thus narratives invoking traditions are presumptive and prescriptive, or, in other words, they are teleological.[22] Thus, for the purposes of the present analysis, the real problem is not the validation of an alleged tradition's facticity. Rather, the focus should be on what makes narratives based on traditions so attractive to lawyers, who are also inclined to trust historical narratives.

For moral philosopher Alasdair MacIntyre, an argument in tradition is a historically extended, socially embodied argument.[23] According to eminent historian Eric Hobsbawm, in narratives relying on traditions the authority of the past is often claimed with reference to "a set of practices…governed by overtly or tacitly accepted rules and of a ritual or symbolic nature, which seek to inculcate certain values and norms of behavior by repetition."[24] The formalization and ritualization of a specific account of history is central to the emergence of a tradition.[25] In addition to the emphasis on repetition, it seems to be a shared trait of all these accounts that their very existence presupposes a community: traditions are shared by a group of people; traditions are instrumental in the identity of a group. Very often arguments invoking traditions are legitimized by asserting that they are based on the well-established narratives of the community, or at least they are shared by the overwhelming majority of the actors. As a reaction to this aspect, it is widely held in accounts of traditions that the unarticulated premise of arguments in tradition is their predominantly majoritarian character. Indeed, the alleged majoritarian features of references to the past seem to be of great significance in establishing the high esteem of such references in constitutional reasoning.[26]

In an attempt to reconstruct the relationship between liberalism and traditions, Edward Shils argues that traditions have a higher

standing than mere historical facts "by virtue of the quality they acquire [due to their] state of communion with past powers."[27] This position suggests that references to traditions automatically imply the compelling force of the past by submitting the present to the command of past practices: they transform a descriptive account of past events (history) into a prescriptive account of the past (tradition), from which consequences follow that would inform—if not instruct—the actions and expectations of present (and future) actors. For historians, the interpretiveness and normativeness of accounts of traditions are not the least bit alien. Indeed, following Hobsbawm it is well established that traditions are "invented" accounts of the polity's past. They are construed as "responses to novel situations which take the form of references to old situations, or which establish their own past by quasi-obligatory repetition."[28] In effect, arguments in tradition use references to past events (history) to situate the present in the social context of the community with the help of relevant past events.

These observations do more than establish the interpretiveness and normativeness of accounts invoking traditions. More importantly, they seem to question a premise widely shared among lawyers concerning the qualities of accounts of history, in which references to historical data tend to be viewed as sound, reliable aids to constitutional construction—a premise which is the most likely culprit to blame for law-office history. Among historians it is a commonplace that any historical narrative necessarily provides an edited account of past events: components of historical narratives—as of other instances of human knowledge—are chosen and structured along predetermined patterns of interpretation.[29] This finding has numerous implications for the present analysis. To begin with, it questions the basic premises of positions holding that arguments in history are fundamentally different from arguments in tradition, for historical narratives are objective while traditions are invented. Indeed, a careful analysis might reveal substantial correspondences between historical narratives and references to traditions that have far-reaching consequences for an analysis of the role of historical narratives in constitutional adjudication.

In contemporary theories of history there are numerous competing approaches to explaining the relationship between the observer (his-

torian) and her subject (history). These theories offer crucial insight towards a better understanding of shared beliefs of, and mistakes committed by, lawyers when resorting to historical inquiries in constitutional cases. Offering a full-scale panorama of even the most influential theories of history would, however, be beyond the scope of the present analysis. Since Paul Ricoeur and Hayden White there has been a strong hermeneutical tradition of understanding history as a text that has a meaning of its own. Whether this approach is ultimately useful as a method for historians is not addressed here.[30] From the perspective of lawyers and legal reasoning there is a clear advantage in seeking advice from the hermeneutical school in historiography and its offspring: despite the inherent questions and problems, the reading and interpreting of written texts is a terrain in which lawyers feel comfortable.[31] The following analysis draws heavily on the important insights offered by the predominantly German tradition of the "history of concepts" or "conceptual history" (Reinhart Koselleck) and by the Cambridge-based "ideas in context" school (Quentin Skinner, J.G.A. Pocock). Interestingly, the works of some of these historians are not entirely unfamiliar in legal circles. Laura Kalman demonstrates how Pocock's *Machiavellian Moment* made an impact on U.S. constitutional discourse in the age of originalism.[32] Yet Pocock seems to have become triumphant due to his findings, and not because of his methodological observations. The present analysis seeks to undo the misunderstandings apparently shared, or at least displayed, by lawyers regarding narratives invoking the past. This task can be performed relatively successfully without dwelling on the otherwise important and well-established differences between the approaches outlined by the above-mentioned theorists of historiography.

As Hayden White duly observed, historical explanations are based on metahistorical presuppositions, such as moral or value arguments. (This finding is not to be confused with the conservative conception of time as a creator of value.[33]) Importantly, however, one such presupposition is no better than any other.[34] This theory of historical narratives corresponds with the Heideggerian concept of human understanding, to the extent that "interpretation is never a presuppositionless apprehending of something presented to us… One likes to appeal to what 'stands there'…[but] what 'stands there' in the first

instance is nothing other than the obvious undiscussed assumption…of the person who does the interpreting…"[35] A theory of history, and even the hypothesis underlying historical analysis, should thus reflect on the tacit presupposition of teleology so characteristic of history as a discipline. In causal reasoning, numerous causes might be asserted to support a given event. Constraints on permissible explanations are asserted ex post, on the hypothesis informing the inquiry itself.[36] Thus not only lawyers but also professional historians select (pick and choose) historical data and thereafter arrange these pieces of information according to the point they intend to make. This being the case, lawyers are not the only interpreters of the past with a predetermined mindset.

Indeed, as Koselleck submits, "[c]orrectness in interpreting sources is not only assured by the source data but, first of all, by making the question concerning possible history theoretically evident."[37] This observation on the role of source data and of the hypothesis framing historical inquiry efficiently casts doubt on the juxtaposition of narratives in history and in tradition. It is well established that writing (documentation) turns traditions into assertions about facts.[38] Judicial decisions unquestionably represent a form of writing, often recording accounts of memory, narratives in history, and tradition. Therefore, on the one hand, the correctness of narratives in traditions may also be asserted in the very same limited, highly technical sense (i.e., correspondence with source data) as the correctness of historical narratives. Thus in this respect there is little difference between arguments in history and narratives in tradition. Nonetheless, following Koselleck, it seems that accounts of the past are validated not solely by a "secular" collection of facts (Pierre Nora) but also in the light of the hypothesis framing the inquiry into the past.

What a historian identifies as the hypothesis underlying the inquiry into the past amounts to the "phrasing of the issue" for a lawyer. A historian's question (hypothesis) should be theoretically evident within the historical inquiry itself. By contrast, in constitutional analysis the question (i.e., the phrasing of the issue) does not fit first and foremost within a historical inquiry but within a constitutional and legal inquiry—for example, constitutional provisions and a line of precedent. Thus, no matter how searching a judicial inquiry may be,

the terms and premises that direct the phrasing of the issue (i.e., the terms of the inquiry) will match the requirements of constitutional argument. This problem is seriously underexposed in lawyers' discourse, despite some being clearly aware of the practical implications of such initial (strategic) choices. In recent years caveats have been voiced even from within the U.S. Supreme Court, warning that the specificity of the terms of the inquiry into the past and into previous cases may affect the outcome of substantive Due Process analysis.[39]

With these lessons in mind it is time to take a second look at the U.S. Supreme Court's decisions on the constitutionality of homosexual sodomy in *Bowers* and *Lawrence*. Assuming that the justices did not mistreat source data, the deviation in the findings of the majority in these two cases is attributable to the differences in the way questions were posed to frame historical analysis. The contrast between historians' and lawyers' criteria for crafting the terms of an inquiry into the past is marked in *Bowers* and *Lawrence*, as justices disagreed about the proper casting of the constitutional issue, thus displaying a clear lack of consensus which, in return, allows easier access to crossing the transdisciplinary boundary. It is important to note at the outset that justices can and do disagree about the proper phrasing of the issue in a constitutional case, depending on their understanding of the constitutional problem. In *Bowers* and *Lawrence* this disagreement about the law resulted in two distinct conclusions about history and traditions. It was this shift in phrasing the issue that allowed the *Lawrence* majority to conclude that *Bowers* had related bad history, leading to the latter's overruling.[40] The following analysis will show that reasons for such differing conclusions about history can be explained exclusively with reference to legal arguments. This is not to suggest that the various majorities in these cases devised their texts as if blindfolded to the contents of the historical record. Rather, it is to demonstrate how lawyers' accounts of the past can be entirely self-referential and ahistoric.

In *Lawrence*, a careful observer may witness three sharply differing constitutional positions regarding the proper exposition of the constitutional problem raised by the challenge directed at the constitutional validity of the statutory prohibition of homosexual sodomy. Justice Kennedy, writing for a slim majority of five justices, characterized the issue as "whether the petitioners were free as adults to engage in the

private conduct in the exercise of their liberty under the Due Process Clause of the Fourteenth Amendment."[41] For Justice Scalia, writing the dissenting judgment for three, the issue was whether the holding of *Bowers* should be overruled.[42] In *Bowers,* the majority put the issue in the following terms: "Whether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy."[43] This fundamental disagreement about formulating the issue on which the fate of the entire case turned was clearly exposed by both the majority and the dissenters in the case. Justice Kennedy said that the way the *Bowers* court characterized that issue "discloses the Court's own failure to appreciate the extent of the liberty at stake."[44] Justice O'Connor, who voted with the majority, agreed to strike down the law on a completely different constitutional ground, invoking the U.S. Constitution's Equal Protection Clause and an entirely different line of precedent in support of her position.[45] This position does not call for an inquiry into premises deeply rooted in the nation's history and traditions, and also allows for leaving *Bowers* outside the picture.[46]

In sheer analytical terms, the difference between Justice Kennedy's majority stance emphasizing sexual privacy or liberty, and Justice Scalia's emphasis on the right to homosexual sodomy in *Lawrence*, is that while the first variation puts the claim in more general terms as it centers on the scope of the constitutional protection of liberty, the second phrasing is narrower. The *Lawrence* majority found that in the past the sodomy provisions were directed at homosexual and heterosexual sodomy alike—prohibiting not only homosexual sodomy (as found by the *Bowers* majority) but any kind of non-procreative sexual conduct.[47] When it came to the history and traditions of the nation the *Bowers* majority and the dissent in *Lawrence* were not interested in anything exceeding the prohibition of homosexual sodomy. It is only Justice Kennedy's characterization of the issue for the *Lawrence* majority (in terms familiar from the *Bowers* dissent) that calls for a more comprehensive inquiry, covering a wider territory than any possible response that could correspond to the issue as phrased in the majority judgment in *Bowers.* Although, according to Justice Scalia's dissent, the majority's conclusion in *Lawrence* does not cast into doubt the conclusion reached by the *Bowers* majority,[48] the difference between the two findings is at least sufficient to warrant further inquiry.

An explanation of this difference may come in various colors and flavors. For instance, one may argue that Justice Scalia, who prefers *Bowers* on the grounds of precedent,[49] ended up in the *Lawrence* dissent due to shifting majorities in the court.[50] In defense of Justice Kennedy's reformulation of the issue (and consequent departure from precedent) Laurence Tribe (an eminent scholar of U.S. constitutional law who acted as counsel for the right's petitioner in *Bowers*) submitted that the Kennedy position rests on a proper reading of substantive Due Process precedent,[51] based on a line of cases far exceeding *Bowers*.[52] At the same time, William Eskridge (a leading constitutional scholar not only of gay rights but also of Hart and Sacks' legal process approach), in an equally convincing and consistent manner, demonstrates that by redefining the issue, the Kennedy judgment proceeds in the best tradition of the legal process school, seeking to reconstruct what the authors of a constitutional or legal rule meant. Such an approach examines the purpose of the Due Process Clause, the means adopted to achieve it, and its "best application", supported by precedent.[53] One might also suggest that the Kennedy judgment's silence about the criminalized sexual act itself (homosexual sodomy) in the phrasing of the issue is an intelligent (and familiar) judicial attempt to manufacture consensus by finding a neutral formulation that drops all details that could antagonize the audience (such as direct references to homosexual sexuality).[54]

Note that the mechanics of the Kennedy judgment in *Lawrence*, and the reasons for a radically different conclusion drawn from history, can be explained in terms that are free of hints at justices' willful manipulation of the historical record. It is important to see that this alteration in the premises of the judicial inquiry—which was also instrumental in overturning the controlling precedent—can be convincingly explained within the confines of constitutional or legal concepts without reference to the segment of the past that is the very subject of the judicial analysis. The explanations work even if one presumes judicial indifference towards the specific contents of the historical record: the broader array of historical evidence and the conclusion thus reached may be regarded as a collateral consequence of *Lawrence*'s redefining of the issue, as required for overruling precedent.

This is not to suggest that Professors Eskridge and Tribe, or Justice Kennedy, were insensitive to the appropriateness of the reconstruction of the historical record in *Lawrence*.[55] Nonetheless, based on the above it is at least plausible to argue that the majority's conclusion in *Lawrence* is a clear example of how the outcome of a court's inquiry into history and traditions is shaped by factors that are not intrinsic to the hard evidence from the past but stem from techniques of legal reasoning within the control of constitutional reasoning. From this perspective, whether or not the issue is defined so as to fit the relevant segment of the past is of secondary importance, if considered at all. The classification of the claim and the delineation of the issue are legal (judicial) decisions that are extrinsic to an inquiry into history or traditions: such juridical arguments serve as the terms for subsequent historical analysis. The terms of the judicial inquiry (i.e. the very hypothesis) must match constitutional jurisprudence and not the segment of the past under judicial scrutiny. In a sense, at this initial phase the central question of the inquiry into the past seems to be isolated from its subject. The outcome of judicial inquiry into the past is then presented as the previous generation's verdict on a question posed by the present generation, the exact terms of which were not anticipated by the inquirer.

Advocates of principled adjudication might approve of such a judicial attitude, as it seems to ensure that the terms of the inquiry are not tarnished by its likely outcome. From the perspective of the historian, however, this is a disturbing prospect, as it might undermine attempts to test the fitness of the hypothesis framing an inquiry into history. Note that this difference has pragmatic implications for legal analysis as well: it is apparent that phrasing the issue in one manner or another can result in significantly different outcomes in materially similar cases. As Cass Sunstein put it, justices in constitutional cases retain an instrumental relationship to history: they refer to arguments in history with a specific outcome or, rather, with a variation of possible future outcomes in mind.[56] These observations suggest how lawyers' accounts of the past can be entirely self-contained and ahistoric.

This difference in lawyers' and historians' perspectives contributes to a further distinction between historians' treatment of their subject

and lawyers' handling of the past in the narrow field of constitutional adjudication. It also follows from Koselleck's observation that the process of building historical narratives entails choices awaiting further theoretical validation. This suggests that many such choices depend solely on the interpreter and, as such, are subjective. The validation of the choices framing historical narratives does limit the array of legitimate options. However, there is as yet no agreement on what qualifies as a specifically historical explanation of any set of historical phenomena.[57] Along these lines, Posner points to two problems inherent in referring to historical truth in legal analysis. The first problem is the "elusiveness of historical truth": "not the facts that compose a simple narrative or chronology, or even statistical inferences from historical data, but the truth of casual and evaluative assertions about history."[58] The second problem "arises when the issue is the meaning of some historical event or document, and thus an interpretive issue, the indeterminacy of the choice of interpretive approach."[59] These characteristics of historical narratives are much more problematic for lawyers than for historians due to their different expectations regarding the outcome of inquiries into the past: unlike historians, lawyers consider the past "as such" to be authoritative.[60]

As Hayden White reveals, there is no such thing as objective history; instead, there is a plurality of legitimate views but no exclusive objectivity.[61] In consequence, the writing of history is as much invented as found, events are made into a story, and it is for the audience to decode ("re-emplot") the events and determine their significance.[62] This phenomenon can easily be demonstrated by a brief yet well-known episode of U.S. Civil War history. Refusing the invitation of President Lincoln to become the chief of the federal army, General Lee instead went to Richmond and offered his services to Georgia shortly before the Civil War. According to Chief Justice Warren Burger this was "not for the support of secession, not for the defence of slavery, not for the dissolution of the Union, but simply for the defence of his native state."[63] Chief Justice Burger did not present the story of General Lee as a general account of Civil War history; he used the figure of General Lee to explain the relationship of citizens vis-à-vis their states. This small illustration may elucidate Hayden's submission that a historical narrative is a verbal fiction.[64] It is difficult

to see how historical narratives in constitutional argument can be exempted from this qualification.

The intellectual framework surrounding historical narratives is rather complex. To begin with, the interpreter cannot distance herself from the historical continuity or tradition in which she is situated. Therefore, the interpreter, being part of the flow of events, cannot have an external account of historical data. From the perspective of hermeneutics, this means that history is part of the interpreter's mindset, and, therefore, that historical prejudices influence the interpretation of historical data. For the interpreter it means having to discount her own prejudices when approaching the object of interpretation and, also, having to take into account the potential prejudices of the author of the text which is being interpreted.[65] Looking well beyond the confines of constitutional history, Peter Burke used the "recurrent myth of the founding fathers" to demonstrate how the tailoring of accounts of the past to fit the present constitutes a "social amnesia."[66] For Burke, one such example is when narratives of the past become instances of collective or social memory, transforming not only the past but also the present, thus making the present fit a narrative line cast as the proper account of a "shared past." This mutual reinterpretation is at the core of claims for continuity that impregnate any present-day reliance on the stories of an approved past. Alternatively, when it comes to conceptualizing moments from a despised past, a similar mechanism of amnesia is activated to distance the present sufficiently from past wrongs.

One example from accounts of the founding of Australia can be used as an illustration.[67] The founding of a penal colony is surely an inglorious moment, tainted with images of a remote and inconvenient life, and the repression of indigenous inhabitants. At the centennial celebrations the emblematic gesture marking the founding of Australia was Captain Cook's arrival at Botany Bay—which took place 18 years before the convicts' colony was established. Over the years the figure of Captain Cook has come to acquire a central place in accounts of the founding of Australia. At the time of the bicentennial celebrations, the fear of aboriginal opposition prompted the canceling of the reenactment of the first fleet's voyage. The arrival of Captain Cook as a symbol, along with other founding gestures, was displaced

from the inventory of Australian collective memory. In this sense, the edited account of the past has a function that exceeds the interpreter's aspirations to construe a fitting account of the past for present purposes. Instead, as pointed out by Burke, narratives of past events shape the interpreter's perception of, and the narratives of, the present. For the purposes of constitutional analysis it is essential to be mindful of this interrelationship between the narratives of past and present. By way of warning about the systemic implications of these concerns, it might be important to acknowledge that "the interpreter will use judgment to gauge and evaluate the lessons of present tradition. Because different interpreters reflect different aspects of contemporary tradition, and thus bring different influences to the interpretative process, the political branches, representing the people, should consider these factors in selecting judges."[68]

Regarding constitutional adjudication and strategic interpretive options, it is crucial to bear in mind that any riddle that today's courts and lawyers seek to resolve by an inquiry into history ("framing the issue") will be construed in such a self-reflecting manner. This observation also echoes Dworkin's observation on objectivity in constitutional interpretation. Dworkin argues that objectivity in legal argument and interpretation is impossible because it would suggest the existence of an external standard.[69] Attempting to show on objective grounds that slavery is wrong, Dworkin demonstrates that when testing a proposition against an external standard legal argument internalizes that standard.[70] Indeed, a view that suggests the objective character of arguments in history seems to be mistaken. Instead, the connecting and describing of historical data are in themselves gestures of interpretation.[71] Thus the claims of objectivity and neutrality, submitted as the major virtues of arguments from history, appear questionable. For methodological reasons, arguments from history (historical narratives) are per se interpretive and teleological. Historical narratives are therefore heavy with subjectivities of varying intensity. As a quality stemming from methodology, choice—even when somewhat curbed by professional canons of justification—has a central role in constructing historical narratives. Also, at a more personal level, certain a priori decisions are driven by the interpreter's experiences and prejudices. Indeed, professional canons of justification might have a

role not only in curbing but also in masking preconditions that shape the framework of interpretations.

Among lawyers, historical narratives are often associated with neutral judicial decision making and the preserving of the status quo. Neutrality and status quo are both very plausible terms, used in scholarly literature and judicial opinions with multiple and somewhat indefinite meanings. It is beyond the scope and ambitions of the present analysis to explore the actual uses and possible meanings of these terms. Certain difficulties posed by references to the status quo in constitutional adjudication nonetheless require closer inquiry for our purposes. At this point it is sufficient to say that status quo usually refers to the current state of affairs and designates a social or professional consensus.[72] Preserving the status quo in one of these contexts might amount to groundbreaking departures from long-held positions in another. This phenomenon is illustrated by various readings of the U.S. Supreme Court's judgment in *Lochner*.[73] In *Lochner,* the majority found that the U.S. Constitution's Due Process Clause afforded protection to the liberty to contract, thus invalidating New York's minimum-wage and maximum-hour legislation. *Lochner* opened the era of economic substantive due process, where the Court reviewed and invalidated market regulation affecting economic rights.[74] As Justice Holmes pointed out in dissent, the majority's approach was predominantly motivated by trendy theories of economics and not of constitutional law, and lacked support in the constitution.[75] Critics of *Lochner* see the decision as an example of the Supreme Court's willingness boldly to expand its power to overrule economic legislation on rights grounds with reference to the Due Process Clause, a course that the Court followed well into the New Deal era.

In a somewhat unorthodox manner, Sunstein argues that, when enacting minimum-wage and maximum-hours rules, the New York legislature was interfering with the settled conditions (status quo) of the market.[76] Thus, when the Supreme Court decided to strike down these legal rules, the justices in effect *restored* the market conditions affected by the legislature, that is, the Court restored the status quo. In doing so, the Supreme Court made a major leap in acknowledging that the Due Process Clause was not merely a depository of procedural guarantees, but also provided substantive economic liberties

(constitutionally acknowledged rights in property and contracts). While *Lochner* was not the first case in which the concept of the liberty of contract arose,[77] it was the first and to date the strongest articulation of its protection[78]—a clear departure from a relatively settled professional understanding (status quo) of the scope and applicability of the Due Process Clause. After three decades the Supreme Court overruled *Lochner* and abandoned economic substantive due process.[79] Nonetheless, *lochnerizing* has become a synonym for limitless judicial activism. Thus the *Lochner* era remains to be evaluated in U.S. constitutional law from the perspective of the professional status quo, while concern for the status quo of the market is fading in accounts of economic substantive due process.

In addition, attempts to preserve the status quo have a temporal dimension that is often overlooked. Judge Posner showed that a reference to the status quo may mean the status quo of today or the status quo of yesterday. New traditionalists intend to preserve the status quo of yesterday, and at first sight references to history and to the traditions of the polity are more likely to preserve the status quo of yesterday than to reinforce a contemporary consensus.[80] Note that a decision to preserve today's or yesterday's professional or societal consensus implies a value choice per se, and, therefore, it can hardly be neutral in principle. The identification of the right or relevant status quo ante is also a matter of interpretation, with regard to which the exact same considerations apply that were submitted in relation to narratives of history and traditions.

When relying on historical narratives, constitutional review fora act among a multiplicity of actors and institutions, each owning a legitimate—yet not necessarily corresponding—account of a segment of the past. Ball and Pocock warn lawyers about the practical consequences of invoking a longstanding consensus on matters of public concern in arguments from the history and traditions of the polity. As an unintended side-effect of preserving the status quo ante, the language of the law could become a language that the polity no longer speaks.[81] Thus, past-oriented narratives may indeed isolate constitutional review from the rest of the public discourse, containing it within its self-made universe of a long-forgotten semantic context.

Interestingly, the above findings with respect to historical narratives make arguments from history sound very much like references to traditions: historical narratives are as interpretive ("invented") as references to traditions. From this perspective it is easy to show the similar characteristics of arguments from history and from the traditions of the polity. Like historical narratives, rhetorical frameworks that invoke the traditions of the polity are construed along a predetermined framework. The preferences of the interpreter are present not only when she invokes the traditions of the polity (a set of highly valued historical references), but also when she selects historical data in support of a position. In fact, the objectivity of history cannot mean more than a skill for proving facts or sequences of facts, an exercise performed within the confines of methodology[82]—a finding that applies equally to accounts of history and of traditions. As the above analysis demonstrates, for an inquiry into indeterminacy in constitutional reasoning, no distinction in principle can be drawn between arguments from history and narratives of tradition. Therefore, in the following analysis observations made about past-oriented narratives apply to arguments from history and traditions, unless expressly noted otherwise.

1. 2. Common-law reasoning, Edmund Burke, and conservative/liberal ideals

When talking about the courts imposing the authority of the past on a polity via references to history and traditions, associations with the force of common-law reasoning are difficult to avoid. As Justice Kirby of Australia put it in his Mason lecture: "It is an inescapable feature of the common law that judges and other lawyers live their lives in the presence of the great legal spirits of the past and the cases of those people... To be a judge in our legal tradition is thus to be a privileged participant in the making of this form of legal history."[83]

The jurisprudence of constitutional review fora operating in common law regimes presents special challenges for an analysis of arguments from history and from the traditions of the polity, as even in

constitutional cases arguments referring to common law may merge with arguments seeking the repetition of long-established legal principles or practices. At its core, common-law reasoning allows for the reaffirming of a rule without testing its substance, even in the days of refined theories of precedent and *stare decisis*. This is a fundamental doctrine of common-law reasoning that should not be left out of sight. The various highly principled takes on the dispute over the relation of repetition and reason, however, do not alter the fact that in a large number of cases references to common law do not rely on specific sources of legal authority, but rather point to a long-existing trend or prevailing legal concept in self-contained terms. Most often, judicial attempts to infuse constitutional adjudication with the wisdom emerging from longstanding traditions are associated with a common-law approach.[84] Since many cases analyzed in the present work are drawn from common-law jurisdictions, such as the U.S., Australia, and Canada (with the exception of Québec[85]) or from the "mixed legal system" of South Africa,[86] before discussing those aspects of past-oriented narratives that are particular to constitutional adjudication, it is important to explore the role and relevance of reliance on traditions in a legal culture in which constitutional and legal arguments are marked by the tension of repetition and reason.

1. 2. 1. Common law: room for reason in repetition

To begin with, references to common law might have numerous different, although sometimes overlapping, connotations. A preliminary exploration of references to common law will inform the inquiry into the role of historical narratives in common-law regimes. In addition, the lessons drawn from the following analysis have important implications for an inquiry into constitutional reasoning and adjudication well beyond common-law jurisdictions, as it uncovers some aspects of the inherent historicity of legal (juridical) arguments. In a very broad sense it refers to the "common-law constitution", the basic unwritten principles of governance that are shared in common-law jurisdictions, despite local variations and differences (Walters).[87] In contrast, in a very technical sense, the term "common law" may refer

to a distinct body of legal norms developed by courts, norms that are present and applicable to a specific set of claims within the respective legal systems. Judicial lawmaking occurs when courts decide an issue for the first time, but also when they overrule or distinguish precedent, certainly when justices add qualifications to existing common-law rules, and even when justices simply follow established case law.[88] Common-law rules apply alongside the legal rules made by the respective legislatures (statutes) or executives (as a matter of delegation or in the exercising of prerogative powers), and the rules of equity (where they exist). Some areas previously governed by judge-made law have been constitutionalized or legislative enactments have been passed, while other spheres still remain under judge-made norms.[89]

"Common law" in this sense has for a long time afforded protection to a number of rights that written constitutions came to protect in express terms. Without a written constitution, common-law rules can effectively forestall the invasion of individual freedom. Note that, as of 1999, the House of Lords acknowledges freedom of assembly in the context of trespass on a public highway, leaving aside the opportunity to refer to the international instruments of human rights protection, among them the European Convention on the Protection of Human Rights and Fundamental Freedoms.[90] Even following the entry into force of the *Human Rights Act*, in the early days the Lords showed greater willingness to protect rights under common law than with reference to the provisions of the European Convention and the jurisprudence of the European Court of Human Rights.[91] Once constitutionalized, common-law rules might and do inform the courts' understanding of rights and freedoms when applying the constitution. Common law is often invoked in the U.S. in cases concerning freedom of expression, criminal due process, and rules on search and evidence, despite the existence of constitutional and statutory provisions. The U.S. Supreme Court's reliance on common law varies over time, and is more intense in certain types of cases than in others. A point that is often overlooked is that, until the early twentieth century, free speech jurisprudence in the U.S. followed—though somewhat inconsistently—the rather restrictive approach advocated in Blackstone's *Commentaries*.[92] Consider also that before *Goldberg v Kelly*,[93] "the Court defined liberty and property interests by reference to the com-

mon law."[94] Indeed, according to Sunstein, under the Due Process Clause the U.S. Supreme Court adopted an attitude protecting longstanding traditions; however, under the Equal Protection clause the Court tends to abolish longstanding forms of discrimination, and even to invalidate practices that were widespread at the time of the ratification and that were expected to endure.[95]

Constitutionalization also means that—within the confines of constitutional provisions—constitutional scrutiny is extended to common-law rules.[96] Probably the best-known example in this respect is *New York Times v Sullivan*[97] in the U.S., a leading case in modern free speech jurisprudence. The case arose from a civil libel suit under Alabama common law. Justice Brennan, writing for the court, made it clear that the U.S. Constitution, and thus the First Amendment, applies in any case where a state exercises its powers, including the actions of state courts in civil matters under state common law.[98] The jurisprudence of the Canadian Supreme Court follows a similar route under the supremacy clause (section 52) of the Constitution Act, 1982, and the Charter's application clause (section 32). In *Dolphin Delivery*[99] the Canadian Supreme Court held that common-law rules are subject to constitutional scrutiny under the Charter to the extent that common-law norms form the basis of government action. Constitutional scrutiny of common-law rules was extended to private relationships in *Hill v Church of Scientology of Toronto*.[100]

In South Africa the effect of common-law rules on constitutional rights and freedoms presented difficult challenges. While common-law rules had the potential to protect liberty even during apartheid, courts rarely used this opportunity to protect rights. In the rare cases where courts took up the challenge and went "too far", statutes were passed instantly to overrule common-law rules. As a consequence, common-law rules protecting individual rights were emptied, and gradually the law became the means of enforcing apartheid.[101] In order for law to operate in this manner, sometimes even apparently neutral lines of reasoning would suffice. Consider the judge's reasoning in a murder case where a self-defense plea was entered on the grounds that the accused believed in witchcraft. This defense was rejected on the grounds that the "common law of South Africa in regard to murder and self-defense reflects the thinking of Western

civilization… To hold otherwise would be to plunge the law backward into the Dark Ages."[102] As Tholakele Madala, justice of the South African Constitutional Court, points out, one should not fail to notice that this line of reasoning, invoking the standards of the civilized West, is inherent in the criminal judge's cultural bias.[103]

This effect was clearly acknowledged by the drafters of the South African Constitution. The interim Constitution (sections 7[1], 33[2] and 35[3]) and the Constitutional Court brought common law under the umbrella of constitutional review. Under the interim Constitution the South African Constitutional Court, however, proved rather reluctant to strike down common-law rules. Instead, in *Du Plessis* the constitutional justices expressed a preference for a constitution-compatible (re)development of common-law rules, noting that "the common law is not to be trapped within the limitations of its past. It must not be interpreted in conditions of social and constitutional ossification. It needs to be revisited and revitalized with the spirit of the constitutional values defined in [the chapter on constitutional rights] and with full regard to the purport and objects of that chapter."[104] This position meant that when the Constitutional Court struck down a rule of common law, it remained the task of the Supreme Court to develop common-law rules that were compatible with the constitution.[105]

In response, South Africa's final Constitution reaffirms "rights or freedoms that are recognized or conferred by common law, customary law or legislation, to the extent that they are consistent with the Bill [of Rights] [section 39(3)]." At the same time, the final Constitution makes it the responsibility of the courts, including the Constitutional Court, to apply and develop common law in accordance with the "spirit, purport and objects" of the Constitution's Bill of Rights (sections 8[3], 39[2] and 173).[106] The consequences of extending constitutional review over common-law rules open up the possibility of judicial review fora to influence the development of common law. Thus, the constitutionalization of common law might become a reciprocal learning process. This is not to suggest that all aspects and rules of common law would necessarily be transformed into constitutional norms.[107]

References to "common law" as such may well stand for a very specific set of legal norms, the common law of England. Thus, the

phrase "common law" may refer to that particular legal system that had a strong influence on jurisprudence in other common-law jurisdictions. The authoritative stature of the common law of England in these countries is not so obvious, since—despite their colonial roots—the legal systems of the U.S., Canada, and South Africa are independent of the laws of England.[108] The influence of English common law is traceable to some extent in all these jurisdictions,[109] although in the U.S. scholars tend to dispute the lasting influence of the common law of England and disagree concerning the extent to which the common law of England might be authoritative. The U.S. Constitution is silent about the adoption or rejection of the common law of England. Note, however, that in some of the 13 former colonies state constitutions did make express provision regarding the force of the laws of England. The New Jersey Constitution (1776) preserved the common law of England (section XXII); the Maryland Constitution (1776) provided that its inhabitants are "entitled to the common law of England" (section III); and the New York Constitution (1777) also expressly reaffirms the applicability of the statutes and common law of England with certain exceptions (section XXXV). In contrast, the Virginia Constitution (1776) expressly prohibits the governor to "exercise any power or prerogative, by virtue of any law, statute or custom of England." The rules of the state constitutions thus make the silence of the U.S. Constitution puzzling. Regarding this silence Rakove explains, "[t]he framers believed that their concept of a constitution broke decisively with the prior understanding they inherited from Britain. Yet, in one sense that break was less radical than it seemed."[110] He then adds that, since 1789, Americans have always possessed two constitutions: a written document and the "working constitution", comprising a body of precedents, customs, understandings, and attitudes, that has shaped the operations of the federal machinery ever since. In U.S. jurisprudence this influence is traceable in two distinct forms.

In constitutional jurisprudence, alongside old English statutory law, old English common-law rules are also often consulted when mapping the legal history of a particular constitutional issue. For instance, in Canadian constitutional jurisprudence, classics of English common law have also been consulted by the Canadian justices on

numerous occasions. Blackstone's views were introduced for defining such basic concepts as crime,[111] trial by jury,[112] and marriage;[113] he was also quoted regarding Sunday observance laws,[114] the prohibition of suicide,[115] and the doctrine of continuity in the context of aboriginal rights.[116] In the U.S., in the course of exploring the legal regulation of abortion, Justice Blackmun in *Roe v Wade* consulted Bracton, Coke, Blackstone, and Hale[117] alongside English statutory law and its application up to the most contemporary developments.[118] Similarly, when deciding on the constitutionality of physician-assisted suicide, in establishing the 700-year-old common-law prohibition against assisting suicide Chief Justice Rehnquist consulted Bracton, Coke, and Blackstone, alongside rules adopted by the various states of the U.S.[119] In such cases English common-law rules are not considered as legal norms in effect, but are used as factual evidence from history or tradition.

Supreme Court justices in the U.S. also turn to the above-mentioned classics of common law (and old English statutory law) when the task is to establish the framers' probable understanding of a legal problem. Establishing the authors and works that had a probable intellectual and professional influence on the framers' understanding of legal and constitutional problems itself requires careful historical analysis. Often, such an inquiry is overtaken by recourse to common knowledge. After all, Edmund Burke already noted with pride and appreciation that: "I hear that they have sold nearly as many Blackstone's *Commentaries* in America as in England."[120] Not surprisingly, justices explore the works of those authors—and Blackstone is a prime example—who were studied by the Framers[121] and look into leading cases that were (or are likely to have been) familiar to the Framers. In addition, old English common law and statutory law can have a gap-filling function in the hunt for Framer's intent. In discussing the scope of the U.S. Constitution's Speedy Trial Clause, Justice Brennan observed that there was no record of the Framers debating this issue extensively, as there was no record of significant opposition to it, either; nonetheless, precedent suggests that the Framers clearly understood the relevant common-law rules.[122]

While framers' intent arguments are noticeably rare in Canada, the principles that the 1867 constitutional arrangement sought to bring into

force are conveniently established with reference to—among other things—English common law. An inquiry into English common law (and old English statutes) does inform Canadian justices on the source, scope, and evolution of such fundamental constitutional principles as the independence of the judiciary or the principle of democracy.[123] In the field of rights protection, in the case involving a challenge to Sunday closing under the Charter, the Canadian Supreme Court justices reviewed the history of English Lord's Day legislation.[124] Another opportunity for common-law rules to infiltrate rights protection is under section 7 of the Charter, which provides that "Everyone has the right to life, liberty, and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice." In a seminal decision on the construction of section 7, in the *BC Motor Vehicle reference*[125] the Supreme Court said that the phrase "principles of fundamental justice" refers not to "natural justice" but to principles that "have been developed over time as presumptions of the common law", while "others have found expression in the international conventions on human rights."[126]

Several intrinsic qualities of constitutional reasoning in common-law courts, which are of crucial relevance for the present analysis, are revealed when references to common law are encountered in a more abstract sense. In this sense a reference to common law points to the basic features of common-law reasoning or attitude, often associated with a doctrine of precedent or *stare decisis*. In this sense "common law" refers not to a set of rules but to a method of legal reasoning. As Horwitz remarked: "(l)ike the effects of a common language on the structure of the thought, the common law tradition affects our sensibilities at almost pre-rational levels."[127] In this sense, common-law reasoning is often understood as inherently conservative, a doctrine which relies upon stability and predictability.[128] The substance of such understandings is an appeal to common-law reasoning conceived as "reason tested on experience (repetition)", which date from time immemorial. A typical argument in this family would claim, for example, that the institutions of Anglo-American law "are worthy of protection because the premises forming their foundations are true and timeless."[129] Ongoing repetition then becomes the source of continuity and stability. The force of repetition should not be underestimated. For Koselleck, the

most obvious illustration of how the *long durée* of mankind's history is heavy with repetition is via pointing to "constitutional forms and modes of power … are based on the repetition of well-known rules",[130] suggesting in the meantime that such repetition results from conscious as well as from subconscious forces.

There is a strong line of argument originating in the works of Coke and Hale, and resulting in the 17th century concept of the 'ancient constitution' which in effect identifies common law with a set of customs of immemorial origin.[131] In this sense, common law is simply the prescription of behavior via repetition (i.e. tradition). Pursuant to this understanding of common law, the source of the substance of a legal norm will not be examined; it is enough to adhere to the custom of application. The words of Chief Justice Lamer of the Canadian Supreme Court are instructive on the problem that lies at the core of this view, submitting that "[w]hile the appellant may well be correct in pointing out that English and Canadian courts have not, as a matter of practice, compelled members of the clergy to disclose confidential religious communications, this does not answer the question of whether there is a legal common law privilege for religious communications."[132]

Theories of common law differ in construing the role and relationship of the passage of time, of experience, and of the judge in the development of common law. The relationship of repetition and reason is complex and often debated. The claim based on repetition does not assert that repetition confers an action with the force of law, but rather that the legitimacy of legal rules follows from their continuous application (empirical evidence of continuous application and social experience). Indeed, legal historians have established that up until the seventeenth century in common-law reasoning the binding force of previous decisions was derived from respect for a particular judge who announced the rule (for Bracton) or from referring to previous decisions as examples of the rule (for Coke), but not from the "authoritative" prior decision itself. Repetition thus seems to have been central to common-law reasoning well before the emergence of the distinction between holding and dictum and the development of *stare decisis*.[133] Blackstone saw repetition as an instance of evident compliance with the immemorial, submitting that "(t)o make a particular

custom good, the following are necessary requisites. (1) That it have been used long, that the memory of man runneth not to the contrary." Other criteria established are that the particular custom be continued, peaceable, reasonable, certain, compulsory, and consistent.[134] Others see repetition as a highly rational behavior and argue that certain actions would not be repeated over and over if they were not beneficial.[135] In the opinion of Justice Cardozo, justices should look to customs for tests and standards determining how established rules should be applied.[136] Authors at the other end of the spectrum argue that following certain patterns of behavior and attributing special significance to them constitutes a profoundly irrational element of common law. Oliver Wendell Holmes observed in *The Common Law* that "precedents survive in law long after the use they once served is at an end and the reason for them has been forgotten. The result of following them must often be failure and confusion from the merely logical point of view."[137]

For an illustration of departing from outdated precedent in a constitutional case one might refer to a highlight from the jurisprudence of the Privy Council. In the affair which became famous as the *Persons* case,[138] the Privy Council had to decide whether "persons" under section 24 of the *British North America Act* (today's Constitution Act, 1867) included women. The Supreme Court of Canada—in the light of ample guidance from common law to this effect—was of the view that women did not amount to "persons" and were therefore not qualified to hold elected or other offices under the BNA.[139] Viscount Sankey of the Judicial Committee of the Privy Council, however, decided to follow a markedly different route. Discarding references to Roman law and common law concerning the inferiority of women, he famously said that the *'British North America Act* planted in Canada a living tree capable of growth and expansion within its natural limits. The object of the Act was to grant a Constitution to Canada. … Their Lordships do not conceive it to be the duty of this Board—it is certainly not their desire—to cut down the provisions of the Act by a narrow and technical construction, but rather to give it a large and liberal interpretation."[140]

The tension between reason and repetition in common-law reasoning is at its greatest when one must establish a theory of *stare decisis*

that allows departure from precedent while maintaining a sense of continuity. This tension is only furthered where precedent is followed in constitutional cases under written constitutions, since, as Rosenfeld points out, "the pervasive use of common law methodology in constitutional adjudication appears to exacerbate the respective tensions between predictability and fairness."[141] In the U.S., a sharp exchange on *stare decisis* made famous *Planned Parenthood v Casey* far beyond its holding. In the case, which centered on a body blow to the cornerstone of modern abortion jurisprudence,[142] the justices disagreed about the proper justifications for overruling precedent. As Justice O'Connor's joint opinion explained, the court

> may ask whether the rule has proven to be intolerable simply in defying practical workability, whether the rule is subject to a kind of reliance that would lend a special hardship to the consequences of overruling and add inequity to the cost of repudiation, whether related principles of law have so far developed as to have left the old rule no more than a remnant of abandoned doctrine, or whether facts have so changed, or come to be seen so differently, as to have robbed the old rule of significant application or justification.[143]

In contrast, in Chief Justice Rehnquist's position outlined in dissent, the Supreme Court's duty is "to reconsider constitutional interpretations that depart from a proper understanding of the Constitution. … [W]hen it becomes clear that a prior constitutional interpretation is unsound we are obliged to reexamine the question."[144] This stance is significantly narrower than the one held by Justice O'Connor. For the Chief Justice, apart from clear error committed by the court, no other reason may justify overruling precedent. Indeed, the Chief Justice added that courts should be able to correct their own mistakes in constitutional cases because "[e]rroneous decisions in such constitutional cases are uniquely durable, because correction through legislative action, save for constitutional amendment, is impossible."[145] This remark reveals immediately that the Chief Justice's position is not simply about *stare decisis*, but also about the proper judicial attitude in constitutional cases that gravitates towards preserv-

ing rules once properly established. It is exactly this premise that divides the two stances so sharply. While the Chief Justice defines the court's proper role with a narrow focus on establishing and preserving the "proper understanding of the Constitution", Justice O'Connor places the court in the much more volatile reality, marked by controversies on fundamentals deeply divisive of the polity.[146] It is in this context that such seemingly non-legal factors as the passage of time changing peoples' ways and minds are significant for constitutional jurisprudence. It is between this Scylla and Charybdis that "the very concept of the rule of law underlying our own Constitution requires such continuity over time that a respect for precedent is, by definition, indispensable."[147]

An almost maverick attempt at saving the continuity residing in precedent, while keeping up with the dictates of the times when they call for admitting a grave and lasting mistake, was undertaken by the Australian High Court's Justice Brennan in the *Mabo* case.[148] In this case, the High Court renounced the doctrine of *terra nullius*, a common-law legal construct which served as the backbone of the legal regime subjecting Australia's indigenous population to colonial rule and depriving indigenous peoples of a legally recognizable interest in or title to land. Before doing away with this centuries-old doctrine, Justice Brennan remarked that

> [i]n discharging its duty to declare the common law of Australia, this Court is not free to adopt rules that accord with contemporary notions of justice and human rights if their adoption would fracture the skeleton of principle which gives the body of our law its shape and internal consistency. Australian law is not only the historical successor of, but is an organic development from, the law of England. Although our law is the prisoner of its history, it is not now bound by decisions of courts in the hierarchy of an Empire then concerned with the development of its colonies.[149]

Note how Justice Brennan distinguishes between rules of common law, which might be subject to change, and the "skeleton of principle" that needs to be preserved over time. Furthermore, Justice Bren-

nan's concept abandons the premise of common law being a declaration of immemorial rules. As Patapan points out, in Justice Brennan's vision common law is judge made law; judges develop the rules of common law not at their own discretion but in accordance with the values of their community.[150] While this vision is not shared by all members of the High Court, and while alternative routes were also indicated in *Mabo*, all these cases seem to indicate that, despite its path-dependence, there are avenues in common-law reasoning, and also within the doctrine of precedent, for more than mechanic repetition of ancient practices dating from time immemorial.

In order better to understand the role of common law reasoning and adherence to traditions in constitutional adjudication it is useful to suppose that the two are not necessarily identical.[151] This suspicion might be confirmed when one learns that justices of the U.S. Supreme Court who are clearly associated with the Court's conservative side, such as Chief Justice Rehnquist and Justice Scalia, reject the classic common-law approach in constitutional interpretation. Instead, they rely on authoritative commands from the past that appear as positive law.[152] According to Justice Scalia, instead of developing common-law rights under the pretext of enforcing a "living constitution", the task of the Supreme Court is to enforce the original meaning of the terms of the Constitution.[153] Establishing original meaning might entail following lessons drawn from history at the expense of adhering to precedent. This approach was explained by Justice Scalia from the bench in a dissenting judgment in *Rutan*, in the following terms:

> when a practice not expressly prohibited by the text of the Bill of Rights bears the endorsement of a long tradition of open, widespread, and unchallenged use that dates back to the beginning of the Republic, we have no proper basis for striking it down … such traditions are themselves the stuff out of which the Court's principles are to be formed. They are, in these uncertain areas, the very points of reference by which the legitimacy or illegitimacy of other practices are to be figured out. When it appears that the latest "rule", or "three-part test", or "balancing test" devised by the Court has placed us on a collision course with such a landmark practice, it is the former that

> must be recalculated by us, and not the latter that must be abandoned by our citizens. I know of no other way to formulate a constitutional jurisprudence that reflects, as it should, the principles adhered to, over time, by the American people, rather than those favored by the personal (and necessarily shifting) philosophical dispositions of a majority of this Court.[154]

In terms of this approach, common-law rules and reasoning have a limited and rather dubious value in constitutional adjudication. Common-law rules and rules invoked upon common-law reasoning seem to be relevant only to the extent that they reflect the original meaning of the Constitution. Indeed, common-law reasoning in this limited capacity seems to stand as evidence of framers' intent and not as a depository of legal rules with normative force. This means that common-law courts argue on the basis of established traditions and history, while clearly departing from precedent. Leaving the path paved by precedent is a clear sign of a court's departure from an established rule of the law and suggests the beginning of a new journey, based on distinctly novel principles. Otherwise, there is little reason to abandon old rules, supported by precedent. Yet, once departure from precedent is presented as a consequence of adherence to the commands of history and long-held traditions, the decision to abandon precedent still preserves the impression of continuity and fidelity to the original meaning of the constitution.[155]

These findings do not seek to enter the current U.S. discussion on whether any of the U.S. Supreme Court's conservatives can be cast as Burkean,[156] nor do they advocate a Burkean approach in adjudication,[157] or an originalist theory[158] or critique of precedent.[159] Instead, they are introduced to highlight the potential for tension between common-law reasoning and references to history and tradition in constitutional reasoning. Enthusiasts of the doctrine of precedent, and *stare decisis* in particular, might find Justice Scalia's position of preferring tradition over precedent to be at the least disturbing. After all, one of the fundamental virtues of common-law reasoning is its capacity to allow courts to adapt the law over time while preserving fidelity to long-held principles and practices.[160] Fixing an arbitrary point in time—and the time of drafting is one of those "rational but not rea-

sonable" choices—as the moment for stopping the clock seems out of bounds in the context of common-law reasoning. As Monaghan noted, Justice Scalia's approach is based on a static understanding of common law and is contrary to the "dynamic element" of common law that was known to the Framers themselves.[161]

Indeed, Monaghan's remark highlights a second concern, which is less specific to the nature of common-law reasoning and may be equally traceable in any jurisdiction. This observation clearly indicates that narratives of history and tradition might be an instrument for fueling change or for freezing rights, depending on the constitutional justices' inclinations and preferences. Before *Roe v Wade*[162] the Warren Court in the U.S. relied on history and traditions in general as liberal tools for expanding the protection of constitutional rights. Traces of this approach are still present in judicial reasoning, such as in the concurring views of Justice Stevens in *Rutan* (in response to Justice Scalia's words quoted above), when he noted that the "tradition that is relevant in this case is the American commitment to examine and reexamine past and present practices against the basic principles embodied in the Constitution."[163]

More recently, however, in the hands of originalist justices, references to history and traditions became conservative tools, narrowing the scope of non-textual liberties entitled to constitutional protection.[164] While the earlier approach allows for adapting the legacy of the past to the circumstances of the present, the more recent (originalist) approach is notoriously resistant to any departure from a position that was held in the distant past.[165] Interestingly, both approaches, independent of their immediate effect on the scope of rights protection, illustrate the capacity of common-law reasoning "to accord an authoritative status to tradition in 'supplementing or derogating from' the constitutional text."[166] This is yet another reminder of the potential in legal (judicial) reasoning to preserve continuity with reference to tradition, even at the expense of freezing the meaning of the constitutional text, thus placing it outside the temporal confines of contemporary political discourse.

1. 2. 2. Edmund Burke on traditions, repetition, and reason

The basic features of common-law reasoning were famously discovered and valued by Edmund Burke, who is commonly associated with a conservative intellectual attitude, as if advocating the preservation of traditions at all costs. A faithful admirer of the common-law method, Burke learned most from the *Commentaries* of Blackstone, although he had read further in law, being familiar with the works of Coke and Hale.[167] He then applied the main attributes of common-law reasoning within a larger context, to social and political developments, believing that "[a]ll the reformations we have hitherto made, have proceeded upon the principle of reference to antiquity, and I hope, nay I am persuaded, that all those which possibly may be made hereafter, will be carefully formed upon analogical reasoning, precedent, authority and example."[168] The validity of this approach is not limited to common-law jurisdictions. After all, legal reasoning in common-law and civil-law jurisdictions alike operates via supporting present positions with examples and analogies drawn from sources of the institutionalized past.[169] While problems in connection with reliance on traditions might present themselves more readily in common-law legal systems, similar problems—if less visible—are also traceable in civil-law legal systems. At the same time, lessons learnt from Burke's approach to the following of traditions are equally relevant outside the common-law hemisphere.

In his *Reflections* Edmund Burke invoked common-law methodology to show how the observance of traditions contributed to stable government in England, and how the rejection of traditions led to questionable consequences in France. Indeed, as Kronman observed, Burke's oeuvre offers a concept of tradition in response to real-life problems, introducing these ideas in an age when adherence to traditions was no longer that appealing.[170] Thus, understanding Burke's reasoning—a classic argument in tradition—is especially interesting for the present discussion on the role of past-oriented narratives in common-law reasoning, as it might have important inputs concerning the role and effects of historical narratives in constitutional adjudication.

Some commentators assert that Burke denied reason and valued faithful (cowardly) repetition, or "blind obedience."[171] MacIntyre ar-

gues that Burke contrasted tradition with reason.[172] In a similar vein Ackerman holds that the new Burkeans of U.S. constitutionalism favor gradual development via precedents (wisdom in gradual evolution) and ignore the achievements of contemporary constitutional theory.[173] If that is so, the Burkean concept of tradition, and, maybe, the basic tenets of the common-law method are severely undermined. Others, however, argue that Burke did not deny the role of reason in governments based on tradition; moreover, it is asserted that Burke believed that adherence to traditions is an instance of highly rational behavior.[174]

In his *Reflections* Burke does not deny the role of human reason in changing government. Nor does Burke deny the need for adjustment in established governments. He says that a "state without the means of some change is without the means of its conservation. Without such means of change it might even risk the loss of that part of the constitution which it wished the most religiously to preserve."[175] In the process of change Burke attributes a central role to tradition. In the light of his anthropological presuppositions and his general concept of political affairs, it might appear that in his theory adherence to traditions does not presuppose or result in automated routines. Burke holds that there are a few men with exceptional talents, and these people are capable of construing great theories of government. In his view, politics is not a matter solely for abstract theories but also for experiment, for testing theories in practice. "The means taught by experience may be better suited to political ends than those contrived in the original project."[176] Although he despised revolution as a means of political change, he could accept revolution as an (even necessary) experiment to break from tyranny. Thus, he went as far as acknowledging that even a revolution can be accepted as an experiment, and tested by time.[177] Furthermore, Burke submitted that aberrations of theory were corrected by experience in old establishments.[178]

A number of his anthropological presuppositions are also worth noting, as these points illuminate Burke's preference for experience over rapid changes and theoretical innovations. He believed that ordinary men are reasonable and have their wants and passions. This point seems to echo Blackstone in his opinion that the "only true and natural foundations of society are the wants and fears of individu-

als."[179] Burke added that men are not going to restrain themselves unless there are external means to control them.[180] These findings are based on Burke's perception of the French revolutionaries, who, to his great surprise, were mostly lawyers.[181] He also refers to the arrogance of those who have never experienced wisdom greater than their own.[182] Burke believed that the best control over passions is the accumulated experience of many generations:[183] "The science of government being therefore so practical in itself, is intended for practical purposes, a matter which requires experience, and even more experience than any person can gain in his whole life…"[184] Burke's theory of accumulated wisdom is strongly tied to ideas about inheritance and the natural order of the world.[185] This arrangement ensures the stability and predictability that are essential to human and humane existence.[186] Burke's argument is based on reason, tested on and constrained by experience over time, over many generations (tradition). The common-law method is apparent throughout his theory. He construes tradition as an effective and legitimate constraint—on human passions on the one hand, and on imperfections of reason on the other. As such, it may be argued that Burke asserts an epistemic claim on behalf of tradition. According to Burke, traditions are to be observed because the past knows better than the present generation what the truths of government are.[187]

At this point it is fitting to look into what Burke means by past experience. When discussing the reasons behind preserving hereditary monarchy in England, Burke repeatedly invokes the wisdom of antiquity,[188] the inheritance from forefathers,[189] "antient indisputable laws and liberties",[190] "antient constitution of government", and "antient fundamental principles of our government."[191] He pinpoints actual acts and events and collects them into the shared experience of the polity. For instance, in explaining the events behind the making of the act of settlement (rules of inheritance to the crown), Burke concludes a certain limitation was inserted "in order that the monarchy might preserve an unbroken unity through all ages."[192] It is noticeable that Burke does not advocate recourse to the wisdom of an actual, well-defined moment of the past. Instead, he refers to principles and lessons from a past which is divested of its time. In this way, past events, customs, and traditions are separated from their roots and slip into an

immemorial past.[193] It may be due to the general nature of such references, and to the lack of any indicator of their origin, that Stanlis understands these references as invocations of natural law.[194]

For Burke, the authority of past events thus lies not in the prominence of the unique event itself. In a way the unique, first moment is not relevant: events transformed into experience over an extended period of time constitute customs and tradition in a Burkean setting. It is therefore clear that Burke does not advocate mindless repetition of inherited patterns of behavior: he does not deprive the recipients of tradition of making decisions for the purposes of practical application. Indeed, he emphasizes that this discretion is also guided by "solid principles of law and policy."[195] Using the common-law method Burke does indeed provide means and create room for editing the lessons of past experience (customs). Burke understands the "limited utility of history." Based upon this understanding he creates an approach that is capable of fostering change while efficiently hiding the appearance thereof, thus supplying political reality with an important device of legitimation: the image of continuity.[196]

Indeed, Burke was so successful in hiding change behind the façade of respect for traditions, that in political theory his views are usually considered as the standard conservative understanding of tradition.[197] This is all the more interesting as Burke himself used his argument in support of a liberal position in the daily politics of his time. Still, when it comes to authoritative references to the history and traditions of the polity, liberals are usually placed in the opposing camp, lining up behind J.S. Mill's observations on the dead hand of tradition. What constitutes the preservation of commonly shared values and experience for one, amounts to the infringement of individual autonomy for another. What conservatives view as stability, liberals are likely to name backwardness. In Hayek's theory of constitutionalism and liberty, the tension between traditionalism and institutional design (reason) has never been successfully resolved.[198] For Nagel, the basic percepts of common-law reasoning contradict the logic of the self-development of political tendencies.[199] Nonetheless, powerful attempts have been made to show that reliance on traditions is not backwardness per se. Edward Shils is one of the major liberal advocates of the observance of traditions. He argues that a non-critical

approach towards traditions (a position that Shils labels as traditionalism) is hostile to traditions themselves.[200] Instead, following a line of argument similar to that of Burke, he advocates a knowing adherence to tradition and argues that, in effect, accepting traditions enhances rights, as it provides an a priori framework for safeguarding individual liberty.[201]

1. 3. Conclusion: towards a better understanding of historical narratives

The above analysis suggests that, instead of providing objective, external, and neutral points of reference, historical inquiries provide a "history for today." A keen eye might find that arguments from the history and traditions of the polity are normative claims, implying value judgments. Even if one refuses to accept the above positions, it is still the case that in a historical narrative the interpreter has a privileged position at the end of the past; the observer identifies herself with the problem and with the assertion that a solution to that problem is in sight. Otherwise, as Raymond Aron observed, the study of history would undermine its own legitimacy.[202] Thus, instead of providing an objective, neutral justification, references to the history and traditions of the polity are about construing the past for the purposes of present and future legal and constitutional reasoning. Historical examples are invoked to reinforce norms of behavior in accordance with past examples, or to deter from a certain conduct using past analogies to model possible (undesired) outcomes.[203]

As references to the history and traditions of the polity are forward looking, they might appear convenient for supporting future-oriented reasoning that is insensitive to the outcome (to the decision in the case), exactly as neutral principles do. Historical narratives, and references to traditions in particular, offer themselves as suitable bases for principled judgment. This is one of the many reasons why they are so well established in legal and constitutional argument. However, historical narratives are invented, thus they are per se context sensitive and result oriented. This is why they cannot fulfill their initial promise

of objectivity and neutrality. As historical narratives are teleological and normative, they cannot give rise to principled legal and judicial decisions. These findings might form the framework for understanding arguments from history and traditions in constitutional adjudication. Furthermore, so far the inquiry has rested on the premise that historical narratives are depositories or reflections of traditions, or, more precisely, a narrow set of the polity's traditions. Nonetheless, in a constitutional case, in the course of legal or constitutional argument, a multiplicity of accounts of the past is presented by the parties before a group of justices, all of whom might have differing accounts of the past. Thus, in this sense it might even be as misleading to talk about the court as such as it is misleading to talk about the past. When invoking a historical narrative, in essence the court selects one privileged account of the past.

Despite suggestions to the contrary, it seems to be the case that justices framing the terms of an inquiry into the past are asking questions upon which a particular answer is to surface from the past. These questions, although they may be, and usually are, phrased in terms that match standards familiar from legal (juridical) reasoning, correspond to criteria that are external to legal and constitutional argument. At the same time, this correspondence of the premises of analysis and past events has very little to do with the criteria of fitness appreciated by historians. it should be remembered that the correctness of the source data used to establish this point is instrumental for the validity of the argument, but should not be confused with the source of the rule of behavior derived from past practices. A patchwork of past events, when invoked in narratives from history or traditions, is selected to command present actions and interpretations because it supports an underlying normative premise preferred by the court. If viewed in this way, past events in themselves do not compel present actions but serve as illustrations of a rule (norm) determined by the interpreter situated in the present. In this respect it is of secondary importance whether the past origins of a phenomenon are traceable (as a concrete historical date), or immemorial (as in the case of many traditions). Furthermore, observations in the present chapter indicate that historical narratives do not point to a sole construction of a constitutional provision validated on an objective basis. It re-

mains to be seen, however, whether the historical narratives selected to illustrate (underpin) the interpreter's point are capable of delineating a range of legitimate options of interpretation, thus reducing the discretion of the interpreter. Alternatively, such an altered hypothesis might still reveal that historical narratives and references to tradition provide ample, if not additional, opportunity for the interpreter to insert and mask her preferences in the course of constructing the constitutional text, thus indirectly opening up the potential for furthering indeterminacy in constitutional adjudication

This introduction was not intended to resolve the basic tensions and predispositions attached to arguments invoking the past. Rather, it was an attempt to show that arguments from history and traditions may be formulated to preserve a certain institutional arrangement, and also to change it; that the very same references may foster as well as limit individual liberty; and that the same set of references is capable of delineating as well as increasing the legitimate choices of the interpreter, and thus the scope of judicial review. Also, legal reasoning, or at least common-law reasoning, has methodological features which may call for references to the past. In the context of constitutional adjudication, this means that arguments invoking the past may be devices for activism as well as for deferentialism. Thus, arguments invoking the past should be analyzed in a more comprehensive framework that also responds to teleological aspirations, and to claims of normativeness and continuity raised or masked by these references. A final caveat: the past does not bind the present unless the present chooses to be bound.[204] In Gadamer's words "there is no such unconditional antithesis between tradition and reason. … The fact is that in tradition there is always an element of freedom and of history itself. Even the most genuine and pure tradition does not persist because of the inertia of what once existed. It needs to be affirmed, embraced, cultivated. It is, essentially, preservation, and it is active in all historical change. … At any rate, preservation is as much a freely chosen action as are revolution and renewal."[205]

NOTES

1 Holmes, "Learning and Science", 139.
2 *Bowers v Hardwick*, 478 U.S. 186 (1986)
3 *Bowers v Hardwick*, at 194 (J. White).
4 *Bowers v Hardwick*, at 212 (Blackmun, J., dissenting).
5 *Washington v Glucksberg*, 521 U.S. 702, 710 (1997) (Ch. J. Rehnquist).
6 *Poe v Ullman*, 367 U.S. 497, 542–543 (1965).
7 See *Griswold v Connecticut*, 381 U.S. 479, 501 (1965) (Harlan, J., concurring).
8 *Griswold v Connecticut*, at 501–502 (1965) (Harlan, J., concurring).
9 *Moore v City of East Cleveland*, 431 U.S. 494, 501 (1977) (Powell, J.).
10 *Lawrence v Texas*, 123 S.Ct. 2472 (2003).
11 *Lawrence v Texas*, at 2478 (2003) (emphasis added).
12 *Lawrence v Texas*, at 2484 (2003).
13 Cf. Lund and McGinnis, "*Lawrence v Texas* and Judicial Hubris". For an excellent critical account of the *Bowers* majority's treatment of history see Eskridge, "Hardwick and Historiography".
14 E.g. Flaherty, "History Lite". In the South African context see de Vos, "South Africa's Constitutional Court: Starry-Eyed in the Face of History".
15 Reid, "Law and History," 197–203.
16 Eskridge, "*Lawrence*'s Jurisprudence of Tolerance", 1046.
17 In the U.S. see, e.g., Brown, "Tradition and Insight", 210–211; in Canada see Vaughan, "History in Canadian Constitutional Adjudication", 61.
18 Luban, "Legal Traditionalism", 1046.
19 Barber, *On What the Constitution Means*, 84.
20 Pocock, *Politics, Language and Time,* 253–354.
21 Cf. Pocock, *Politics, Language and Time*, 228.
22 Pocock, *Politics, Language and Time*, 237.
23 MacIntyre, *After Virtue*, 206–207.
24 Hobsbawm, "Introduction: Inventing Traditions", 1.
25 Hobsbawm, "Inventing Traditions", 12. Inventing traditions is formalization and ritualization. For the claim that references to history in legal argument invoke longstanding traditions see Gordon, "The Struggle over the Past", 124. Also, Weber, *Economy and Society*, 36.
26 E.g. Strauss, "Tradition, Precedent, and Justice Scalia", 1708; West, "The Ideal of Liberty", 1378 (1991); Brown, "Tradition and Insight", 205.
27 Shils, "Tradition and Liberty", 105.
28 Hobsbawm, "Inventing Traditions", 2.
29 Rüsen, *Studies in Metahistory*, 89.
30 Ankersmit, *History and Tropology*, 99–101.
31 Note that in the U.S. the rise of originalism brought with it (philosophical) hermeneutics as a potential mighty challenger in the field of constitutional scholarship early on. Kalman, *The Strange Career*, 136–137.

32 Kalman, *The Strange Career*, 153 et seq.
33 See Mannheim, *Ideology and Utopia*, 211.
34 White, *Metahistory*, 13.
35 Heidegger, *Being and Time*, 191–192.
36 Here I follow Koselleck, *The Practice of Conceptual History*, 1, 10 et seq.
37 Koselleck, *The Practice of Conceptual History*, 13.
38 On the relationship between traditions and the documents to which they are tied see Pocock, *Politics, Language, and Time*, 254–256.
39 E.g. *Michael H. v Gerald D.*, 491 U.S. 110, 139 (1989) (Brennan, J., dissenting).
40 Eskridge, "*Lawrence*'s Jurisprudence of Tolerance", 1046. Yale law professor Eskridge was one of the authors of the Cato Institute's amicus brief for the petitioners, which the *Lawrence* majority used to reverse *Bowers*'s reading of the past.
41 *Lawrence v Texas*, 2476 (2003) (Kennedy, J.).
42 *Lawrence v Texas*, 2488 (2003) (Scalia, J., dissenting).
43 *Bowers v Hardwick*, 190 (1986).
44 *Lawrence v Texas*, 2478 (2003) (Kennedy, J.).
45 *Lawrence v Texas*, 2484 (2003) (O'Connor, J., concurring).
46 For a sound criticism of Justice O'Connor's stance in *Lawrence*, see Tribe, "*Lawrence v Texas*", 1910–1911.
47 *Lawrence v Texas*, 2473 (2003) (Kennedy, J.).
48 *Lawrence v Texas*, 2493 (2003) (Scalia, J., dissenting). In a similar vein see also Lund and McGinnis, "*Lawrence v Texas* and Judicial Hubris", 1579–1580.
49 *Lawrence v Texas*, 2488 (2003) (Scalia, J., dissenting).
50 The swing vote cast by Justice Powell after oral argument built the majority in *Bowers* to succeed in the terms discussed above. Justice Powell, whose place in the Supreme Court was taken by Justice Kennedy, "publicly announced shortly after his retirement that his vote in *Bowers* was the one error he believed he had made while in the Court." Tribe, "*Lawrence v Texas*", 1953.
51 Tribe, *"Lawrence v Texas*", 1900.
52 Justice Kennedy relied on *Griswold v Connecticut*, and also on *Pierce v Society of Sisters*, 268 U.S. 510 (1925), and *Meyer v Nebraska*, 262 U.S. 390, 2647 (1923); *Eisenstadt v Baird*, 405 U.S. 438, 1477 (1972). Also *Planned Parenthood of Southeastern Pa. v Casey*, 505 U.S. 833, 2480(1992). *Romer v Evans*, 517 U.S. 620, 2482 (1996). For a critical account of the *Lawrence* majority's use of precedent see, e.g., Wagner, "Hints, Not Holdings". On *stare decisis* in *Lawrence* see Eskridge, "*Lawrence*'s Jurisprudence of Tolerance", 1058 et seq.
53 Eskridge, "*Lawrence*'s Jurisprudence of Tolerance", 1052.
54 A similar "trick" is familiar from *Griswold v Connecticut*. There the state's argument concerned the right to contraception, while Planned Parenthood's counsel on the side of Estelle Griswold focused on liberty and privacy in more general terms, thus making their claim more acceptable to the justices of the Supreme Court. See the records of the hearing in *Griswold* in *May It Please the Court*, 24–36.
55 See Eskridge, "*Lawrence*'s Jurisprudence of Tolerance", 1057.

56 Sunstein, "The Idea of the Useable Past", 602–605. See also Krygier, "Law as Tradition", 249–250; Reid, "Law and History", 195–196; Rakove, "The Origins of Judicial Review", 1038.
57 White, *Metahistory*, 13.
58 Posner, "Past-dependency", 594.
59 Posner, "Past-dependency", 594.
60 Kalman, *The Strange Career*, 180.
61 White, *Tropics of Discourse*, 47.
62 White, *Tropics of Discourse*, 82 et seq.
63 Burger, "The Origins of the United States Constitution", 215–216.
64 White, *Tropics of Discourse*, 82 et seq.
65 For a summary of approaches related to traditions in constitutional argument see also Moore, "Dead Hand", 265.
66 P. Burke, "History as Social Memory", 109–110.
67 Here I follow Spillman, "When Do Collective Memories Last?" 176–179.
68 Brown, "Tradition and Insight", 220 et seq.
69 Dworkin, *A Matter of Principle*, 167–177.
70 Dworkin, *A Matter of Principle*, 173–174.
71 White, *Tropics of Discourse,* 89.
72 Merrill, "Bork v. Burke", 513.
73 *Lochner v New York*, 198 U.S. 45 (1905).
74 See also Chapter Two.
75 See Justice Holmes dissenting in *Lochner v New York*, 75.
76 Sunstein, "*Lochner*'s Legacy", 874 and 882. In a similar vein see also Friedman, "The History of the Countermajoritarian Difficulty".
77 See e.g. *Allgeyer v Louisiana*, 165 U.S. 578 (1897).
78 "*The Road to Lochner*", 710–713.
79 *West Coast Hotel Co. v Parrish*, 300 U.S. 379 (1937).
80 Richard Posner, *Problems of Jurisprudence*, 444.
81 Ball and Pocock, *Conceptual Change and the Constitution*, 10–11.
82 Gottschalk, *Understanding History*, 9.
83 Kirby, "Constitutional Interpretation and Original Intent?"
84 E.g. Walters, "The Common Law Constitution in Canada".
85 See Dickinson, "New France".
86 See Visser, "Cultural Forces in the Making of Mixed Legal Systems".
87 See Walters, "The Common Law Constitution", 432. For an account of the components see Saunders, "Evolution and Adaptation of the British Constitutional System".
88 Bale, "Casting off the Mooring Ropes of Binding Precedent", 259.
89 This is especially true in the Canadian context, where the Charter entered an operating, fully developed legal system that was predominantly of common-law origin. Evans, "The Principles of Fundamental Justice", 56.
90 *DPP v Jones* [1999], 2 AC 240, [1999] 2 All ER 257 (Lord Irvine).

91 See e.g. *R (Daly) v Secretary of State for the Home Department* [2001], UKHL 26, [2001] 2 AC 532. For a recent instance in which various Lords (most prominently Lord Bingham) did rely extensively on the European Convention and Strasbourg jurisprudence see *A (FC) and others (FC) v Secretary of State for the Home Department (No2)*, [2004] EWCA Civ 1123; [2005] 1 WLR 414, a case involving a challenge against post–September 11 anti-terrorism legislation targeting non-nationals. But see Lord Hoffmann, esp. para 93. This departure is all the more significant since the rules challenged in the case are matters of national security, where the European Court of Human Rights traditionally affords a wide margin of appreciation to the member states.

92 Blakey and Murray, "Threats, Free Speech", 894 et seq.

93 *Goldberg v Kelly*, 397 U.S. 254 (1970).

94 Stone, et al. *Constitutional Law*, 920.

95 See Sunstein, "Sexual Orientation and the Constitution".

96 This extension also leads to the extension of constitutional control over private relations. The problem of the third-party effect (*Drittwirkung*) or horizontal effect of constitutions will not be discussed in detail. For a comparative account see Tushnet, "The Issue of State Action/Horizontal Effect in Comparative Constitutional Law".

97 *New York Times v Sullivan*, 376 U.S. 254 (1964).

98 *New York Times v Sullivan*, at 265 (Brennan, J.).

99 *WRWDSU v Dolphin Delivery Ltd.* [1986], 2 S.C.R. 573, 598–599 (J. McIntyre).

100 *Hill v Church of Scientology of Toronto* [1995], 2 S.C.R. 1130. See also Peacock, "Judicial Rationalism and the Therapeutic Constitution", 37 et seq.

101 Sarkin, "The Common Law in South Africa", 11–12. Also Dyzenhaus, *Judging the Judges*, esp. 6–14.

102 Holmes J.A. in *S. v Mokonto*, 1971 (2) SALR 319 (A), 324.

103 Madala, "Rule under Apartheid", 754.

104 Justice Mahomed in *Du Plessis v De Klerk*, CCT 8/95 (1996), para. 86.

105 See Justice Kentridge in *Du Plessis v. De Klerk*, at paras. 44, 52–53, 62–63.

106 Note that, in addition to extending the supremacy of the Constitution over common law, all courts were juggling with a procedural problem, i.e., the Constitution's third-party effect, a problem that will not be tackled here in detail.

107 See Chapter Three on the sub-constitutional status of indigenous rights and native title in Australia.

108 This discussion does not extend to the impact of imperial common law and the effect of the jurisprudence of the Privy Council. Note that the (Judicial Committee of the) Privy Council ceased to be the highest forum of appeal in Canada in 1933 in criminal cases and in 1949 in civil cases, while in Australia appeals to the Privy Council have not been allowed since 1986. The earlier jurisprudence of the Privy Council has remained influential in both jurisdictions.

109 For a discussion see Chapter Five.

110 Rakove, *Original Meanings*, 339.

111 *Reference Re: S. 94(2) of the Motor Vehicle Act (BC)*, [1985] 2 S.C.R. 486, para. 113 (Wilson, J.).
112 *R. v Turpin* [1989], 1 S.C.R. 1296, para. 11 (Wilson, J.).
113 *M. v H.* [1999], 2 S.C.R. 3, para. 164 (Gonthier, J.).
114 *R. v Big M Drug Mart Ltd.* [1985], 1 S.C.R. 295, para. 49.
115 *Rodriguez v British Columbia (Attorney General)* [1993], 3 S.C.R. 519, para. 152 (Sopinka, J.).
116 *R. v van der Peet* [1996], 2 S.C.R. 507, para. 174.
117 *Roe v Wade*, 410 U.S. 113, 132–136 (1973) (Blackmun, J.), also notes 21 and 23.
118 *Roe v Wade*, at 136–138 (Blackmun, J.).
119 *Washington v Glucksberg*, 2263.
120 E. Burke, "Conciliation with America", 225.
121 See, e.g., Bader, "Some Thoughts on Blackstone, Precedent, and Originalism", and Berman, "The Origins of Historical Jurisprudence".
122 *Dickey v Florida*, 398 U.S. 30, 40, note 2 (1970) (Brennan, J., concurring).
123 See Chapter Five for a detailed account.
124 *R. v Big M Drug Mart Ltd.*, paras. 51–53.
125 *Reference re: S. 94(2) of the Motor Vehicle Act (BC)* [1985], 2 S.C.R. 486 (Lamer, J.).
126 *Motor vehicle reference*, para. 30. This is not to suggest that section 7 analysis is restricted to an inquiry into common law. The complexity of section 7 analysis is illustrated, e.g., by *R. v Malmo-Levine* [2003], 3 S.C.R. 571, concerning the constitutionality of the criminal prohibition of marijuana consumption.
127 Horwitz, "The Changing Common Law", 66.
128 See, e.g., Murphy, *Elements of Judicial Strategy*, 204.
129 E.g. Gifford, "Conceptual Foundations", 773.
130 Koselleck, *The Practice of Conceptual History*, 124, also 128–129.
131 For a comprehensive account see Pocock, *Politics, Language and Time*, 213. On the differences in the visions of government of the U.S. Framers and the concept of ancient constitution see Rose, "The Ancient Constitution vs. the Federalist Empire".
132 See also *R. v Gruenke* [1991], 3 S.C.R. 263 (Lamer, C.J.).
133 Berman and Reid, "The Transformation of English Legal Science: From Hale to Blackstone", 444–447.
134 Blackstone, *Commentaries,* vol. 1, 76–78.
135 Pocock, *Politics, Language and Time*, 220.
136 Cardozo, *The Nature of the Judicial Process*, 60.
137 See Holmes, *The Common Law*, 35.
138 The litigation was prompted by a challenge to the appointment of suffragette Emily Murphy, the first female police magistrate of Alberta, and by her being proposed for the Senate of the federal parliament. Canadian prime minister Mackenzie King helped the "Famous Five" Canadian suffragettes to have their case heard before the Privy Council via the reference.
139 *Edwards v Canada (A.-G.)* [1928], S.C.R. 276 [1928], 4 D.L.R. 98.

140 *Edwards v Canada (A.-G.)* [1928], S.C.R. 276 [1928], 4 D.L.R. 98, paras. 54–55. On the decision see McLachlin, "Courts, Legislatures, Executives in the Post-Charter Era", 65. Saywell, *The Lawmakers*, 188–192, points out that Lord Sankey came to the Privy Council with a new generation of lords who were expected to bring change after the Haldane years.
141 Rosenfeld, "Constitutional Adjudication in Europe and the United States", 648.
142 *Roe v Wade*, 410 U.S. 113 (1973).
143 *Planned Parenthood v Casey*, 854–855 (1992) (O'Connor J.).
144 *Planned Parenthood v Casey*, 956 (1992) (Rehnquist, Ch.J., dissenting).
145 *Planned Parenthood v Casey*, 955–956 (1992) (Rehnquist, Ch.J., dissenting).
146 See *Planned Parenthood v Casey*, 867 (1992) (O'Connor J.).
147 *Planned Parenthood v Casey*, 854 (1992) (O'Connor J.).
148 *Mabo v Queensland [No. 2.]* (1992), 175 C.L.R. 1. For further discussion see Chapter Five.
149 *Mabo v Queensland [No. 2.]*, para. 29.
150 Patapan, *Judging Democracy*, 24–25.
151 On *stare decisis* in constitutional reasoning see Monaghan, "*Stare Decisis* and Constitutional Adjudication", 725, and Strauss, "Common Law Constitutional Interpretation".
152 Gordon, "Struggle over the Past", 132. See Luban, "Legal Traditionalism", 1047.
153 Scalia, *A Matter of Interpretation*, 13 and 38–40.
154 *Rutan v Republican Party of Illinois*, 497 U.S. 62, 95–96 (1990) (Scalia, J., dissenting).
155 Examples include, e.g., *Bowers v Hardwick* (majority), *Michael H. v Gerald D.* (Scalia, J., plurality), *Rutan v Republican Party of Illinois* (Scalia, J., dissenting), above.
156 See, e.g., also Kelso, "The Natural Law Tradition on the Modern Supreme Court".
157 See, e.g., Young, "Judicial Activism and Conservative Politics", 1142.
158 For an originalist theory of precedent see Bader, "Some Thoughts on Blackstone, Precedent and Originalism", 17.
159 See Kleinhaus, "History as Precedent."
160 This is not to deny that among common-law rules oddities are preserved, irrespective of jurisdiction.
161 Monaghan, "Doing Originalism".
162 *Roe v Wade*, 410 U.S. 113 (1973).
163 *Rutan v Republican Party of Illinois*, 497 U.S. 62, 90 (1990) (Stevens, J., concurring).
164 Brown, "Tradition and Insight", 204, and Friedman and Smith, "The Sedimentary Constitution".
165 Monaghan, "Doing Originalism", 34.
166 Monaghan, "Our Prefect Constitution", 382.
167 Stanlis, *Edmund Burke*, 8–13.

168 E. Burke, *Reflections*, 120.
169 Krygier, "Law as Tradition", 257–258.
170 Kronman, "Precedent and Tradition", 1046–47.
171 See e.g. Brown, "Tradition and Insight", 212.
172 MacIntyre, *After Virtue*, 221.
173 A prominent figure of new Burkeanism is Bickel. Ackerman, "Constitutional Politics", 472–473. For Bickel's position, see Bickel, *The Morality of Consent*, 20, and Bickel, "Constitutional Government and Revolution".
174 Moore, "Dead Hand", 269.
175 E. Burke, *Reflections*, 106. See also id., 280.
176 E. Burke, *Reflections*, 285.
177 E. Burke, *Reflections*, 276.
178 E. Burke, *Reflections*, 285.
179 Blackstone, *Commentaries*, vol. 1, 44.
180 E. Burke, *Reflections*, 151.
181 E. Burke, *Reflections*, 129 et al.
182 E. Burke, *Reflections*, 193.
183 E. Burke, *Reflections*, 152, 285.
184 E. Burke, *Reflections*, 152.
185 E. Burke, *Reflections*, 119–120.
186 E. Burke, *Reflections*, 265–266.
187 Moore, "Dead Hand", 268.
188 E. Burke, *Reflections*, 177.
189 E. Burke, *Reflections*, 177.
190 E. Burke, *Reflections*, 177.
191 E. Burke, *Reflections*, 110.
192 E. Burke, *Reflections*, 109.
193 Smith, *Politics and Remembrance*, 112–115.
194 Stanlis, *Edmund Burke and Natural Law*; also Stanlis, *Edmund Burke*.
195 E. Burke, *Reflections*, 112.
196 Smith, *Politics and Remembrance*, 116–118.
197 See Young, "Rediscovering Conservatism", 634.
198 Rowland, "Beyond Hayek's Pessimism".
199 Cf. Nagel, *Constitutional Cultures*, 19.
200 Shils, "Tradition and Liberty", 114.
201 Shils advocates loose patterns of traditions. See Shils, "Tradition and Liberty", 105 and 117. Cf. Sunstein, *Designing Democracy*, 78–87.
202 Aron, *Politics and History*, 59.
203 For a typology of the functions of historical narrative see White, *Metahistory*, 7 et seq.
204 Wofford, "The Uses of History in Constitutional Interpretation", 523.
205 Gadamer, *Truth and Method*, 281–282.

CHAPTER TWO

An Overview of Arguments Used in Constitutional Adjudication

In jurisdictions with a written constitution, the paradox underlying constitutional reasoning is relatively easy to identify. Constitutional provisions are phrased in a general manner: their open texture often offers little specific guidance for the resolution of particulars in constitutional claims. Despite fleeting indeterminacy in constitutional adjudication, in the thousands of judgments being handed down in constitutional cases each year courts tend to rely on relatively few types of arguments. This phenomenon evokes an deep Aristotelian current in legal reasoning and makes the (post-)modern observer mindful of the stasis (status) system developed to analyze legal conflicts using a set of formal questions and arguments.[1] It is not completely accidental that a professional tradition relying on pre-set rules of reasoning is also heavy with recurring arguments and narratives.[2] The legitimacy of such recurring arguments in legal reasoning is presupposed. Dominated by similar intellectual reflexes and infused with ideas of constitutional theory, academic discourse on constitutional adjudication is marked by efforts to identify arguments and narratives that are acceptable for the purposes of constitutional adjudication. In this respect there is little, if no, difference between law as integrity and variations of originalism.

In spite of the obvious limitations of textualism in constitutional interpretation, an argument's relationship with the constitutional text is an internal criterion used to legitimize a preferred argument or technique of constitutional reasoning and—ultimately—the exercise of the constitutional review power. In consequence, most often the

written words of the constitution have a limited role in controlling or determining the resolution of constitutional cases, while the words of the constitution retain an almost magic force in legitimizing the outcomes of interpretation reached in constitutional adjudication. This chapter provides a brief overview of the arguments used most frequently in constitutional reasoning. The reference point for such an overview will be the distance of an argument from the text of the constitution, while critical analysis is guided by curiosity as to whether any such arguments are successful, and, if they are, to what extent, in curbing indeterminacy in constitutional reasoning.

While some arguments raised in constitutional adjudication are text-based, others go beyond the constitutional text and seek correspondence with the broader setting of the constitution. Among arguments beyond the text from a lawyerly perspective, legal or juridical arguments (e.g. *stare decisis*, tests, "purposive approach") may be distinguished from extra-legal arguments (e.g. social science evidence). The analysis in this chapter reveals that the seemingly artificial line between textual arguments and other arguments helps reveal how references to the constitutional text retain a crucial role in legitimizing the exercise of the constitutional review power. Second, even a concise overview of arguments used in constitutional reasoning reveals that references invoking the force of past events and traditions (historical narratives) are recurrent in all genres of argument used in constitutional cases.[3] Independent of the controlling characteristics of the argument in which they are subsumed, in constitutional cases historical narratives are perceived to be successful in curbing the indeterminacy resulting from the constitution's open texture. This makes references to historical narratives in constitutional adjudication almost immune to more searching critical scrutiny. The bulk of scholarly criticism is directed at the appropriateness of the court's historical analysis (i.e., at whether the court got the story right) when justices are engaged in an originalist enterprise. In other instances, however, little attention is paid to the soundness of the rationale prompting courts to rely on historical narratives in a given context.

Note that the following overview is intended to cover arguments, references, or means of constitutional construction that are widely used by constitutional review fora in various jurisdictions around the

world, in fundamentally different constitutional and legal settings. In so doing, this short overview and the analysis throughout the book may cover cases that were overruled or abandoned, since their relevance in understanding techniques of constitutional reasoning cannot be underestimated. The present chapter does not claim to supply an exclusive list of legitimate references in constitutional reasoning; its main purpose is to serve as a sound platform of orientation for the forthcoming analysis of the role of historical narratives in constitutional adjudication.

2.1. The limits of textualism in constitutional reasoning

The plain meaning of terms and phrases is often invoked in legal argument, especially in statutory construction. In the U.S., arguments referring to the "plain meaning" of legal or constitutional provisions are often associated with a textualist approach, and those to "original meaning" with a genre of originalism (strict textualism). Justice Higgins gave a classic formulation of a strict textualist (in Australia: literalist) approach in the *Engineers' case*, controlling constitutional interpretation in Australia's High Court until the late 1980s in the following terms:

> The fundamental rule of interpretation, to which all others are subordinate, is that the statute is to be expounded according to the intent of the Parliament that made it; and that intention has to be found by an examination of the language used in the statute as a whole. The question is, what does the language mean; and when we find what the language means, in its ordinary and natural sense, it is a duty to obey that meaning, even if we think the result to be inconvenient or impolitic or improbable ... unless the limitation can be found elsewhere in the Constitution, it does not exist at all.[4]

The justices of the Australian High Court undertook this position in open rejection of an interpretive approach advocating judicial reliance on the constitutional text's "implications" (progressivism). In sharp contrast with reliance on implications, for textualists the "natu-

ral sense" of the text was seen as impartial and unbiased, therefore, per se apolitical. This form of textualism might be familiar as a technique of statutory (and not constitutional) interpretation.[5] As a matter of praxis, in common-law countries attempts at textualism in constitutional cases might be seen as intellectual attempts to come to terms with the task of interpreting a written constitution.[6]

Textualist approaches differ depending on the theory of language to which they subscribe. One prominent strain emphasizes the enduring meaning of words. In contrast, the other dominant position advocates the meaning attributed to a provision by the interpreter in her own time, that is, the contemporary meaning of the provision. This position takes into account changes in the meaning of words over time.[7] Some are rather skeptical about the potential role a "plain-meaning" or strict textualist approach might have in constitutional interpretation. The U.S. Supreme Court's Chief Justice Marshall implied that a plain-meaning approach, divesting the text of its social and linguistic context, "will either yield unresolvable indeterminacies of language or just nonsense."[8] Accounts advocating the exclusiveness or dominance of the plain meaning of a provision seem to disregard factors which influence the interpreter–a point emphasized by scholars of hermeneutics. Yet even a moderate deconstructionist might be troubled by H. L. A. Hart's proposition, suggesting that general rules of behavior are per se open-ended when they have to be applied in a given case.[9] An even more radical argument in refutation of a textualist approach might hold that, although legal reasoning is inherently political, constitutional interpretation is so political that conventional legal reasoning fails in constitutional cases.[10] Whether or not one is prepared to accept such an extreme position, the limits of a plain-meaning approach in constitutional adjudication are manifold.

In its most extreme form, textualism avoids any reference to context and instead relies on dictionaries and grammar books in ascertaining the plain meaning of the words of a provision. Indeed, the past decade brought a "dramatic increase" in references to dictionaries as sources of plain meaning in the U.S. Supreme Court's jurisprudence. The search for the original meaning of constitutional provisions also contributed to this trend. After all, it is reasonable to expect that consulting a dictionary compiled at around the time of the Fram-

ers would provide some guidance for understanding constitutional language better. At least as a matter of first impression, dictionary definitions are surrounded by an air of objectivity.

Nonetheless, dictionary definitions might be insufficient means of interpretation due to the methodology on which the creation of dictionaries is based.[11] More precisely, they may be used to demonstrate that a term does not have a plain meaning.[12] The U.S. Supreme Court also relied on dictionary definitions to ascertain the meaning of the word "try" in the Impeachment Trial Clause of the U.S. Constitution in *Nixon v U.S.*, allowing Chief Justice Rehnquist, writing for the Court, to conclude that "try" is an imprecise term and does not afford a judicially manageable standard.[13] In the *AZAPO* case the South African Constitutional Court contrasted various dictionary definitions of the term "amnesty" used in the interim Constitution's epilogue and elegantly reconstructed these definitions against the etymological background of the word.[14]

Constitutional provisions are infamous for being phrased in general terms, thus making it necessary for constitutional adjudicators to specify the meaning of the provision in the context of the actual case. The standard casebook example of this phenomenon is the Due Process Clause of the U.S. Constitution's Fifth and Fourteenth Amendments, which prohibits the deprivation of "life, liberty, or property, without due process of law."[15] In addition to serving as the hallmark of procedural guarantees (procedural due process), in the jurisprudence of the U.S. Supreme Court the clause was turned into a depository of constitutionally protected unwritten rights and interests.[16] In 1905, in *Lochner v New York* the U.S. Supreme Court used the liberty and property pillars of the Due Process Clause to find that the Constitution protected a liberty to contract–a liberty that is not spelled out in the U.S. Constitution as such.[17] By recognizing the liberty to contract the Supreme Court invalidated a considerable amount of economic legislation, a terrain usually left alone by courts performing constitutional review.[18]

The much-criticized era of economic due process was brought to an end during the New Deal,[19] leaving behind the ugly ghost of Lochnerizing that continues to haunt U.S. constitutional adjudication and scholarship. The second renaissance of the Due Process Clause as

a guarantee of substantive rights was marked by the Supreme Court's recognition of the constitutional protection of privacy in *Griswold* (with reliance on due process to a significant extent),[20] followed by such important decisions as the recognition of the right to marry in *Loving*[21] or the constitutional premises of voluntary termination of pregnancy in *Roe v Wade*[22] and, most recently, the recognition of homosexual sexual privacy in *Lawrence*.[23] The substantive Due Process cases expose the U.S. Supreme Court to constant criticism for exceeding the confines of constitutional review power, exactly for want of textual guidance from the Constitution, thus it is a trivial example for demonstrating textualism's limitations in controlling indeterminacy in constitutional reasoning.

At this point it is worth emphasizing that the Supreme Court's more recent efforts at keeping the Due Process Clause's effects at bay include a judicial inquiry into history. The clearest expression of the terms of this inquiry was in Chief Justice Rehnquist's majority judgment in *Glucksberg*, a case which involved a claim about assisted suicide, in the following terms: "First, we have regularly observed that the Due Process Clause specially protects those fundamental rights and liberties which are, objectively, 'deeply rooted in this Nation's history and tradition' … Second, we have required in substantive-due-process cases a 'careful description' of the asserted fundamental liberty interest."[24] Note how the chief justice refers to the inquiry into history and traditions as an objective criterion of the test. Recently the care required for deciphering history and traditions was demonstrated in *Lawrence*.[25] In that case it was also demonstrated how the terms of the careful description of the claim frame and lead the inquiry into the past.

While the open texture of the Due Process Clause makes it an easy target for skeptics who question the utility of textualism in constitutional reasoning, one must see that indeterminacy lingers even around provisions that appear far more specific at first sight. For instance, constitutional clauses on freedom of expression tend not to specify what exactly constitutes protected speech for the purposes of the application of the provision. This is a clear example of indeterminacy as to the scope of constitutional speech protection. Defining the limits of the scope of a free speech provision is not a trivial task, as exam-

ples on the constitutional protection of commercial advertising (commercial speech) suggest. The resolution of such an issue usually requires more from courts than recourse to the plain meaning of the words "speech" or "expression." In *Virginia Pharmacy Board*[26] the U.S. Supreme Court per Justice Blackmun declared that "speech does not lose its First Amendment protection because money is spent to project it"; the fact that the advertiser's interests are purely economic does not deprive her of First Amendment protection. For commercial speech to be protected under the First Amendment "it must concern lawful activity and not be misleading" (*Central Hudson*).[27] In *Irwin Toy*[28] the majority of the Canadian Supreme Court found that section 2(b) of the Charter was meant to protect "all expressions of the heart and mind" in a "free, pluralistic, and democratic society [praising] a diversity of ideas and opinions for their inherent value both to the community and to the individual…"[29] Thereupon the Supreme Court's view was that commercial advertisement was an activity that satisfied the above criteria and was subject to constitutional protection.

In the above cases the courts did not rely on the plain meaning of the constitutional provision interpreted or the term "speech." The U.S. Supreme Court derived the core of the reasoning from precedent, by drawing analogies from *New York Times v Sullivan* for the protection of paid speech (advertisement), or from *Chaplinsky* and *Roth* for proving that commercial speech also contributes to the public discourse. The Canadian Supreme Court also made it clear that it does not restrict itself to the plain meaning of the language of section 2(b) of the Charter. Instead, it provided a solution based on a purposive interpretation of the Charter's freedom of expression clause. Note also that strategies of interpretation chosen by courts were not compelled by the respective constitutional provisions. Before, the U.S. Supreme Court had already extended constitutional speech protection to conduct as symbolic speech.[30] Still, the U.S. Supreme Court decided to protect commercial speech (advertising) not as a form of human conduct—a path followed by the Canadian Supreme Court—but as a class of utterances worthy of constitutional protection due to its contribution to the public discourse. As the reasons in *Irwin Toy* demonstrate, the latter consideration was also central for the Canadian Supreme Court—although for slightly different reasons. These

cases illustrate how the open texture of constitutional provisions might undermine a textualist or plain-meaning approach as a successful method of constitutional construction.

The interpretation of old constitutions erects further barriers in the way of a plain-meaning approach, as the framers of an eighteenth- or nineteenth-century document could not possibly have considered constitutional problems triggered by wiretapping or biotechnology. Such problems may arise in practice not only in rights cases but also in separation of powers and federalism jurisprudence. For instance, in a case involving the proper interpretation of the Australian federal government's powers to regulate the settlement of "industrial disputes" beyond the limits of states (section 51[xxxv]), the resolution of the constitutional issue depended on whether engineering was an "industrial activity." Justice Windeyer of the Australian High Court argued that

> [w]e must not, in interpreting the Constitution, restrict the denotation of its terms to the things they denoted in 1900. The denotation of words becomes enlarged as new things falling within their connotations come into existence or become known. But in the interpretation of the Constitution the connotation or connotations of its words should remain constant. We are not to give words a meaning different from any meaning which they could have borne in 1900. Law is to be accommodated to changing facts. It is not to be changed as language changes.[31]

Thus, the plain meaning of constitutional provisions is unlikely to provide much guidance in such cases.

A "plain-meaning" approach might give rise to further doubts when a constitutional review forum operates in a diverse linguistic and cultural environment. Having the text of a constitution in two or more languages does not always contribute to clarity. Formulations in bi- or multilingual constitutional documents often record fragile compromises that go well beyond the rationales and sensitivities that dictionaries could possibly capture. In addition, it would be naive to leave aside the problem of legal terminology and doctrine, especially in mixed jurisdictions. Courts are charged with the task of reconciling

such differences, without undermining the integrity of the constitution in any of the languages. Two examples from South African constitutional jurisprudence may be used to illustrate the complexities of this task. The first case, *Du Plessis*,[32] reveals the limits of clarity in drafting constitutional provisions, and the imprint left by the politics of constitution drafting on constitutional language. The second case, *Makwanyane*, is an illustration of plural societies and the limits of the English language.

In *Du Plessis*, the main issue depended upon whether the rights provisions of the interim Constitution applied to common-law defamation. All section 7(2) of the interim Constitution said was that the rights chapter "shall apply to all law in force…" The case turned on whether "law" meant statutory law "in force", or whether it also included common law. Following an overview of the horizontal effect of constitutional rights in a number of jurisdictions, Justice Kentridge moved to compare the English and the Afrikaans versions of section 7(2). Very simply, he found that the language of the provision in Afrikaans unambiguously covered both statutory and common law.[33] Thus, at least on the surface, it seems that it was for once beneficial to have the same constitutional instrument in more than one language, as the ambiguities of one version were clarified with the aid of the other.

Justice Kentridge judgment in *Du Plessis* has deeper layers, and these layers give rise to considerations that should be taken into account when it comes to the plain meaning of bilingual constitutions. After resolving the issue of constitutional construction that appears trivial in the light of the Afrikaans text, he went further, saying that

> [a]lthough the Afrikaans version … was the original signed version, by virtue of section 15 of Act 2 of 1994 the English version is deemed to be the signed version. The latter version would therefore prevail in case of a conflict between the two versions. But where there is no conflict between them there is another well-established rule of interpretation: if one text is ambiguous, and if the ambiguity can be resolved by reference to unambiguous words in the other text, the latter unambiguous meaning should be adopted … Both texts must be taken to represent the intention of Parliament.[34]

This is careful language, offering very little practical advice on how to distinguish minor discrepancies from collisions that prompt the English version to prevail. As the scenario in *Du Plessis* demonstrates, even minor discrepancies between the two versions could make a crucial difference. In this case itself, the stakes of the word-game were considerable: whether or not common law comes under the aegis of the interim Constitution's rights provisions. While ultimately Justice Kentridge took the problem in *Du Plessis* as a case with no conflict, his explanation on the status of the two versions of the constitutional text generates more doubt rather than providing a resolution.

The initial question posed in *Du Plessis* concerning the scope of section 7(1) of the interim Constitution retained its relevance after the adoption of the final Constitution. Section 8(1) of South Africa's final Constitution provides that the "Bill of Rights applies to *all law*, and binds the legislature, the executive, the judiciary and all organs of state." The question that still appeared unresolved under section 8(1), however, was whether, and to what extent, Muslim personal law or indigenous African personal laws came under constitutional scrutiny. This dilemma is far from trivial considering that the Supreme Court of India exempted personal laws from challenges under the Indian Bill of Rights when applying constitutional provisions similar in substance.[35] The persistence of the issue clearly shows the limitations of a plain-meaning approach in the final Constitution in constitutional interpretation. In the unique case of South Africa, the language of the respective constitutional provisions was refined in the light of the practical difficulties to which the previous formulation gave rise. Nonetheless, even the revised text appeared too vague to resolve issues that were certain to emerge in South Africa's mixed and plural legal environment.

Indeed, this quote might be more about acknowledging an important compromise reached in the course of constitution making than about clarifying the scope of constitutional provision. The quote stands as a reminder of how the "language question" was one of the most emotive issues at the time of the making of the South African interim Constitution. The recognition of Afrikaans as an official language (section 3[1] of the interim Constitution) alongside English and numerous indigenous African languages had symbolic significance at

the time of constitution making. Section 3(1) of the interim Constitution records a fragile compromise: the recognition of Afrikaans as an official language was seen as the acknowledgement of the Afrikaaner identity ("Volk"), while at the same time it was meant to symbolize that there was no room for denigrating indigenous African peoples and languages under the post-apartheid constitution.[36] The exposition of the relationship of the English and Afrikaans versions of the interim Constitution in *Du Plessis* should be read against this background. Justice Kentridge words provide little practical guidance in borderline cases, although they clearly demonstrate how close the Constitutional Court got to the deep political sensitivities hidden behind the plain meaning of the constitutional provisions. Furthermore, it should be noted that at the time of the drafting of the interim Constitution the emphasis was on circumscribing the status of Afrikaans as a language and, incidentally, as a stamp of identity.

Constitutional review fora might also face deep cultural sensitivities embedded in constitutional language. The epilogue (or postamble) of the interim Constitution of South Africa placed special emphasis on the "need for *ubuntu*" in the process of reconciliation. *Ubuntu* is a Zulu and Xhosa word for a concept well known in many African languages that cannot simply be translated into English. For the best alternative, the concept of *ubuntu* is often explained with reference to the Xhosa phrase or proverb *Umuntu ngumuntu ngabanye bantu*, which may be rendered in English as "People are people through other people."[37] When the South African Constitutional Court abolished capital punishment in *Makwanyane*,[38] various justices relied extensively on the concept of *ubuntu*, giving slightly differing interpretations. For Justice Langa, "It recognizes a person's status as a human being, entitled to unconditional respect, dignity, value and acceptance from the members of the community such person happens to be part of. … An outstanding feature of *ubuntu* in a community sense is the value it puts on life and human dignity."[39] According to Justice Mahomed, "'The need for *ubuntu*' expresses the ethos of an instinctive capacity for and enjoyment of love towards our fellow men and women; the joy and the fulfillment involved in recognizing their innate humanity; the reciprocity this generates in interaction within the collective community; ..."[40] In the case, Justice Mokgoro said that "[g]enerally, *ubuntu* trans-

lates as *humaneness*. In its most fundamental sense, it translates as *personhood* and *morality* … While it envelops the key values of group solidarity, compassion, respect, human dignity, conformity to basic norms and collective unity, in its fundamental sense it denotes humanity and morality."[41]

While the above understandings are all centered around human dignity and individuals' responsibility towards one another and their community, *ubuntu* is hardly a constitutional term with a plain meaning. Rather, it is a "shared value and ideal that runs like a golden thread across cultural lines."[42] In South African constitutional jurisprudence, *ubuntu* is regarded as a "guiding value",[43] reflecting a set of value choices and informing the interpretation of various constitutional provisions, even though the text of South Africa's final Constitution no longer refers expressly to *ubuntu*.[44] In addition, the many facets of *ubuntu* are expected to appear before courts of ordinary jurisdiction and the Constitutional Court in cases decided under, or involving, indigenous (customary) law.[45] Note that such an interplay of multilayered concepts and fine nuances should not be surprising for common-law jurists: after all, common law—at least in England—is a trilingual environment.[46]

At the same time, as the fluidity of the concept of *ubuntu* suggests, in plural, multicultural societies, a plain-language approach to constitutional interpretation is unlikely to be of much aid. *Ubuntu*, in a sense, was a convenient aid to demonstrate this difficulty, since the very concept cannot be rendered in the language that suits the rest of the South African Constitution reasonably well. Nonetheless, the example of *ubuntu* should make one realize that even the most basic terms of a constitution, such as "dignity" or "religion", might entail characteristically differing, yet constitutionally relevant, understandings among various segments of the polity. As the above examples demonstrate, such understandings are influenced by political and cultural considerations, and are also informed by concepts of the past and tradition. The South African Constitutional Court in the cases discussed above made efforts to pay due respect to such considerations. In addition to acknowledging the complexity of the task, one must also see the limited utility of a plain-meaning approach in resolving the underlying constitutional controversies.

This ambiguity and lack of clear lines raises legitimate doubts not only about the appropriateness of a textualist approach in constitutional construction but also about the role of the constitution's written words in constitutional adjudication. The reasoning of the Supreme Court of India in *Bandhua Mukti Morcha* elucidates these concerns.[47] In this case, the Indian Supreme Court had to interpret Article 32(1) of the Constitution of India, which guarantees the "right to move the Supreme Court by appropriate proceedings" for the enforcement of certain constitutional rights. The Supreme Court found that

> [w]hile interpreting Article 32, it must be borne in mind that our approach must be guided not by any verbal or formalistic canons of construction but by the paramount object and purpose for which this article has been enacted as a fundamental right in the Constitution and its interpretation must receive illumination from the trinity of provisions which permeate and energize the entire constitution, namely, the Preamble, the Fundamental Rights and the Directive principles of State Policy. … There is no limitation in the words of clause [1] of Article 32 that the fundamental right which is sought to be enforced by moving the Supreme Court should be one belonging to the person who moves the Supreme Court nor does it say that the Supreme Court should be moved only by a particular kind of proceeding. It is clear from the plain language of clause [1] of Article 32 that whenever there is a violation of a fundamental right, anyone can move the Supreme Court for the enforcement of such a fundamental right.[48]

As for the substance of the rule established in the case, this reading of Article 32 represents a significant departure from the traditional criteria of standing applied in common-law jurisdictions.[49] Although in order to reach this conclusion the Indian Supreme Court applied various techniques of constitutional construction, the central premise of the Court's reasoning was a strong reliance on, yet not adherence to, the plain meaning of Article 32. In *Bandhua Mukti Morcha* the Court's argument opens with declaring that it will resort to a compre-

hensive, holistic reading of the Constitution, admittedly abandoning textualism in a narrow sense. This does not mean, however, that the Indian Supreme Court detached itself from the text of the Constitution. Interestingly, confirming that the plain language of Article 32 does not exclude or prohibit the rule of standing developed by the Court via a purposive reading is central to underscoring the freshly established rule.

Thus, in reaching the above conclusion, the justices referred to the plain language of the constitutional provision interpreted, as if it served as a yardstick to define the line between legitimate and illegitimate options of construction. This could be understood as the basic minimum function of a textualist or plain-meaning approach in constitutional construction. From a textualist perspective, nonetheless, this finding might appear to question the very relevance of the constitutional text for constitutional adjudication. From a somewhat broader perspective, however, this finding indeed reinforces the fundamental significance of the constitutional text in legitimizing the exercise of the constitutional review power. The words of Justice McHugh of the Australian High Court in *Re Wakim, Ex parte McNally*[50] exhibit a careful approach:

> Change to the terms and structure of the Constitution can be carried out only with the approval of the people in accordance with the procedures laid down in section 128 of the Constitution. Until change is made, the function of the judiciary is to give effect to the present terms and structure of the Constitution. … But even if we continue to hold ... that the meanings of the words in the Constitution do not change as language changes … a Constitution contains implications, inferences and propositions as well as words, phrases and clauses. Experience derived from the events that have occurred since its enactment may enable us to see more in the combination of particular words, phrases or clauses or in the document as a whole than would have occurred to those who participated in the making of the Constitution.[51]

This position may be more about shifting lines than drawing them in describing the relationship of the constitutional text and the justices' role proper.

The role of the constitution's text in legitimizing the exercise of the constitutional review power is best illustrated in cases where constitutional review fora face collisions within the text of a constitution. This is a delicate situation, as in such a case the court can easily be criticized for reaching a decision without clear guidance from the constitution. According to the South African Constitutional Court—although an irreconcilable tension between constitutional provisions is an unlikely phenomenon—when encountering such an internal collision in the constitution and conflicting constitutional provisions, "courts must do their best to harmonize the relevant provisions, and give effect to all of them."[52] At first, this task might appear to be a special challenge in constitutional interpretation. However, as Justice Schmidt indicated in his dissent to the Hungarian Constitutional Court's decision in the *capital punishment* case, the Constitutional Court does not have jurisdiction to resolve the collision of constitutional provisions, as this is clearly a task for the constitution maker.[53] Thus, an opposite conclusion is still valid and possible, albeit unpopular with courts.

Indeed, taking into account all the vices and the internal and external limitations of a textualist approach in constitutional interpretation, the wording of a constitutional provision might be the least disputable—and therefore most solid—basis with reference to which the integrity of constitutional argument can be traced. When applying the constitution in actual cases, constitutional review fora perform their Hartian task of filling the open texture of constitutional provisions. In such cases textualism is of little aid. Note that for H. L. A. Hart the field for such judicial acts is relatively small, while judges are part of a system, the rules of which prescribe the rules for the proper construction of a legal or constitutional provision.[54] In constitutional cases the second part of H. L. A. Hart's observation comes under keen scrutiny in the light of recent constitutional jurisprudence. As Habermas once remarked, "Every important judicial decision or precedent goes beyond the interpretation of the text of the statute and to this extent requires external justification."[55] In order to understand the mechan-

ics of constitutional construction as performed by constitutional review fora, the external justifications that are applied by courts alongside or in place of arguments from the text must inevitably be analyzed in constitutional cases. The selection of arguments from context used by courts in constitutional and legal reasoning largely depends on the legal culture of a particular national legal and judicial system.

2.2. Courts reaching beyond the text: means of construction outside the constitutional text

If "plain meaning" is a somewhat fluid term, "context" is also a multilayered concept that is difficult to define. In a purely mechanical, textualist sense, words neighboring the term interpreted amount to its context. On the basis of a broader perception of context, a text as such does not exist on its own. After Gadamer, a text cannot always be perceived as a pre-existing object of interpretation. Rather, the text is construed via interpretation.[56] Furthermore, "utterances derive their meanings from the contexts in which they are made. These are contexts of language, of action and of relevance..."[57]

In an intentionalist perception actors inhabit a number of contexts from which they choose when they determine the meaning of their acts, and actors try to direct the contexts in which their actions are given a particular meaning. Ball and Pocock go as far as arguing that, depending on how contextual arguments are used, a contextual approach may show more about the eighteenth century context of the Framers of the U.S. Constitution than about the Constitution itself. This finding is in line with Bobbitt's submission, claiming that in constitutional interpretation historical argument is about the controversies, attitudes, and decisions of the period during which a particular constitutional provision was proposed and ratified.[58] Without intending to choose between various competing perceptions of text and context, at this point it is sufficient to note that strategies of textual interpretation which disregard context are incoherent and lack heuristic value, and therefore such theories do not have normative implications for constitutional interpretation.[59]

2.2.1. Lawyers' domain: legal (juridical) arguments

In an ideal case, when "the court declares that the words of a section … are plain and clear, it has usually, at a minimum, read them in the context of the act as a whole and, in the situation where several meanings are possible, has chosen one meaning over the other."[60] Some of these "arguments from context" are characteristic of legal (juridical) reasoning. Nonetheless, many authors—Posner among them—forcefully question the autonomous nature of legal reasoning as a distinct intellectual endeavor.[61] Although an exploration of this issue would exceed the ambitions of the present analysis, one point made by Alexy is particularly powerful and tackles an issue which is highly relevant for the present analysis.

For Alexy, legal discourse is a special case of general practical discourse ("special case thesis").[62] One of the main differences between practical and legal discourse is that in legal discourse not all questions are open to debate. In addition, legal discourse has constraints which do not apply to practical discourse, such as procedural rules, time constraints, and assigned roles. Thus, legal discourse does not always qualify as rational discourse in the sense of "non-coercive unfettered communication." Legal discourse has an institutional (authoritative or real) character and a discursive character. It reveals this institutional character when courts decide legal disputes. Legal discourse is special because "it is not concerned with what is absolutely correct but with what is correct within the legal framework and on the basis of a validly prevailing legal order."[63] For our present purposes it is sufficient to admit that opinions of constitutional review fora rely to a large extent on reasons which legal professionals would characterize as juridical arguments. From this perspective, other arguments from context qualify as extra-legal. Arguments from the text may be difficult to distinguish from juridical arguments. The main difference is probably that "plain-meaning" arguments refer to the common meaning of words and refuse to look into meanings attributed to the words of the provision by prior case law. Those arguments that rely on the meaning of terms as developed in jurisprudence or legal scholarship are considered to be juridical arguments.

Juridical arguments are conceived as means of interpretation having roots in legal scholarship, and, as such, among lawyers they are deemed to be self-evident, and thus per se legitimate, means of construing statutory and constitutional provisions. Juridical (legal) arguments can be conceived as rules of legal reasoning which are phrased at a higher level of abstraction for the purposes of legal interpretation.[64] In common-law legal systems, the term "juridical argument" might refer to a theory of precedent followed by courts and scholarly accounts related to it.[65] Both common-law and civil-law legal systems use tests to reach a principled judgment in constitutional cases. Also, courts in both common-law and civil-law jurisdictions refer to such juridical arguments as the intent of the drafters, purposive interpretation, or canons of construction, and rely on comparative constitutional arguments, to mention only a few from among the most frequent ones.

These juridical arguments invoke characteristically different philosophies and techniques of constitutional or statutory interpretation, and not all of them are accepted in each jurisdiction, let alone theories of constitutional interpretation and adjudication. Nonetheless, these juridical arguments seem to share some orientation towards past events and practices, a feature that might not be obvious at the outset in all cases. While in the case of framers'-intent arguments this claim is relatively trivial, it might require some explanation regarding other instances of juridical argument. Furthermore, one might realize that the (apparent or indirect) historicity of these juridical arguments might clash with their legal or constitutional implications. Such a tension is most apparent regarding framers'-intent arguments.

Framers'-intent arguments are the most often used—and most often criticized—source of moderate originalist argument in the U.S ("original intent"), although references to the intent of the U.S. Constitution's Framers were widely used by the Supreme Court well before the age of originalism. In 1819, in *McCulloch v Maryland*[66] Chief Justice Marshall discussed the powers of the federal government to establish a national bank,[67] and the scope of the Constitution's Necessary and Proper Clause with explicit references to the intent of the Framers,[68] in both instances rejecting narrow (strict textualist) readings of constitutional provisions in favor of readings favored by the

Framers. Subsequently, in one of the most regrettable decisions of the U.S. Supreme Court, in *Dred Scott v Sanford* (1857),[69] Chief Justice Taney concluded from "legislation and histories of the times, and the language used in the Declaration of Independence", that at the time the U.S. Constitution was framed and adopted, public opinion favored slavery, therefore a fugitive slave cannot become a citizen upon his return from the North to the South "within the meaning of the Constitution."[70] These references, although they long precede the coming of originalism, do nonetheless provide clear examples of the basic types of framers'-intent arguments. Modern originalist argument might be richer in, if not overwhelmed by, references to authorities of all sorts, yet the basic logic of the arguments has altered little since the early days. In exploring the force of framers'-intent arguments in contemporary constitutional argument, Eskridge argues that the reason for the high authoritative value of references to the Federalist papers is that they "carry with them the authority of the original participants."[71]

Reasoning derived from framers' intent can be questioned at various levels of specificity, for various reasons. Discussing challenges in detail would derail the present analysis. At the core of the criticism of originalism is the premise that the discretion involved in selecting sources relevant for identifying framers' intent, and the interpretation thereof, makes originalism a highly subjective and value-laden endeavor, a practice that yields unpredictable outcomes in constitutional construction.[72] As Eskridge put it, "[o]ne problem with original-meaning jurisprudence is its indeterminacy; an indeterminate methodology does not constrain the interpreter. The historical mise en scène … is very hard for historians to reconstruct in all its complexity. It is even harder for Supreme Court justices, who are, at best, amateur historians."[73] TenBroek noted well before the rise of originalism that "[i]f any intent is to be sought … then certainly it should not be that of the proposing draftsman [sic] but that of those whose sanction gave the instrument operative force."[74] This observation has lost little of its validity. The difficulty in drawing lines regarding framers'-intent argument is best illustrated by the following anecdote. In the course of an oral hearing Justice Scalia (an originalist himself) asked the solicitor general whether, by his reference to original intent, he meant to

bind the Court to the understanding of the people in the days of the founding, or whether he was referring to a possible understanding of an identifiable set of actors—a distinction which might not be possible to draw.[75] Such concerns are amplified in cases where framers' intent is to be ascertained about abstract concepts such as sovereignty and sovereign immunity.[76] Still, while in U.S. jurisprudence framers' intent has a very high authority, the drafters' voices are not necessarily regarded as compelling commandments in all courts.

In Canada it was maintained for a long time that the founders were practical men and their reasons were limited to the problems of the moment but not beyond, a view which has been not challenged until relatively recently.[77] Lately, Canadian courts have been considering Confederation history and the drafting history of the Charter (including earlier drafts of the text), but not without considerable reluctance.[78] In the *BC Motor Vehicle reference* the Canadian Supreme Court per Justice Lamer openly departed from the interpretation of the Charter's section 7 that was suggested by the Charter's drafting history. In the case, Justice Lamer stressed that the "inherent unreliability of ... statements and speeches is not altered by the mere fact that they pertain to the Charter rather than a statute."[79]

Canadian justices are not unique for their limited reliance on drafters' intent as a compelling source of constitutional interpretation. The German Constitutional Court refers to drafters' intent to confirm findings that were established already on other grounds, thus in Germany "Framers' intent is not an independent source of authority."[80] One rare instance where the German Constitutional Court went uncharacteristically far in consulting the Basic Law's drafting history was the *Elfes* case. In this case, the justices matched the originally proposed draft of Article 2(1) of the Basic Law with the words later adopted. Article 2(1) of the Basic Law, as adopted, provides that "Everyone shall have the right to the free development of his personality insofar as he does not violate the rights of others or offend against the constitutional order or the moral code." The proposed text of Article 2(1) opened "Every person is free to do or not to do what he wishes" and concluded with a reference to the constitutional order. Consulting the original proposal—irrespective of the lack of any specific reference in the final wording of Article 2(1) in this re-

spect—the Constitutional Court found that Article 2(1) was meant to protect not only the "core sphere of personality" but also a "general freedom of action" (*Handlungsfreiheit*).[81] In the case, when reconstructing the drafters' intent the justices remarked that the original proposal was dropped out of linguistic rather than constitutional considerations.

References to framers' intent are not that popular in jurisdictions living with constitutional review. Recently, in the *same-sex marriage reference*, a unanimous Canadian Supreme Court refused to be nailed by framers' intent on the construction of various constitutional provisions concerning the distribution of federal and provincial jurisdiction.[82] Furthermore, the justices were not willing to accept that the Constitution Act 1867 "effectively entrenches the common-law definition of 'marriage' as it stood in 1867."[83] The Supreme Court emphasized that "[t]he 'frozen-concepts' reasoning runs contrary to one of the most fundamental principles of Canadian constitutional interpretation: that our Constitution is a living tree which, by way of progressive interpretation, accommodates and addresses the realities of modern life."[84]

In Canada, India, or South Africa the principle of "purposive interpretation" is one of the characteristic features of constitutional jurisprudence, and rights review in particular. A purposive approach requires the Canadian Supreme Court to "ascertain the purpose of the Charter guarantees", meaning that Charter rights are to be understood "in the light of the interests they were meant to protect." As a method in constitutional interpretation, a purposive approach is often associated with overt judicial activism,[85] as courts and justices subscribing to a purposive reading tend to emphasize that rights provisions are to be read in a "generous" manner and not in a legalistic one, to provide the right's claimant with the full benefit of constitutional protection.[86] It is striking at first sight that courts contrast a generous (purposive) interpretation of rights provisions with a legalistic stance, a contrast already familiar from Australian jurisprudence exposed in the *Engineers' case,* quoted above. Thus it is clear that a purposive approach calls for a departure from textualism or formalism, in the name of a self-proclaimed judicial agenda providing rights provisions with full force. In the Australian context such a motivation

would most probably amount to a search for "implications", the very motivation rejected in the *Engineers' case*.

Justices seem to follow similar paths when they are looking out for such implications or purposes. According to the by now classic formulation put forth in the Canadian Supreme Court's decision in *Big M*, purposive interpretation is to be carried out "by reference to the character and the larger objects of the Charter itself, to the language chosen to articulate the specific right or freedom, to the *historical origins of the concepts enshrined*, and, where applicable, to the meaning and the purpose of the other specific rights and freedoms with which it is associated within the text of the Charter."[87] Following similar lines in *Makwanyane*, South Africa's Justice Chaskalson said that "section 11(2) of the Constitution must not be construed in isolation but in its context, which includes the history and background to the adoption of the Constitution, other provisions of the Constitution itself and, in particular, the provisions of Chapter Three of which it is part."[88]

When a court follows a purposive approach in rights cases, it engages in defining the scope of the constitution's rights provisions by clearly departing from a narrow, textualist (literal or formalistic) account of rights provisions, and reaches for extra-textual aids of construction. Among these external aids the justices consult the broader setting of a constitutional provision within the constitution, and clues from the time of rights provisions' adoption, typically regarding the types of claims a constitutional provision was meant to address—whether identified from the records of constitution making or from the overall historical setting of the drafting (fears of the Founding Fathers). Indeed, alongside structural arguments (typically, the place of the rights provision interpreted in the constitution's rights chapter, or among other constitutional provisions), references to the historical record, whether in the form of the origin of concepts or events surrounding the constitutional drafting, seem to have a central role for purposive interpretation. This suggests that among the extra-textual aids of constitutional interpretation, historical narratives tend to retain a special place.

It is all the more interesting that in the case of purposive interpretation, historical narratives are invoked under the pretext of juridical (legal) argument, and not as extra-legal reasons. While evidence from

constitutional drafting history might appear as standard, classic sources of statutory interpretation, when resorting to a purposive approach in constitutional cases the Canadian and South African courts seem to invoke such evidence not in a highly technical sense, but in a more comprehensive manner. It is difficult to read judicial references to the "historical origin of concepts enshrined" in the Canadian Charter, or the "history and background" of the making of the South African Constitution, as references restricted to the letter of the legislative record. Rather, it seems the justices are ready to seek guidance on the basis of historical narratives as to the broader implications of the adoption of a specific rights provision. This comprehensive inquiry into the past might escape the observer's attention as it is made part of a juridical (legal) argument labeled as "purposive interpretation" or a "purposive approach", internalizing (if not concealing) judicial willingness and readiness to consult the past for guidance in constitutional interpretation.

Juridical arguments may also contain principles of legal reasoning in an even more abstract manner. Such abstract rules of legal interpretation are also known as canons of interpretation or canons of construction.[89] The idea that courts of law rely on self-developed principles of construction was presented forcefully by Karl Llewellyn. In his comprehensive work Llewellyn collected 28 canons, or, more precisely, 14 pairs of canons. He showed that each canon of construction may be refuted by invoking its opponent, an equally strong counterpart. See, for instance, pair number 20: "*Expression of one thing excludes another*" and "*The language may fairly comprehend many different cases where some only are expressly mentioned by way of example.*"[90] These canons are formal or procedural rules of construction in constitutional or legal reasoning, that is, canons of interpretation are general rules for the use of language (H.L.A. Hart).[91] Such canons are well known in civil-law systems as well. A much broader understanding refers to canons of construction as means of legal and constitutional literacy: they show the importance of canons in shaping constitutional arguments by influencing the community of constitutional interpreters.

In recent years, a number of so-called substantive canons have been discovered in the opinions of the U.S. Supreme Court.[92] Eskridge and Frickey suggested that these substantive canons embody

sheer value choices made by the Supreme Court and are then masked as technical devices fostering interpretation. Although canons of interpretation can eliminate some of the uncertainties which result from the application of general legal rules in specific cases, canons still cannot provide for their own interpretation.[93] While bearing in mind all the above-mentioned disadvantages, one of the many virtues of canons of interpretation is that they have the capacity to minimize sharp changes and foster continuity.[94]

Note that the dilemma posed by the above pair of canons can, in principle, be resolved with reference to the legislative record, or legislative history. This observation suggests, on the one hand, that a certain type of juridical argument can evolve or supplement other kinds of juridical arguments with relative ease. The main difference in this respect is that, on the face of it, canons of construction appear more abstract, thus less suspicious of veiling an unprincipled political agenda, than a direct call for an inquiry into legislative records. At the same time, this finding also suggests that even such abstract and seemingly technical means of legal and constitutional argument as canons of construction may mask the premises of an inquiry into a potentially highly politicized segment of the past.

The above inventory of juridical arguments encountered in constitutional cases is far from exhaustive. Arguments from comparative constitutional law or references to commentaries and eminent scholarly accounts have not even been mentioned, although they are often invoked in both civil-law and common-law legal systems. Nonetheless, the examples mentioned provide an illustration of arguments in context which are generally perceived as juridical arguments. The above overview of juridical (legal) arguments also reveals that many arguments initially cast as juridical (legal) are heavy with references to the past. In the case of juridical (legal) arguments, these historical narratives are often not as prevalent, as the legal/doctrinal features of these narrative schemes often overshadow their historicity, at least for insiders of the legal profession. Thus, despite their historicity, the arguments analyzed above belong among juridical (legal) arguments, as they are usually accepted as per se legitimate instruments in legal and constitutional reasoning.

2.2.2. When legal arguments run out: room for extra-legal arguments

Juridical arguments are not the only means of interpretation applied in legal and, especially, in constitutional argument. Judicial review fora often invoke external justifications that have a much looser connection with legal scholarship. Constitutional review fora derive such external justifications (arguments from context) from legal and constitutional scholarship (juridical arguments), and from scientific and social-science evidence. A "looser connection" does not mean that extra-legal arguments are less authoritative when raised by constitutional tribunals. On the contrary, such arguments are invoked precisely because they are considered to be appropriate and legitimate in supporting a (preferred) line of reasoning. The extra-legal quality of such arguments from context means that their underlying justification (and thus legitimacy) originates from outside legal theory or jurisprudence: they rely on evidence that is largely extrinsic for legal analysis. Still, such extra-legal arguments might be intelligible for an observer relying on means of legal construction. Bobbitt argues that even extra-legal arguments retain an "aura of facticity" and may be approached via analogical reasoning.[95]

The connection between juridical arguments and extra-legal arguments is complex and tainted with ambivalence. Arguments from context may supply reasons pertaining to the narrower context of a constitutional provision, be this the circumstances of drafting or the sphere of operation of the words interpreted. In these cases it may be impossible to distinguish juridical and extra-legal arguments. Such a problem of delineation is clearly present in originalist reasoning and also in references to legislative history. Many of the difficulties of originalism were explored in the previous section, yet further concerns arise when looking into the mechanics of judicial inquiry into legislative history. An inquiry into legislative history in the sense explored here is not synonymous with framers' intent. Courts in constitutional cases are often venturing into exploring the circumstances of the making of the particular legislative measure the constitutionality of which is being challenged before them. As I hope to demonstrate in the following passages, such a venture is difficult to

cast as legal or juridical argument in the sense discussed in the previous section.

The relationship of extra-legal arguments to juridical arguments may be characterized along the following lines, depending on the nature and intensity of the relationship of juridical and extra-legal arguments.

(i) In many cases extra-legal arguments are invoked to support an interpretation which has already been outlined via juridical arguments: these instances reflect the search for authoritative guidance in establishing the meaning of a constitutional provision. For instance, according to Posner "[w]hen a court reads the Eighth Amendment, it is (or at least it should be) looking for authoritative guidance, and it would get none if it felt free to give 'cruel and unusual punishments' any meaning that the words wrenched free of their historical context might yield."[96]

(ii) Extra-legal arguments are also used in cases where, using pre-existing rules of legal reasoning, it is not possible to make a decision or choice from among a number of equally possible (competing) alternative interpretations. In such cases extra-legal arguments might mask preferences of interpretation—sometimes even preferred outcomes of judgment—which would be difficult or impossible to justify solely via juridical arguments. Justice Holmes in dissent warned the majority of the U.S. Supreme Court about this attitude in *Lochner*, when he reminded that the "the Constitution does not subscribe to any social or economic theory."[97]

(iii) There are some cases in which extra-legal arguments are used completely to substitute otherwise possible juridical arguments,[98] or they are used to establish a line of reasoning which contradicts the outcome of a legal reasoning process, for instance to overrule precedent.

Among extra-legal arguments, courts are more and more often facing scientific evidence and social-science evidence of various sorts in constitutional cases. Social-science evidence might be introduced as an aid in the interpretation of facts, also incidentally affecting the construction of constitutional arguments. The constitutional jurisprudence of the U.S. records the "Brandeis brief" and the "Baldus study" among the most famous instances in which social-science evidence

was introduced before the Supreme Court. The Brandeis brief was the first major attempt to present arguments in a constitutional case on the grounds of social-science evidence in *Muller v Oregon*,[99] a case involving minimum-working-hours legislation protecting women. "Not surprisingly, significant citations of social-science facts in judicial opinions began with the 1916 appointment of Louis Brandeis to the Supreme Court. Brandeis found an ally in Oliver Wendell Holmes, Jr."[100] Rustad and Koenig show that despite these early developments, the real boom in social-science evidence in the Supreme Court commenced during the Warren years, via the medium of amicus briefs.[101] The best-known example of the era is *Brown v Board of Education I,*[102] in which Chief Justice Warren, in his famous footnote 11, relied on the history of public education in the U.S. and social-science evidence to overrule the longstanding principle of "separate but equal", established by the Supreme Court in 1896 in *Plessy v Ferguson* under the Equal Protection Clause.[103] While the quantification of arguments from discrimination cases in the context of education might be one of the many consequences of *Brown*,[104] the Supreme Court has not been all that welcoming in other contexts.

One infamous instance in which the justices rejected social-science evidence is *McClesky v Kemp*,[105] a capital case from Georgia, alleging system-wide discrimination in the administration of capital punishment. The raw data for the Baldus study, collected from over 2,000 death cases in Georgia, indicated that "defendants charged with killing white persons received the death penalty in 11 percent of the cases, but defendants charged with killing blacks received the death penalty in only 1 percent of the cases."[106] In *McClesky*, the Supreme Court's majority per Justice Powell accepted the validity of the Baldus study but found it insufficient to support the petitioner's discrimination challenge or other constitutional claims, for "discretion is essential to the criminal justice process, we would demand exceptionally clear proof before we would infer that the discretion has been abused."[107] It was suggested that when accepting the validity of the Baldus study the Supreme Court intended to protect juries in capital cases.[108] However, it should be mentioned that, with the language used by Justice Powell for sidelining the Baldus study he also raised the bar so high that ever since it has been almost futile to introduce social-science

evidence in death cases in an attempt to overturn individual convictions.[109] This point also suggests, at least indirectly, that the Supreme Court does not perceive itself as the right forum for entertaining system-scale challenges against the administration of capital punishment in the U.S.

Note that, over the years, courts have expressed their reservations about social-science evidence in constitutional cases in other jurisdictions as well, especially when it does not provide straightforward guidance. This attitude is prompted by practical, prudential, as well as constitutional considerations. In *Irwin Toy*[110] the Canadian Supreme Court reviewed a statutory advertising ban which prohibited commercial advertising aimed at children below 13 years of age. The reasonableness of the age limit was a central issue for the litigation. Various studies were introduced to the courts on the effects of advertising on minors of various ages. The majority of the Court of Appeal below reviewed this evidence and found that the age limit which fitted the purposes of the statute was not 13, but 6 years.[111] In the limitation analysis (applying the so-called Oakes test under section 1 of the Charter) seeking to establish whether the statute had a "pressing and substantial objective", the majority of the Supreme Court also accepted that the evidence submitted was the strongest with regard to the younger age group. Nonetheless, the Supreme Court justices emphasized that the legislature was not restricted exclusively to protecting the most vulnerable group: instead, the threshold of legislative action limiting constitutional rights is reasonableness under the Oakes test. This standard is satisfied "if the legislature has made a reasonable assessment as to where the line is most properly drawn, especially if that assessment involves weighing conflicting scientific evidence and allocating scarce resources on this basis, it is not for the court to second guess. That would only be to substitute one estimate for another."[112]

Thus, the justices of the Supreme Court were not willing to go as far as the court below and render a decision altering the legislature's decision on the most substantive issue, that is, the age limit. This stance is partly an expression of prudence, while in part it is clearly motivated by respect for the political branches and separation of powers considerations.

Inconclusive scientific evidence might raise further constitutional concerns. In the *Kalkar* case the German Constitutional Court upheld the constitutionality of a statutory delegation clause which referred to "existing scientific knowledge and technology" as a condition in one of the criteria for licensing nuclear reactors. According to the German Constitutional Court, while the phrase is not precise it is permissible as, due to lack of scientific knowledge, it is impossible to foresee the effects and consequences of the implementation of nuclear technology. "In this necessarily uncertain situation the legislature and the government primarily have the political responsibility for making what they consider pragmatic decisions within the confines of their respective authority. Under these circumstances, it is not the function of the courts to substitute their judgment for that of the political branches when assessing the situation, because legal criteria for such decisions do not exist."[113]

As the above cases suggest, scientific and social-science evidence is introduced before constitutional review fora in a wide range of contexts spanning from rights cases to the separation of powers issues. Interestingly, courts in the above cases refused to look into the details of scientific and social-science evidence: instead, they left the task of handling scientific findings to the decision maker, usually the legislator. In such cases, the courts' main concern was to make sure that the legislature had properly familiarized itself with this, and both courts made it apparent that drawing a line on the basis of inconclusive scientific evidence is not an issue for judicial determination but a matter of political responsibility. While this point was already touched upon in the Canadian *Irwin Toy* case, when the justices referred to the problem of the allocation of scarce resources, the German Constitutional Court in the *Kalkar* case expressed its concerns in even more precise terms. In addition, both cases suggest that a reserved judicial stance might neatly be justified by justiciability considerations—after all, constitutions do not usually provide guidance in matters of science.

It is often suggested that a number of constitutional provisions are so vague that it is impossible to interpret them without extra-legal aid. The difficulties triggered by the open texture of constitutional provisions such as the U.S. Constitution's Due Process Clause come to mind instantly. In addition, there are a number of issues which are not

provided for in a constitution. Also, there are cases in which a review forum might deliberately depart from its long-established jurisprudence. These problems might be difficult or impossible to resolve without invoking extra-legal arguments. Still, in cases where legal arguments do not even hint at possible paths of normative guidance, reliance on extra-legal arguments becomes questionable in a number of regards. First of all, due to the overall indeterminacy of the normative background, it is impossible to foresee the outcome of such interpretation, at least in a legal sense. This finding runs against the very heart of any approach which is seeking constitutional construction in a principled fashion, where abstract prerequisites would keep reasoning at bay, without compelling particular outcomes upon the preexisting preferences or prejudices of the interpreter (neutral principles).[114] This does not mean that textual or juridical arguments cannot render unexpected results. Extra-legal arguments, however, have the potential of trumping textual and juridical arguments even in cases where there is a pre-set path of interpretation. And they do so without offering legally intelligible reasons.

The second problem originates from the characteristics of constitutional review itself. Legislatures often rely on extra-legal justifications in the normal course of their operation. It is the task of constitutional review fora to determine the extent to which such justifications are relevant in constitutional review. Extra-legal arguments do not follow from the text of the constitution: they are not traceable there. In constitutional adjudication, extra-legal arguments enhance the capacity of constitutional review fora to readjust the powers of government and the contours of individual rights. In this way a constitutional tribunal may create rights or obligations which were not foreseen for other branches of government. To the trained eyes of U.S. lawyers, this reservation seems to revive the age-old debate between Justices Chase and Iredell in *Calder v Bull*.[115] In this case, Justice Chase was confident to claim that the Court may invalidate valid legislative acts with reference to "certain vital principles in our free Republican governments, which will determine and over-rule an apparent and flagrant abuse of legislative power."[116] Justice Iredell responded that the power to invalidate legislation on the grounds of natural law was not entrusted to the Supreme Court, reluctantly add-

ing that "[w]e must be content to limit power where we can, and where we cannot, consistently with its use, we must be content to repose a salutary confidence."[117] This is not to suggest that extra-legal arguments undermine predictability (foreseeability) in constitutional adjudication, nor that they result in activist judicial decisions per se, while decisions based on textual or juridical arguments are more likely to be deferential. Nonetheless, from this point it is easy to see that extra-legal arguments, depending on how they are invoked by a constitutional review forum, are capable of undermining the basic tenets of constitutionalism.

2.3. Arguments from context: the trace of the past, history, and traditions in constitutional cases

The reluctance of courts to evaluate inconclusive scientific evidence is not to suggest, however, that constitutional review fora shy away from all forms of extra-legal argument. There is one type of evidence from context which constitutional review fora are comfortable to gather, evaluate, and argue—that is, evidence from past events. Arguments invoking the past are among the most often used instruments in the reasoning of constitutional review fora. Sunstein observed that history is a common denominator from which constitutional argument may proceed.[118] Although arguments invoked in constitutional reasoning are not self-legitimating, the legitimacy of references to history is hardly ever questioned. The reasons for the high stature or esteem afforded to arguments invoking the past are manifold. Gordon goes as far as submitting that "[e]very important political or legal argument is an argument either changing, preserving, or recovering something in the past, which in turn relies on a narrative account of what has been changed and why."[119]

Those who are focused on the nature of constitutional interpretation as textual interpretation would argue that constitutions as old written documents cannot be interpreted without taking into account the context in which they were authored, since constitution making—as other human acts in politics—starts from a historically determined

context.[120] In a contractarian vein it is also plausible to tie the legitimacy of historical argument with the perception of the constitution as a contract.[121] In an even more comprehensive fashion it is possible to argue that law is a "sediment of history", where law is the product of the historically developing ethos.[122] The historical school of jurisprudence (Savigny) could also offer strong inspiration.[123] Note that for Dworkin the historicity of the legal system is not vertical but horizontal, a feature which contributes to the integrity of the law.[124] These reasons seem to be rooted in the belief that the unavoidable continuity of past, present, and future makes past experience relevant for the present and future.[125]

There is one genre of historical reasoning in which courts of law are true champions, and this is the field of legislative history. At the outset, the legitimacy of references to legislative history seems to be beyond doubt in legal reasoning, even in constitutional cases. Many might even argue that legislative history is just another instance of *stricto sensu* legal (juridical) argument. Legislative history in a narrow sense is the record of legislative events, or the absence thereof, preceding the entry into force of the legal norm interpreted. Sometimes an argument in legislative history may include references to the legislative records of the act concerned, although most constitutional review fora refuse to recount the votes that a bill received in the house. In *R. v Heywood* the Canadian Supreme Court per Chief Justice Lamer said that legislative history was not admissible as a proof of legislative intent; at best, it can be used "for the more general purpose of showing the mischief Parliament was attempting to remedy with legislation."[126] Surprising as it may sound, the Canadian justices did not perceive legislative history as a record of events in parliament. Rather, as this quote suggests, the legislative record—as hard evidence of legislative history in a broader sense—might become grounds for more complex arguments about legislative powers when invoked in a more comprehensive manner, in search of the underlying motivations driving the legislature to act in a particular manner.

Invoking legislative history might be of considerable practical significance when a court uses it to discard certain plausible interpretations of a provision which were previously rejected by the legislature.[127] It is worth noting, however, that an originalist approach does

not entail strict reliance on legislative history. As Justice Scalia warns, courts' reliance on legislative history in statutory cases provides lobbies with yet another opportunity to pursue an agenda that has already been handled before the legislature.[128] At a more abstract level, immense reliance on legislative history may be attributed to the inherently historical nature of legal and constitutional argument.[129] Others argue that legal interpretation as textual interpretation cannot perceive a text without an author, even if that author is imaginary or fictitious.[130] In practice, however, it is especially challenging to determine the intent of an assembly of hundreds.[131] Note also that arguments that focus on the intent of the author when searching for the meaning of a provision have an often overlooked effect—that is, by the introduction of an imaginary author of the constitutional text, other arguments from context are likely to be ignored.

The history of the norm under scrutiny might also become the subject of a historical inquiry. In *Roe v Wade* the U.S. Supreme Court reviewed the history of termination of pregnancy since ancient Greek times and the Roman era. The Court looked not only into legislation but also reviewed ancient medical practices.[132] The majority opinion of the Canadian Supreme Court in *R. v Zundel*[133] opens with sketching the historical background of the challenged criminal-law prohibition on the dissemination of false information. Then–Justice McLachlin found that the regulation dated back to the thirteenth century, when its initial purpose was to protect the security of the state in times when lies could trigger armed response on a mass scale, and he concluded that "[a]lthough the offence of spreading false news was abolished in England in 1887, and does not survive in the United States, it was enacted in Canada as part of the 1982 Criminal Code. The reason for the offence's retention is unknown."[134] Whether Justice McLachlin's reconstruction of the purpose of the rule is appropriate is of secondary importance here. The reasoning is worthy of attention because the justices did not accept being bound by a rule simply because of the fact that the rule was ancient.

Note also, that when a court is attempting to establish the motivations or considerations behind a particular measure, sometimes guidance does not reside in the printed letters of the parliamentary record. The legislature's silence or inaction might be as informative as

speeches delivered on the floor. In *The Steel Seizure* case the U.S. Supreme Court had to decide whether Congress's silence following the president's order to seize the steel mills amounted to Congressional approval or disapproval.[135] Justice Black, writing for the majority, relied on prior instances when Congress refused to adopt legislation to a similar effect, while a dissenting Chief Justice Vinson recalled several examples when Congress remained silent after the announcement of similar presidential measures. Similarly, in the *Pentagon Papers* case the government argued that Congress intended to authorize the president to exercise the power contested in the case. In this case, Justice Th. Marshall of the U.S. Supreme Court showed that Congress twice refused to enact the legislation which would authorize the president.[136] The congressional record was used as evidence in an even more indirect manner in *Tennessee Valley Authority v Hill*.[137] In this case, the U.S. Supreme Court had to decide whether the continuous congressional apportionment allotted for a dam constituted a waiver of the bans enacted in a prior statute applicable to the dam. Whether such arguments remain within the domain of juridical arguments depends on the proportion of legal and other considerations. It is often the case that, without exploring the broader setting of congressional action or inaction, the legislative record reveals little; assessing the broader context (whether directly or indirectly, as if a counterfactual) often goes beyond reading the pages of Hansard or its equivalent.

Note that a similar problem persists in the originalist universe with respect to drawing the line between its legal and extra legal realms. The search for the intention of the drafters may reveal competing but still likely results—that is, the authors of the same text could have meant, in their contexts, any of the readings suggested by the interpreter. Thus it might not be possible to give a final determination of the intent of the drafters. A choice between competing readings is a "decision to privilege one context of interpretation above the other and to ascribe authority to one set of 'original intentions' instead of another."[138] Gadamer takes this point even further, suggesting that when the interpreter of the text has a preconception of what a given text is supposed to mean, the result of the interpretation is going to be biased in favor of the preferred reading, irrespective of other competing readings.[139] This submission seems to

validate Rakove's finding about the utilization of originalist arguments for partisan purposes.

From a legal perspective, such a choice is a matter of discretion: the decision maker acts as she thinks best within a framework of standards and principles. It is the discretionary character of the decision that makes extra-legal arguments so interesting for a study of potential constraints on constitutional reasoning. Firstly, the standards and principles on which the decision is based are outside the reach of legal scholarship. These standards can be accepted or rejected, but even this decision is made on extra-legal grounds, as the standards themselves are often not intelligible for legal analysis. Theories of precedent and analogical reasoning strongly rely on the discretion of the decision maker. The discretionary choice is, however, made on the basis of principles or standards which are considered to be "legal" or "juridical" [criteria of relevance].[140] This is what Fried means by "trained intuition."[141] The validity of historical sources, the truth or falsehood of a moral proposition, or the economic consequences of a given decision cannot be determined solely on the basis of juridical arguments. Secondly, even if it is possible to conceptualize the standards guiding the decision in legal terms, any decision made upon the application of these standards or principles is the result of personal judgment.

Well beyond the relatively familiar fields of legislative history and original intentions, justices comfortably venture into writing real history. Courts often rely on past events as examples of good morals,[142] or recall the early days by way of illustration. This is what Justice Stevens of the U.S. Supreme Court did in *44 Liquormart, Inc.*, when submitting that "[a]dvertising has been a part of our culture throughout history. Even in colonial days the public relied on 'commercial speech' for vital information about the market. Early papers displayed advertisements for goods and services on their front pages, and town criers called out prices in public squares. Indeed, commercial messages played such a central role in public life prior to the Founding that Benjamin Franklin authored his early defense of a free press in support of his decision to print, of all things, an advertisement for voyages to Barbados."[143]

Similar attempts often display a longing for origins, for myths of ancient virtues, and even nostalgia for an ancient way of life. Indeed,

as LeGoff forcefully demonstrates, such rhetorical devices date back to ancient Rome,[144] and are traceable in Lord Coke's perception of custom.[145] Such references are often ahistoric, as their primary purpose is to demonstrate the victory of the past ideal over time and individual events. In this way they fix the meaning of the term or norm, disallowing changes over time.[146] The common features of historical exempla and analogical reasoning, means often applied in juridical argument, are thus apparent.

It is not always easy to draw the line between originalist arguments referring to framers' intent, and more general historical narratives referring to the times of the framers. It is important to note, however, that while a reference to framers' intent offers guidance when invoking authorities from a particular segment of the past, references to history and tradition are intended to assert the authority of specific past trends or events. For this distinction to work, one would have to be able to draw a line between the ideas of the framers and their historical context.[147] Such a critical reflection is crucial when evaluating arguments from framers' intent in the light of evidence from history and traditions. Such a step was taken by Justice Scalia in his dissent in *Lee v Weisman*.[148] In this case, the U.S. Supreme Court had to decide whether a prayer at a public school's graduation ceremony violated the Religion Clauses of the First Amendment. The majority of the U.S. Supreme Court, per Justice Kennedy, emphasized that the "Framers deemed religious establishment antithetical to the freedom of all."[149] Justice Scalia in his dissent, however, argued that the majority's approach undermines "an even more longstanding American tradition of nonsectarian prayer to God at public celebrations generally."[150] Thus, critical reflection could prompt even an originalist to abandon framers' intent and accept different principles stemming from tradition. It remains to be seen whether such examples are capable of strengthening the line suggested above, taking into consideration that framers' intent cannot be discredited upon historical data, as our comprehension of historical data would be based on our current standards of morals, good and bad.[151]

When considering references to the past in constitutional reasoning it is possible to argue that there is a difference between references to the past as the facts of the case and as arguments supporting a pre-

ferred interpretation. Such a position may be based on the premise that, depending on the character of the submission (i.e. facts of a case or historical arguments), different standards of persuasion may apply,[152] although this distinction is not relevant in abstract review cases and in preliminary review. Historical data are introduced by the litigants in the form of factual submissions and are subject to the rules of evidence. When introduced by the parties, arguments from history are often presented in the form of expert evidence or in amicus briefs.

The impression of the objectivity of history comes closest to being disturbed when experts disagree on particular points. In *Romer v Evans*,[153] a case involving discrimination on the basis of sexual orientation, two eminent scholars, Martha Nussbaum and John Finnis, bitterly disagreed about the proper reading of some passages in Plato. As Farber recalls: "[T]he two crossed swords over whether a particular Greek phrase is best translated as 'those who first ventured to do this' or 'those who were first guilty of such enormities', with the difference turning on the meaning of a single Greek word."[154] In the end, the experts' dispute did not hold sway for the Supreme Court's decision in the case. As in other cases that Farber recounts, disagreements between expert witnesses are played out to appear as quarrels indulging personalities, leaving the impression that representatives of another profession are even vainer of their reputation than lawyers. One alternative, yet equally strong, reading is that historians, once in court, find it difficult to distinguish their scholarship from their politics. While both readings are heavy with hasty generalizations, these accounts of experts disagreeing are easily able to create an impression discrediting the person(s) appearing before the bar, while leaving the objectivity of the historical record unaffected.

As for factual submissions based upon the submission of the parties in a case, it is for the justices to identify the relevant facts of the case along, and for the purposes of, their legal analysis. The distinction between history as the facts of the case and history as an argument is relevant only to a rather limited, negative extent. The distinction might play a role in cases where a test to be applied by constitutional review fora or by ordinary courts calls for the examination of historical data. As a rule, a high court is restricted to the array of facts as established by the trial court. If, in a case, a high court cannot de-

cide upon the facts as established in the trial, the high court may remand the case for retrial.[155] Otherwise, the highest judicial forum runs the risk of establishing its judgment on an incomplete or erroneous factual background. Note, however, that justices themselves do not always agree on the proper judicial attitude at appeal towards the fact-related analysis performed by a trial court. To a large extent the attitude of a supreme court towards the findings of the trial court depends on the self-perception of the supreme court.[156] The most famous instance of a high court requesting supplementary briefing on history in the U.S. is probably *Brown I*.[157] Nonetheless, Chief Justice Warren, writing for a unanimous Supreme Court, did not develop a line of historical argument in the reasoning of the judgment.

References to the past used for constitutional or statutory interpretation, on the other hand, may be introduced not only by the parties but also the court. In Canada it has been suggested that it is appropriate for judges to take judicial notice of historical facts.[158] The entry into force of the Charter of Rights and Freedoms increased judicial creativity in constitutional reasoning and also in the admissibility of references to the past. Thus, independent of whether rules of evidence apply to submissions made by the parties, contemporary constitutional review fora are relatively free to introduce arguments from history as they see fit.

In practice, the outcome of the above processes is reflected in judgments heavy with historical narratives, as selected and presented by the court itself. Factual submissions made by the parties under strict rules of evidence, and historical references introduced by the court, most often become indistinguishable in the judgment; more precisely, the difference is distinguishable to the extent that the court presents references to history in a manner which makes the difference apparent. For instance, the Canadian Supreme Court's judgment in *Delgamuukw* is a weighty account of aboriginal history.[159] The case was a monumental attempt to establish aboriginal title in British Columbia—monumental because of the previously unseen volume of historical evidence, including aboriginal oral history, presented in trial.[160] In his comment Justice Lambert, who tried the case on appeal in the British Columbia Court of Appeal, remarked that the Canadian Supreme Court's judgment is based on submissions other than the ones

submitted by the counsel at the trial, including as yet unpublished academic writing and the Supreme Court's own independent research.[161] To an outside observer the sources mentioned by Justice Lambert are impossible to distinguish in the Supreme Court's judgment. Thus references to the past as facts and as arguments are introduced under different standards of admissibility. Nonetheless, courts usually do not distinguish these submissions in their argument; historical evidence, once admitted or introduced under different standards of scrutiny, and other references to history are argued in similar narrative structures. Therefore, judicial consideration of historical data among the facts of the case, as opposed to references to past argument in support of a legal position, will be treated identically for the purposes of the present analysis.

Following from the above, the observer has the impression that in constitutional cases historical examples are used to examine the story behind the drafting of a constitution, or of a provision thereof. References to history are made to explain the motivations and fears of the drafters, or a compromise that the constitutional provision was meant to record. Constitutional review fora also often consult history in order to learn about the evolution of the segment of reality that the claim before them seeks to represent. In certain cases resort to such inquiry into past events takes place without any special justification—or, more precisely, as if learning the history of a constitutional provision or a claim was per se relevant to deciding the issue. In other cases the inquiry into the past is performed in the course of the application of a judicially crafted test or set of criteria. Whether originally invoked by the court in the form of a juridical argument, or just as an illustration or lesson from the past, these accounts of history retold by constitutional review fora amount to historical narratives. On the face of it, the function of historical narratives in constitutional cases is to resolve the indeterminacy characterizing cases submitted for constitutional review.

2.4. Conclusion: variety and recurring traits in constitutional argument

Ever since the countermajoritarian difficulty met sufficient responses, one of the most inviting challenges left for a theory of constitutional adjudication is the phenomenon of indeterminacy posed by the constitution's open texture. Paradoxically, although in constitutional adjudication the limits of textualism are readily apparent, the text of the constitution preserves an important role in constitutional jurisprudence in legitimizing the courts' reasoning in reaching its decisions. At the same time, although constitutional review fora battle with open-ended constitutional provisions on a daily basis, they rely on relatively few types of arguments in their jurisprudence. Arguments derived from the constitutional text do not meet the demands of deciding constitutional cases. In constitutional adjudication arguments from beyond the text far outnumber textualist arguments. In deciding a constitutional case, context itself is multilayered. In a sphere dominated by lawyers, arguments from legal scholarship or juridical arguments are inevitably a strong component of context. The above analysis has revealed that juridical arguments often have a backward-looking component. Beyond juridical arguments, constitutional review fora tend to rely on extra-legal arguments, among which references to the past, history, and traditions have acquired a certain preeminence: courts tend to rely on accounts of the past, history, and traditions with great confidence in radically different settings.

Accounts of the past lurk in all corners, whether behind the cloak of juridical arguments, or masquerading as well-exposed narrative accounts of past events. The intensity of this claim varies with framers'-intent arguments, various tests calling for an inquiry into past injustice, or more general accounts of past deeds. Yet it is clear that historical narratives retain unusually high esteem in constitutional adjudication and rarely trigger profound challenges directed at their very appropriateness (legitimacy), as is the case with value arguments in constitutional cases. This phenomenon is startling to say the least, since constitutional provisions are typically silent about the relevance of history for their application or interpretation. At the same time,

however, in constitutional cases the relevance and authoritativeness of historical narratives are almost always taken for granted and thus rarely meet serious reservations among lawyers. This makes historical narratives an excellent subject for an inquiry into the role of historical narratives in taming indeterminacy in constitutional adjudication. The following chapters will analyze instances in which courts have invoked historical narratives, the primary question being whether historical narratives do deliver on this promise of curbing indeterminacy, and, if not, what makes them so appealing, if not compelling, in constitutional adjudication. To start this inquiry, Chapter Three will analyze the relationship of the constitutional text and historical narratives from a different perspective: the focus of the analysis is on what it is in the constitutional text that invites historical narratives and to what extent the text of the constitution, if at all, guides courts' inquiry into the past.

NOTES

1 Bederman, *Classical Canons*, 23 et seq.
2 Viehweg, *Topics and Law*. Also Coriat, "Topiques juridiques".
3 Posner, "Past-dependency", 581.
4 *Amalgamated Society of Engineers v The Adelaide Steamship Company Ltd & Others* (1920), 28 CLR 129, 161—162 (Higgins J.), the so-called *Engineers' case*. For a significant departure from literalism towards a moderate orginalist position in Australia see *Cole v Whitfield* (1988), 165 CLR 360.
5 Patapan, *Judging Democracy*, 12–13 and 16.
6 Saunders, "Interpreting the Constitution", 3.
7 Stoljar, "Interpretation, Indeterminacy and Authority", 481–482.
8 Brest, "The Misconceived Quest", 207.
9 Hart, *Concept of Law*, 124–128 and 134.
10 Carter, *Reason in Law*, 123.
11 Aprill, "The Law of the Word".
12 "Looking it up: Dictionaries and Statutory Interpretation."
13 *Nixon v United States*, 506 U.S. 224 (1993).
14 *Azanian Peoples' Organization (AZAPO) v President of South Africa*, CCT 17/96 (1996), paras. 34–35
15 Rosenfeld, "Constitutional Adjudication in Europe and the United States", 648.
16 For a comparative account of procedural and substantive models of due process see Ramraj, "Four Models of Due Process".

17 *Lochner v. New York*, 198 U.S. 45 (1905).
18 See Friedman, "The History of the Countermajoritarian Difficulty", 1448–49, showing that the amount of economic legislation thus invalidated was still insignificant compared to the amount of economic regulation upheld by the Supreme Court in the same period.
19 Lochner's underlying premise was considerably weakened in *Nebbia v New York,* 291 U.S. 502 (1934), and it was overruled in *West Coast Hotel Co. v Parrish,* 300 U.S. 379 (1937). Also *Williamson v Lee Optical Co.*, 348 U.S. 483 (1955).
20 In *Griswold*, reference was also made to the Third, Fourth, and Fifth Amendments. *Griswold v Connecticut*, 381 U.S. 479 (1965). The pre-Griswold line of cases awarding constitutional recognition to various aspects of liberty (at least in part on due process grounds) include control over education (*Meyer v Nebraska*, 262 U.S. 390 [1923], *Pierce v Society of Sisters*, 268 U.S. 510 [1925]) and the right to have offspring (*Skinner v Oklahoma*, 316 U.S. 535 [1942]).
21 *Loving v Virginia*, 388 U.S. 1 (1967).
22 *Roe v Wade*, 410 U.S. 113 (1973). See also *Planned Parenthood of Southern Pa. v Casey*, 505 U.S. 833 (1992).
23 *Lawrence v Texas*, 539 U.S. 558 (2003), overruling *Bowers v Hardwick*, 478 U.S. 186 (1986).
24 *Washington v Glucksberg*, 521 U.S. 702, 720–721 (1997). Also id., 710.
25 See Chapter One.
26 *Virginia Pharmacy Board v Virginia Citizens Consumer Council*, 425 U.S. 748 (1976).
27 *Central Hudson Gas v Public Service Commission*, 447 U.S. 557 (1980).
28 *Irwin Toy Ltd. v Québec (A.-G.)* (1989), 1 S.C.R. 927 (Dickson CJC, Lamer and Wilson JJ).
29 *Irwin Toy Ltd. v Québec (A.-G.)*, 968.
30 *U.S. v O'Brien*, 391 U.S. 367 (1968), and *Cohen v California*, 403 U.S. 15 (1971).
31 *Ex parte Professional Engineers' Association* (1959) HCA 47; (1959) 107 CLR 208, Windeyer J., para 3.
32 *Du Plessis v De Klerk*, CCT 8/95; 1996 (3) SA 850 (CC); 1996 (5) BCLR 658 (CC).
33 *Du Plessis v De Klerk*, para. 44.
34 *Du Plessis v De Klerk*, para. 44.
35 Rautenbach, "Muslim Personal Law and the Meaning of 'Law'".
36 Farlan, "The Protection of Language Rights in the South African Interim Constitution".
37 Graybill, "South Africa's Truth and Reconciliation Commission", 47.
38 *State v Makwanyane*, CCT/3/94; 1995 (3) SA 391 (CC); 1995 (6) BCLR 665 (CC).
39 *State v Makwanyane*, paras. 24–25.
40 *State v Makwanyane*, para. 263.
41 *State v Makwanyane*, para. 308.
42 Mokgoro, "The Protection of Cultural Identity", 1557.
43 Du Plessis, "Emergence of a Constitutional Jurisprudence in South Africa", 315.

44 E.g. *Hoffmann v South African Airways*, 2001 (1) SA 1 (CC); 2000 (11) BCLR 1235 (CC). See Klug, *Constituting Democracy*, 164–165.
45 See section 21(1), South African Constitution, and Mokgoro, "*Ubuntu* and the Law in South Africa".
46 See Baker, "The Three Languages of the Common Law".
47 *Bandhua Mukti Morcha v Union of India* (1984), 3 SCC 161 (P.N. Bhagwati, R.S. Pathak and Amarendra Nath Sen, JJ.).
48 *Bandhua Mukti Morcha v Union of India*, para. 11.
49 Anand, "Public Interest Litigation".
50 *Re Wakim, Ex parte McNally* [1999], H.C.A. 27.
51 *Re Wakim, Ex parte McNally,* paras. 39, 46.
52 *United Democratic Movement v the President of the Republic of South Africa* (CCT23/02), 2003 (1) SA 495; 2002 (11) BCLR 1179; [2002] ZACC 21, para. 83.
53 23/1990 (X. 31.) AB decision, ABH 1990, 94–95 (J. Schmidt, dissenting).
54 Hart, *Concept of Law*, 145.
55 Habermas, *Between Facts and Norms*, 252.
56 See Gadamer, "Text and Interpretation".
57 Ball and Pocock, *Conceptual Change and the Constitution*, 8.
58 Bobbitt, *Constitutional Fate*, 7 and 9.
59 Campos, "Against Constitutional Theory", 117.
60 Charles, "Extrinsic Evidence and Statutory Interpretation", 17.
61 Posner, *Problems of Jurisprudence*. See especially 423–434 on the reasons for the tendency.
62 Here I follow Alexy, *A Theory of Legal Argumentation*, 211 et al. For the purposes of the present analysis adherence to the special case thesis is not supposed to entail adherence to the concept of law as an "autopoetic system".
63 Alexy, "The Special Case Thesis", 375.
64 Carter, *Reason in Law*, 49.
65 See Bobbitt, *Constitutional Fate*, 39–58. See also Chapter One.
66 *McCulloch v Maryland*, 17 U.S. (4 Wheat) 316 (1819).
67 "It is not enough to say that it does not appear that a bank was not in the contemplation of the framers of the constitution. It was not their intention, in these cases, to enumerate particulars" *McCulloch v Maryland,* 323. (Marshall Ch. J.)
68 "As the inevitable consequence of giving this very restricted sense to the word 'necessary' would be to annihilate the very powers it professes to create; and as so gross an absurdity cannot be imputed to the framers of the constitution, this interpretation must be rejected" *McCulloch v Maryland*, 355. (Marshall Ch. J.)
69 *Dred Scott v Sanford,* 60 U.S. (19 How.) 393 (1857).
70 *Dred Scott v Sanford,* 407–408.
71 Eskridge, "New Textualism", 683.
72 For a now classic account see Brest, "The Misconceived Quest".
73 Eskridge, "*Lawrence*'s Jurisprudence of Tolerance", 1046.
74 TenBroek, "Extrinsic Aids in Constitutional Construction, Part 4", 169–170.

75 Dorf, "Text, Time and Audience Understanding in Constitutional Law", 984.
76 E.g. *Seminole Tribe v Florida*, 517 U.S. 44 (1996), and *Alden v Maine*, 527 U.S. 706 (1999).
77 Vaughan, "The Use of History in Canadian Constitutional Adjudication", 66 et al.
78 On this problem see Tremblay, "*Marbury v Madison* and Canadian Constitutionalism", 531 et seq.
79 *Reference re Section 94(2) of the* Motor Vehicle Act [1985], 2 S.C.R. 486, para. 50.
80 Eberle, "Human Dignity, Privacy and Personality in German and American Constitutional Law", 970.
81 *Elfes* case (6 BVerfGE 32), in: Kommers, *Constitutional Jurisprudence*, 317.
82 *Reference Re Same-Sex Marriage*, 2004 SCC 79, para. 30.
83 *Reference Re Same-Sex Marriage*, para. 21, quoting interveners.
84 *Reference Re Same-Sex Marriage*, para. 22.
85 See, recently, e.g. Bronaugh, Barton and Kavanagh, "The Idea of a Living Constitution", 74 (purposive interpretation and the "living constitution"), and McCreath, "A 'Purposive Approach' to Constitutional Interpretation".
86 *R. v Big M Drug Mart Ltd.* [1985], 1 S.C.R. 295, para. 344 ("[T]he interpretation should be a generous and not a legalistic one, aimed at fulfilling the purpose of the guarantee and securing the individuals the full benefit of the Charter's protection."); *State v Makwanyane*, CCT/3/94; 1995 (3) SA 391 (CC); 1995 (6) BCLR 665 (CC), para. 10 (Chaskalson, J.) ("[S.11(2) of the interim Constitution] must also be construed in a way which secures for 'individuals the full measure' of its protection").
87 *R. v Big M Drug Mart Ltd.*, para. 344 (emphasis added). The Canadian Supreme Court had earlier expressed its preference for a purposive approach in *Hunter v Southam* (1984), 11 D.L.R. (4th) 641, 649; the formulation in *Big M* quoted above, however, became the standard reference in Canadian jurisprudence and abroad.
88 *State v Makwanyane*, para. 10.
89 Eskridge and Frickey, "Quasi-Constitutional Law". Also Nelson, "Originalism and Interpretive Conventions".
90 Llewellyn. "Remarks on the Theory of Appellate Decision", 403–406.
91 Hart, *Concept of Law*, 126.
92 Eskridge and Frickey, "Quasi-Constitutional Law", 596.
93 Hart, *Concept of Law*, 126.
94 Shapiro, "Continuity and Change in Statutory Interpretation", 925.
95 Bobbitt, *Constitutional Fate*, 38.
96 Posner, *Law and Literature*, 227.
97 *Lochner v New York*, 198 U.S. 45 (1905).
98 See the use of Canadian history in the *Reference re Secession of Québec* [1998], 2 S.C.R. 217 in Chapter Two.
99 *Muller v Oregon*, 208 U.S. 412 (1908).

100 Rustad and Koenig, "The Supreme Court and Junk Social Science", 104 et seq.
101 Rustad and Koenig, "The Supreme Court and Junk Social Science", 110 et seq. (1993).
102 *Brown v Board of Education of Topeka I*, 347 U.S. 483 (1954).
103 *Plessy v Ferguson*, 163 U.S. 537 (1896).
104 For an overview see Heise, "Equal Educational Opportunity by the Numbers".
105 *McClesky v Kemp*, 481 U.S. 279 (1987).
106 *McClesky v Kemp*, 286.
107 *McClesky v Kemp*, 297.
108 Lindman, "Sources of Judicial Distrust of Social Science Evidence", 763.
109 Fradella, "Federal Judicial Views of the Social Science 'Researcher'", 111.
110 *Irwin Toy Ltd. v Québec (A.-G.)*, 1 S.C.R. 927 (Dickson CJC, Lamer and Wilson JJ).
111 *Irwin Toy Ltd. v Québec (A.-G.)*,989 (Dickson CJC, Lamer and Wilson JJ).
112 *Irwin Toy Ltd. v Québec (A.-G.)*, 990.
113 *Kalkar* case (49 BVerfGE 89), in Kommers, *Constitutional Jurisprudence*, 142.
114 Wechsler, "Toward Neutral Principles of Constitutional Law".
115 *Calder v Bull*, 3 U.S. (Dall.) 386 (1798).
116 *Calder v Bull*, 388.
117 *Calder v Bull*, 400.
118 Sunstein, "The Idea of the Useable Past", 604.
119 Gordon, "The Arrival of Historicism", 1026.
120 Pocock, "Introduction to Burke's Reflections", vii; E. Smith, "Introduction", xvii.
121 Bobbitt, *Constitutional Fate*, 26.
122 Bickel, *Least Dangerous Branch*, 235.
123 Berman, "Toward Integrative Jurisprudence", 780 and 788–791; also Kryger, "Law as Tradition".
124 Dworkin, *Law's Empire*.
125 Rüsen, *Studies in Metahistory*, 5.
126 *R. v Heywood* [1994], 3 S.C.R. 761, 787.
127 E.g. see *D. v Council*, C-122/99, 31 May 2001, paras. 37–38.
128 Scalia, *A Matter of Interpretation*, 34.
129 Bickel, *Least Dangerous Branch*, 236. Also Friedman and S. B. Smith, "Sedimentary Constitution", 955–957.
130 See Smith, "Idolatry in Constitutional Interpretation", 157–192.
131 Eskridge, Frickey, and Garrett, *Legislation and Statutory Interpretation*, 295–312.
132 *Roe v Wade*, 410 U.S. 113 (1973).
133 *R. v Zundel* [1992], 2 S.C.R. 731.
134 *R. v Zundel*, 745 (McLachlin, J.).
135 *Younstown Steel and Tube Co. v Sawyer*, 343 U.S. 579 (1952).
136 *New York Times v U.S.*, 403 U.S. 713, 746 (1971).
137 *Tennessee Valley Authority v Hill*, 437 U.S. 153 (1978) (Endangered Species Act, 1973).

138 Ball and Pocock, "Introduction", 8–9.
139 Gadamer, "Text and Interpretation".
140 Hart, *Concept of Law*, 127.
141 Fried, "The Artificial Reason of Law".
142 Kramer, "Fidelity to History", 1635.
143 *44 Liquormart, Inc. v Rhodes Island*, 517 U.S. 484 (1996).
144 See LeGoff, *History and Memory*, 141.
145 McConnell, "Tradition and Constitutionalism before the Constitution", 175–183.
146 Gordon, "The Struggle over the Past", 125.
147 See Kramer, "Fidelity to History", 1640–41.
148 *Lee v Weisman*, 505 U.S. 577 (1992).
149 *Lee v Weisman*, 591 (Kennedy, J.).
150 *Lee v Weisman*, 632 (1992) (Scalia, J., dissenting).
151 Barber, *On What the Constitution Means*, 47–49.
152 Ogilvie, "Evidence, Judicial Notice".
153 *Romer v Evans*, 517 U.S. 620 (1996).
154 Farber, "Adjudication of Things Past", 1013–1014.
155 See, e.g., *R. v Sparrow* [1990], 1 S.C.R. 1075.
156 For an excellent illustration see *R. v van der Peet* [1996], 2 S.C.R. 507, paras. 207–208, per L'Heureux Dube J., dissenting.
157 *Brown v Board of Education of Topeka I*, 347 U.S. 483 (1954).
158 J. Hall, dissenting, *Calder v A.-G. of British Columbia* (1973), S.C.R. 313, 346. See Ogilvie, "Evidence, Judicial Notice", 205, and Vaughan, "The Use of History in Canadian Constitutional Adjudication", 81.
159 *Delgamuukw v British Columbia* [1997], 3 S.C.R. 1010.
160 For details see Chapter Five.
161 Lambert, "Ten Unresolved Issues", 254–255.

CHAPTER THREE

The Constitutional Text in the Light of History

As demonstrated in Chapter Two, although often the constitutional text itself offers no readily available solutions to particular problems, the quest for legitimacy in constitutional adjudication finds refuge in the constitutional text. Theories of constitutional interpretation resort to the text of a constitutional provision as a yardstick to evaluate or establish the appropriateness of a given construction of the constitution in a specific case. The constitutional text is believed to fulfill this legitimizing function, despite constitutionalists' awareness of the open texture of constitutional provisions, the ghost of indeterminacy, and the admittedly extra-textual (contextual) characteristics of the overwhelming majority of arguments deployed in constitutional cases. In this subculture, a constitutional argument or interpretation passes muster as long as it can be demonstrated that it is supported by the text of the constitution. Disagreement centers on additional methods and reasons for justification. Positions range from the need to stick to the "original meaning" of the text to the search for a reading that exposes the constitutional text in its best light. While these positions on finding a proper theory of constitutional interpretation are based on radically different premises, they concern the very characteristics of the constitutional text, the tasks of the court performing constitutional review and the role of the justices sitting on that court, and the place of the court in the universe of political affairs. Nonetheless, the discourse on legitimacy in often clashing theories of constitutional interpretation is easily and elegantly rescued by pointing to the text of the constitution.

Among arguments aiding constitutional construction, historical narratives have acquired unrivalled prominence in constitutional adjudication. In addition to the often hidden historicity of juridical (legal arguments), constitutional review fora hesitate little to draw lessons from the past and to rely on the time-honored practices and traditions of the polity. Examples from the past are all the more prevalent in constitutional cases in which the constitutional review forum cannot rely on the very words of the constitution, either because of the text's open texture or because of the absence of any guidance. In such cases, courts are more than tempted to look into lessons from the past. Thus, historical narratives infiltrate constitutional reasoning on many levels, in intended and unintended ways, while the presence and workings of historical narratives often elude critical analysis. Common sense directs that when courts resort to historical narratives they significantly depart from the constitutional text, and might even leave the domain of prima facie constitutional and legal argument as such. Courts consult the past for guidance, to provide backing for a particular interpretation of the constitutional text, and in order to reduce indeterminacy or to chase it away in a familiar and reassuring manner. Such attempts are part of courts' quest to eliminate indeterminacy in constitutional interpretation. It seems, indeed, that the pedigree of historical narratives rests primarily of this premise. Therefore the inquiry into the workings of historical narratives shall continue with an exploration of how historical narratives are called to aid in constructing the constitutional text, or—in cases where textual guidance is lacking—to substitute the constitutional text.

In order to examine whether historical narratives are capable of reducing indeterminacy in constitutional cases the first part of the chapter takes a close look at constitutional provisions themselves, in order to ascertain whether it is the language of the constitutional provisions that triggers an inquiry into the past. The intensity of the relationship of the constitutional text and historical narratives in constitutional adjudication may be pictured along a continuum. The continuum stretches from references to history invited by the constitutional text all the way towards history substituting the constitutional text. In between these two poles the relationship between the constitutional text and historical narratives is symbiotic: historical reasoning sup-

plements the constitutional text. Between these two poles constitutional review fora rely on historical narratives as a supplement to the text of the constitution: historical analysis is applied as an interpretive aid in a contextual analysis when it is called for in a test established by the court, or when references to the past give rise to deviations from an otherwise applicable rule (exception). This chapter will look into the three rather different constitutional scenarios stretched along this continuum in order to sketch the initial phases of the relationship between historical narratives and the constitutional text in constitutional adjudication.

3.1. Constitutions on their pasts; courts on the past of their constitutions

Some constitutions are ready to reveal the story behind their own making, while other constitutional charters contain traces of their own making in less obvious ways. Among the founding deeds exposing the circumstances of their own making the English Bill of Rights of 1689 and the U.S. Declaration of Independence of 1776 are probably the most famous documents of constitutional significance. When pointing to the reasons for the colonies' breaking away from the Crown, the Declaration exclaims that the "History of the present King of Great-Britain is a History of repeated Injuries and Usurpations." Indeed, in recounting the instances of gross mischief committed by the Crown the Declaration of Independence was not that unique among the remonstrances and petitions protesting against London's rule.[1]

As if following a well-trodden path, many contemporary constitutions refer to past events in their opening sections. The preamble of the Constitution of the Republic of Ireland reminds of past ordeals in general terms (the "heroic and unremitting struggle to regain the rightful independence of our Nation")[2], while the constitutions of Algeria,[3] Cambodia,[4] China (1991)[5], Croatia (1990)[6] or Macedonia (1992)[7] recount past days of glory and trial in detail. Revolutions and freedom movements, recent and distant, are frequently mentioned in

the preambles of the constitutions of Indonesia,[8] Iran,[9] and Liberia[10]. The constitutions of Belarus,[11] the Czech Republic,[12] and Lithuania,[13] and Latvia's Declaration on the Renewal of Independence[14] illustrate how newly independent countries tend to mention previous periods of independence and flourishing—as if to demonstrate the worthiness of a polity for an independent future. Some constitutions go further than recounting their glorious or vicious past and connect traditions and past events with the future. Some documents, like the Argentine[15] and the Georgian[16] constitutions, simply mention posterity, while others offer more detailed accounts of the past and suggest that the past may be controlling the future of the nation. As in the preamble of the 1997 Polish constitution: "Beholden to our ancestors for their labors, their struggle for independence achieved at great sacrifice, for our culture rooted in the Christian heritage of the Nation and in universal human values; […] Obliged to bequeath to future generations all that is valuable from our over one thousand years' heritage; […] Mindful of the bitter experiences of the times when fundamental freedoms and human rights were violated in our Homeland."[17]

The words of the 1997 Polish preamble echo the language of the U.S. Declaration of Independence of 1776, thus an allusion might be in place. Interestingly, though, the main drafter of the Declaration of Independence, Thomas Jefferson himself, was not so concerned about the past of constitutions but their future; he believed that a "generation may bind itself as long as its majority continues in life; … and may change their laws and institutions to suit themselves. Nothing then is unchangeable but the inherent and unalienable rights of man."[18] This idea is also echoed in Article 28 of the Declaration of Rights of Man and Citizen of the 1793 French Constitution, holding that "People always have the right to review, reform, and amend their constitution. With its laws a generation cannot bind a future generation."[19] Such adjustments, when carried out by the constitution makers of the day—and the history of French constitutionalism has more than a dozen blueprints of this sort—are heavy with measures taken in reaction to past experiences and reflected in the rules on the structure and procedures of government.[20]

Although numerous constitutions contain references to the past and future in general terms, with a few outstanding exceptions such as

in the *AZAPO* case[21] in South Africa discussed below, constitutions' references to the past typically remain unnoticed in constitutional adjudication. The general indifference of constitutional review fora might be attributable to the language of these opening declarations: a historical exposition referring to the past is unlikely to bear any normative character, even if contained in the preamble of a constitution. This intuition might be tested in the light of the French Constitutional Council's reliance on the preamble of the 1958 Constitution.

The preamble of the 1958 Constitution "solemnly reaffirms" in express terms the 1789 Declaration of the Rights of Man and Citizen and the preamble of the 1946 French Constitution. The drafters of the 1958 French Constitution did not intend these references to be applied in practice, nor did they mean the Constitutional Council to become an adamant defender of constitutional rights. Also, the language of the 1958 French Constitution grants little grounds for the defenders of constitutional rights as—rather uncharacteristically for a post—World War II constitution—the 1958 French Constitution itself does not contain an extensive bill of rights. Nonetheless, by 2000 Stone Sweet considered it appropriate to find that the "French bill of rights" is entirely a product of case law developed under the aegis of the preamble of the 1958 Constitution.[22] In its jurisprudence the Constitutional Council relied on the invocation of "fundamental principles recognized by the laws of the republic" and other similar phrases, infusing these sweeping passages with some flavor of French constitutional history, thus invoking a sense of constitutional continuity. This continuity narrative then became essential for the normativeness of principles thus derived from the open-ended language of the preamble. This technique is especially interesting because the textual ground for the continuity narrative in the preamble is not that heavy with references to past glory and injustices, as was the case with constitutions reciting the ballad of the shared experiences of the polity.[23]

While certain constitutions make clear declarations about their past, or about their drafters' perception of past events, most constitutional provisions (especially the ones following the preamble) are silent about their past. Nonetheless, a watchful observer or a court might trace hidden past deals and tensions, fears and promises woven into the words of the deeds of government. Some provisions of the

German Basic Law deal directly with past wrongs, such as Article 139 exempting de-Nazification laws from constitutional review. The constructive vote of no-confidence is a more subtle reference to past abuse. Article 67 of the Basic Law allows the lower house of the German legislature (Bundestag) to bring down the cabinet only in the event that the Bundestag is able to elect a new chancellor (Article 67). The solution was introduced to stabilize the government and to prevent frequent ministerial crises. These perils were not theoretical possibilities only but the very experience that had plagued the Weimar Republic and contributed to Hitler's gaining political space.

In provisions which go by almost unnoticed, the 1958 French Constitution also preserves traits of French constitutionalism that date back to the days of the French Revolution. The 1958 French Constitution reserves national sovereignty for the people (Article 3). This constitutional provision can be traced back to the 1789 Declaration of the Rights of Man and Citizen, which emphatically declares that the "source of all sovereignty is essentially in the nation; no body, no individual can exercise authority that does not proceed from it in plain terms" (Article 3).[24] This rule is further refined in the 1791 French Constitution, which announces that sovereignty belongs to the nation, and that it is indivisible, inalienable, and imprescriptible (Title III, Article 1). Transferring sovereignty from the king to the nation was a grand idea, attributable to Abbé de Sieyès in his pamphlet "What is the Third Estate?" (*Qu'est-ce que le tiers-état*?, 1789). It was announced in the 1789 Declaration and was supplemented by rules of practical operation in the 1791 Constitution. French constitutionalism has borne the consequences of this maneuver ever since.[25] Indeed, West does not exaggerate when submitting squarely that even today's Fifth Republic "is regarded as being legitimate because it is founded on, and acts for and in the name of, the nation. The nation thus provides a strong ideological basis for the state."[26]

While the 1791 Constitution remained in force for only a year, the 1789 Declaration was preserved in the 1958 French Constitution. It is largely due to this factor that the basic concepts of French constitutionalism are to be understood in the light of history and traditions referring back to the French Revolution. The French Constitutional Council did rely on this concept in its decision in 1962 concerning the

constitutionality of a constitutional amendment that was passed in a referendum, making the president of the republic directly elected. President de Gaulle's referendum initiative was an open violation of the 1958 French Constitution's amendment provisions: referenda in this manner were never envisioned by the drafters of the 1958 French Constitution as a means of constitutional amendment.[27] Nonetheless, the Constitutional Council refused to invalidate the result of the referendum, in which 62.5 percent voted in favor. The Council rejected the application for want of jurisdiction, holding that "[…] it follows from the spirit of the Constitution, which made the [Constitutional Council] a body regulating the activity of public authorities, that the laws to which the Constitution intended to refer in Article 61 are only those *lois* [acts] passed by Parliament, and not those which, adopted by the people after a referendum, constitute a direct expression of national sovereignty."[28]

The decision is often referred to as the "suicide of the Constitutional Council" and resulted in the marginalization of the Council for almost a decade. Nonetheless, the president of the Constitutional Council said that it would not have been acceptable to contradict the constitution's author on its meaning.[29] While the implications of such a finding are readily apparent, this position is almost unintelligible without a grasp of "the spirit of the Constitution" and the concept of national sovereignty in the history of French constitutionalism.

In certain cases courts do resort to explaining the history behind a constitutional provision with the aim of situating the claim within the context of the constitution, where layers of prior practices, fears, and understandings are considered to amount to context. After identifying the claim in *Everson*—a challenge based on the Establishment Clause––Justice Black of the U.S. Supreme Court started discussing the "reflection of the words of the First Amendment in the minds of early Americans"[30] without much consideration as to the necessity or appropriateness of such an examination of the past of the First Amendment.[31] In other cases judicial review fora examine the relevant past with the express aim of establishing whether past practices support the claim of the petitioners within the constitution's context. In cases concerning religious/minority education under section 93 of the Constitution Act, 1867, the Canadian Supreme Court always examines

the division of control over section 93 schools at the time the respective province entered the confederation.[32] Referring to the special status of section 93 schools, Justice Iacobucci submitted that "[t]his state of affairs is the product of history, stemming from what this Court has referred to as 'a solemn pact resulting from the bargaining which made Confederation possible'."[33] Note that, even when the Canadian Supreme Court inquires into history, that is, the state of affairs at the time of the entry into force of section 93, it is for the Supreme Court to determine the weight of that evidence for the purposes of deciding a case.

Constitutional review fora invoke arguments referring to the past, history, and traditions (historical narratives) against radically different constitutional (textual) backgrounds. Interestingly, although the language of constitutional provisions in the majority of the above cases did not contain any explicit references to the past, history, or tradition, the phrases were construed as references to longstanding constitutional principles or rules by the constitutional review fora themselves. This invites an exploration of the relationship of the words of the constitution (i.e., the constitutional text in a narrow sense) and the courts' reliance on historical narratives in constitutional adjudication. Such an analysis might commence with a preliminary examination of the correlation, if any exists, between the intensity of the references to the past in the constitutional text and the readiness of constitutional review fora to rely on such historical expositions.

3.2. One pole: the constitutional text calling for an inquiry into history

In constitutional adjudication, prima facie easy cases are those in which the written words of the constitution provide express guidance for the resolution of an issue. In very special cases the constitutional text might even contain express requirements regarding the better understanding, interpretation, and application of its provisions. Section 39 of the South African final Constitution provides express instructions on the aids and aims of constitutional and statutory inter-

pretation. While such a provision is almost exceptional, constitutional provisions are believed to contain less explicit hints regarding their proper reading. To begin with, this chapter explores the jurisprudence of constitutional review fora vis-à-vis historical narratives in cases where, according to the courts, the text of the constitution expressly calls for an inquiry into the past. For such an analysis, two convenient starting points are offered, one from South African transitional justice jurisprudence and the other from Canadian jurisprudence on indigenous peoples' rights. These contexts of inquiry might seem remote and unrelated at first. However, the present analysis will focus not on the substantive components of jurisprudence developed by the respective courts, but on the techniques of reasoning applied by the justices when interpreting various constitutional provisions calling for an inquiry into history. The careful comparative analysis will concentrate on the extent to which the justices felt compelled by the constitutional text to inquire into the past and on the reasons (if any) revealed by the justices in prompting such an analysis.

3.2.1. Detailed constitutional guidance for an inquiry into the past: the application of the South African interim Constitution's epilogue

Among modern constitutions one of the most detailed accounts of past wrongs and the present fears generated by them is contained in the epilogue (or postamble) of the South African interim Constitution of 1991, which bears the title "National Unity and Reconciliation." Opening with the image of a "historic bridge" between the unjust past and the promise of a democratic future built on respect for human rights, the epilogue mandates amnesty legislation as a means to achieve reconciliation. This unusually lengthy segment of the constitution, written in elevated tones, was inserted into the interim Constitution at the very last stage, after the drafting work in Kempton Park was already over. The original draft had no provisions on amnesty—indeed, amnesty was an issue for closed-door negotiations.[34] This might be a reason why general provisions on the need to come to terms with past injustice are not contained in the preamble of the in-

terim Constitution, but were subsequently included in the preamble of the final Constitution in 1996. The epilogue of the interim Constitution served as the constitutional basis for establishing a mechanism for bringing about truth and reconciliation in post-apartheid South Africa,[35] and for the constitutional review thereof in the *AZAPO* case.

In *AZAPO*, families of some of apartheid's best-known victims stood as petitioners, challenging numerous provisions of the Promotion of National Unity and Reconciliation Act of 1995 concerning amnesty.[36] The Act granted amnesty for acts committed with a "political objective" during the apartheid regime, in exchange for full disclosure of all relevant facts pertaining to the offense.[37] The amnesty procedure was to be administered by the Committee on Amnesty, one of the three committees of the Truth and Reconciliation Commission (TRC). The Committee on Amnesty was not a court of law but an independent tribunal composed of five members, and chaired by a judge.[38] In Kader Asmal's words, the "objective of this Act was to deepen our country's factual and interpretative grasp of its terrible past, going back to 1960."[39] Acting upon the petition in *AZAPO*, the South African Constitutional Court was in the position to decide about the constitutionality of legal measures designed to cope with a shameful and repressive past despised by the present regime.[40] The decision is especially interesting since the epilogue of the interim Constitution contains express provisions condemning the repressive past and mandating amnesty. Thus, the Constitutional Court was clearly in a position to draw normative consequences from the past for the purposes of the present and the future.

It would not have been inconceivable for the South African Constitutional Court to enter into passing a moral judgment on the horrors of apartheid, and to evaluate the appropriateness (if not constitutionality) of amnesty legislation against this background. Ample opportunity for such an approach was provided by the most serious challenge launched by the petitioners, which was directed not at amnesty legislation per se but at the scope of amnesty granted by the Act. The petitioners argued that although amnesty legislation is authorized in the epilogue, the amnesty provisions of the Act are too "far reaching" and are beyond the scope of constitutional authoriza-

tion. Thus the Constitutional Court had to determine the scope of the constitutional authorization granted to Parliament in the epilogue's amnesty provisions. The Constitutional Court interpreted the provisions of the epilogue on amnesty in the light of the more general constitutional mandate on democratic transition and reconciliation, and on coming to terms with the past. [41] The Court's judgment is based on the premise mirroring the language of the epilogue, that amnesty is a means to achieve reconciliation and a precondition for democratic transition. References to reconciliation and to the need to understand the past are the decision's signature trait. As Burnham observed: "[I]n reaching its decision, the Court went to great lengths to endorse the Act's rationale as essential to successful democratic transition."[42]

The South African Constitutional Court used the epilogue's metaphor of walking the "historic bridge" between past and future to describe the transition process, and amnesty is used to erect this bridge.[43] Linking together peaceful transition, reconciliation, and amnesty enabled the Constitutional Court to see amnesty legislation in the broader context of democratic transition, as envisioned in the epilogue of the interim Constitution.[44] The Court emphasized that it is impossible to build a lasting future based on retaliation and revenge.[45] The emphasis on a successful yet peaceful undoing of past injustice must be seen in the light of the epilogue's language, contrasting understanding with vengeance. According to the Constitutional Court, reconciliation may only be achieved by learning about the past. In the Act, amnesty is granted to offenders in exchange for a full disclosure of the relevant facts of the offense. For the Court, as a result, amnesty is the best means to process the past for the purposes of the future. "What the epilogue to the Constitution seeks to achieve by providing for amnesty is the facilitation of 'reconciliation and reconstruction' by the creation of mechanisms and procedures which make it possible for the truth of our past to be uncovered."[46]

The Court argued that without amnesty, the prosecution of offenders would leave South Africa without any option for learning the truth:[47] it would be impossible to gather sufficient evidence to conduct such trials properly, and offenders are not likely to confess their acts in detail.[48] In its judgment the Constitutional Court said that although granting amnesty to past offenders was discomforting, there

was no better solution in the circumstances.[49] The Court emphasized that amnesty legislation has to strike a sensitive balance between the needs of the victims of past abuse and transition to a new future.[50] In its decision, the Constitutional Court refused to test the wisdom of the legislation and noted that the Court was only concerned about its constitutionality.[51] The Constitutional Court did not review the appropriateness of the period relevant for amnesty, or the acts covered by the amnesty provisions.

In the Court's formulation the issue in the case was whether granting amnesty for political offenses in exchange for full disclosure was in conformity with the interim Constitution. Although the epilogue expressly provides for amnesty, it does not describe the details of exempting offenders from the consequences of their actions. The decision of the Constitutional Court rests on two premises, which—although they might be connected to the words of the epilogue—are not prescribed by it. The first premise is that amnesty as such is future oriented: it is one of the means of building a new, democratic society. The second premise of the Court's decision is that amnesty should be granted for full disclosure. These premises underscore the Court's purposive approach. According to the Court the purpose of the amnesty legislation was to reveal the past for the purposes of a "new future." Thus in effect labeling the criminal prosecution of wrongdoers "revenge" and "retaliation", the Court converted amnesty into a learning process that is premised on the search for the truth. Full disclosure was cast as an essential precondition of this learning process. Corder notes that the Constitutional Court "showed a keen sensitivity for the politics behind the arguments by finding that reaching the truth was much more improbable without encouraging its telling by the prospect of amnesty."[52] The Constitutional Court's predictions about the difficulties of criminal prosecution turned out to be right. For instance, even while denying many allegations, Magnus Malan, a former apartheid minister of defense, appeared to disclose a lot more about his crimes during his hearing before the TRC than in the course of his criminal trial (where he was acquitted).[53]

One may find that the premises followed by the Constitutional Court echo the phrases of the epilogue. At the same time, it is interesting to observe that, although the Court is constantly talking about

the ways and means of coming to terms with past injustice, the Court at no point looks into the particulars of the gruesome yet relevant past. The first premise underlying the decision of the Constitutional Court is that the epilogue's amnesty provision is future oriented: the point of amnesty is to pave the way for the transition to a "new future." If viewed from the perspective of the future, the past, no matter how unjust it may be, is transformed into a set of historical facts, a record that may be closed upon the completion of research into the past. In this respect the concurring views of Judge Didcott are revealing when he says that "[o]nce the truth about the iniquities of the past has been established and made known, the book should be closed on them so that the catharsis thus engendered may divert the energies of the nation from a preoccupation with anguish and rancor to a future directed towards the goal which both the postscript to the Constitution and the preamble to the statute have set."[54]

This is a somewhat surprising observation, considering that, in other cases, the South African justices were ready to review the practices of the apartheid era in detail. In one case the Court analyzed the effects of racial segregation in education and interpreted "minority education" in its historical context.[55] In another case, concerning the introduction of water metering and water fees in the previously segregated suburbs of Pretoria, the Constitutional Court treated the acts of violent resistance to the plan as an expression of opinion inherited from the apartheid era.[56]

Nonetheless, in *AZAPO*, the Constitutional Court did not open the Pandora's Box of the past, despite the ambiguity concerning the scope of the actions covered by the amnesty procedure. For one, there is dispute as to whether amnesty is limited only to those actions which constituted a crime under the law as in force during apartheid. In addition, the amnesty rules apply to acts committed by the apartheid government as well as by liberation movements, among them the ANC. Note that two out of the three non-governmental commissions of inquiry were appointed by the ANC itself between 1992 and 1993. They found that the ANC did commit torture and other forms of human rights violations.[57] Dugard argues that this "even-handedness" was unfortunate to the extent that it created a "moral equality" among perpetrators and victims of apartheid.[58] The even-handedness re-

sulted, at least in part, from the Court's resistance to looking into the actual events of apartheid repression to be remedied via amnesty.

Reading the decision of the Constitutional Court one finds that the petitioners did not challenge these aspects of the amnesty provisions, thus it is possible to argue that it would have been beyond the powers of the Court to address them. Furthermore, in defense of the Constitutional Court's approach one may also submit that such considerations belong to the "wisdom" of the amnesty rules, a consideration that the Constitutional Court refused to review. Thus, in this respect the Constitutional Court was deferential towards the decision made by the legislative. The question might remain as to whether it is acceptable for a judicial review forum to be willfully incognizant of the past when deciding the constitutionality of legal norms designed to institutionalize that past. Skeptics may note that the work of the TRC "involved making that knowledge officially sanctioned, part of the historic record."[59] One may, however, argue that it was not for the Constitutional Court to analyze the amnesty legislation's appropriateness in the light of the actual events of the past, as there are no judicially enforceable standards to provide a basis for such a review. Thus, by not entering this field the Constitutional Court defined an important aspect of its powers and self-perception. The justices were indeed fully aware of the details of apartheid history and the lack of constitutional and legal standards for reviewing the appropriateness of the amnesty legislation from the perspective of that history: the Court distinguished comparative sources on amnesty with reference to the uniqueness of apartheid in South Africa.[60]

Nothing in the interim Constitution precluded the South African Constitutional Court from passing judgment about the injustices of the apartheid regime on a large scale, and the *AZAPO* case presented an excellent opportunity. The text of the epilogue is heavy with resentment towards apartheid's inhumanness and injustices. Thus the case was decided on the basis of a provision inviting the condemnation of the past, and the facts of the case also presented an opportunity to condemn the past in the name of the present or the future. Furthermore, expressing resentment from the constitutional bench in the early days of democratic transition would not have been unprecedented.

Passing judgment on segments of the past would not have been unprecedented, as Czech transitional justice jurisprudence demonstrates forcefully with the constitutional case of the Beneš decrees.[61] The decrees challenged were issued by President Eduard Beneš in 1945, expelling 2.4 million Sudetan Germans and Hungarians (ethnic minorities living on the territory of then-Czechoslovakia) as allies of occupying Nazi Germany, and confiscating their property without compensation. Subsequently, the decrees were enacted into law by the Czechoslovak parliament in 1946. At the time of democratic transition the validity of the Beneš decrees became a sensitive issue: if declared unconstitutional or otherwise invalid, the gates would be open for Sudetan victims of confiscation to seek justice.[62] It only added to the weight of the matter that restitution for movables taken by the Communists, such as bank accounts and other assets, appeared unlikely at the time, "so that the main subject of restitution would be family homes, apartment buildings, and building and agricultural land."[63] The first major hurdle in the case was the challenge directed at the formal validity of the Beneš decrees, submitting that a presidential decree cannot be considered proper legal means for taking property. In order to establish the formal validity of the Beneš decrees, the Czech Constitutional Court found it necessary to decide which government should be regarded as the proper sovereign of Czechoslovakia at the time the Beneš decrees were issued: Did sovereignty proper reside with the government of the Nazi-occupied Czechoslovak land, or did it reside with the Czechoslovak government (led by President Beneš) in exile?

Although the Czech constitutional justices emphasized that the present should not pass judgment on the past, they also found that the

> foundation of Czechoslovak law could not be put into doubt in any respect by the German occupation ... primarily due to the fact that the German Reich, as a totalitarian state ... exercised governmental power and established a legal order which in essence deviated from the substantive value base of the Czechoslovak legal order... As a consequence of coerced behavior on the part of the Czechoslovak state ... this state lost any credible

> democratic legitimacy, for its conduct quite clearly deviated from an attitude of constitutional sovereignty, that is, of a people whose desire to live in a democratic state had been manifested by the mobilization in 1938, among other actions. We can see precisely in this fact the reason why none of these disastrous acts could be recognized as legitimate, regardless of whether the constitutional procedures were observed when they were carried out. After the dismemberment of the Czechoslovak Republic and the collapse of its constitutional foundations, the conditions that prevailed for a number of years made impossible the democratic formation of the people's constitutive power within the territory of the Republic.[64]

Thus the Czech Constitutional Court did not hide its condemnation of one segment of the Czech past, that is, the Nazi occupation. In sheer constitutional terms, the consequence of this finding is that the Beneš decrees cannot be regarded as per se invalid enactments, since they were issued in accordance with the rules governing the operation of the legitimate government. Based upon this premise, the Czech Constitutional Court moved on to establish the constitutionality of the expulsion and the confiscation. Notably, in the Czech Court's judgment a segment of the past is condemned upon values that are fundamental to the Czechoslovak legal order and that are also supported by the peoples providing the regime with democratic legitimacy. This approach can clearly be taken as an example of a constitutional review forum condemning past events. The Czech Constitutional Court then followed up on this basis, evaluating the substantive rules of the Beneš decrees. In this respect the Court was of the view that the decrees were not made as a result of racist prejudice but reflected actual allegiance to anti-Nazi resistance.[65]

The purpose of the Czech Constitutional Court's forceful condemnation is clear and was exposed by the Czech Constitutional Court itself. It was by delegitimizing one government that, as if reshuffling a deck of cards, the legitimacy of another regime could be established for the purposes of inventing continuity with the present government.[66] Indeed, a careful reader might suspect that in the passage quoted above the justices skipped not one but two non-democratic (thus, problem-

atic) periods: the Nazi occupation and the Communist era.[67] It is worth pointing out that the Czech justices did not further specify the values, nor did they seek to link them with the constitutional text—except for vague references to the rule of law.[68] Thus the Czech case is a telling example of how far a constitutional court might go in condemning tainted segments of the polity's past without much constitutional encouragement to this effect. While the Czech Constitutional Court's decision might appear as a definitive statement, it must be added that the controversial reputation of the Beneš decrees resurfaced after seven years, in 2002, in the context of the Czech Republic's accession to the European Union, and that it also left its mark on Hungary's general election campaign of the same year.[69]

Diverging from the Czech Constitutional Court's stance, in *AZAPO* the South African Constitutional Court did not pass judgment on the past, nor did the justices substitute their vision of proper reconciliation and amnesty for that of the legislative. As Burnham put it, in "construing a constitutional text that many of its members helped to construct, the Court is searching for a balance between the immediate need for policy guidance on contentious matters arising from the dismantling of apartheid and the creation of enduring doctrinal principles."[70] The words of South African constitutional justices echo concepts expressed in the interim Constitution's epilogue, yet the Constitutional Court's inquiry does not include a detailed inquiry into the relevant past. The *AZAPO* decision, however, is not an example of historical reasoning restraining judicial interpretation. Instead, the decision of the South African Constitutional Court demonstrates how a judicial review forum may refrain from passing a judgment on the past even when relevant constitutional provisions provide ample opportunity.

3.2.2. Identifying "existing aboriginal rights" under section 35(1) of the Canadian Constitution Act, 1982

A convenient starting point for our analysis is the application of section 35 of the Canadian Constitution Act, 1982, calling for the constitutional protection of "existing aboriginal rights."[71] Canadian cases demonstrate how, and to what extent, the text of the constitution,

read so as to solicit historical analysis, operates in constitutional adjudication. A careful, comparative analysis of jurisprudence concerning indigenous peoples' rights allows insight as to whether the approach followed by Canadian courts is contingent on the wording of the constitutional provisions. Note that the Canadian constitution[72] deals with the rights of the indigenous peoples of Canada in a number of provisions. Among these, section 35(1) of the Constitution Act, 1982, speaks most directly.[73] Beyond that, however, the Canadian Constitution does not define the scope and contents of indigenous peoples' rights. Brief and open-ended as it sounds, the terms of the Canadian constitutional provisions appear detailed and straightforward, considering how silent other constitutions are when it comes to the rights of indigenous peoples. For instance, for a country with a large indigenous population, the U.S. Constitution does not offer much of a blueprint on indigenous rights. As the U.S. Supreme Court noted, "[t]he source of federal authority over Indian matters has been the subject of some confusion, but it is now generally recognized that the power derives from federal responsibility for regulating commerce with Indian tribes and for treaty making."[74] The backbone of federal Indian law is thus not comprised of constitutional provisions but of a set of the judicially crafted doctrines that often differ to a considerable degree from concepts and canons familiar to constitutional lawyers.

The Australian Constitution (Australia Act, 1986) does not expressly acknowledge indigenous rights. Strangely, the constitutional recognition of indigenous rights resulted from the removal of certain (notorious) textual barriers. By removing an express limitation to this effect, a 1967 constitutional amendment empowered the federal government to regulate indigenous affairs (section 51 [xxvi], the so-called race power). The same referendum removed section 127 of the Constitution, which excluded Australia's indigenous peoples from census.[75] In Australia, cases involving the rights of indigenous peoples are not *stricto sensu* constitutional cases; most often these cases emerge in the domain of property law.[76] In 2004, Victoria became the first state in Australia to provide constitutional recognition to indigenous peoples, without, however, giving any rights or claims to indigenous peoples.[77] Note, however, that constitutional recognition of indigenous rights does not mean that these rights are on the same plane as other

constitutional rights. The South African Constitution does provide that a "traditional authority that observes a system of customary law may function subject to any applicable legislation and customs, which includes amendments to, or repeal of, that legislation or those customs", and that the "courts must apply customary law when that law is applicable, subject to the Constitution and any legislation that specifically deals with customary law" (section 211).

In comparison, section 35(1) of the Canadian Constitution is a forceful, but nevertheless open-ended, acknowledgement of indigenous peoples' rights. This is the result of the failure of representatives of indigenous peoples to agree on a more detailed list of aboriginal rights at various occasions of constitution drafting.[78] For the time being it is left to the courts, and primarily to the Supreme Court, to determine the reach and confines of section 35 of the Constitution in the cases coming before the judiciary. The concept of "existing aboriginal rights" covers a wide variety of claims.[79] Aboriginal rights include, but are not restricted to, aboriginal rights pertaining to land and to aboriginal self-government.[80] Land-related aboriginal rights typically include aboriginal title and other ancillary rights. Aboriginal title cases involve claims for the general, all-encompassing use of a piece of land. These claims, prior to the entry into force of section 35, were handled under common law. Aboriginal title is a specific form of aboriginal rights,[81] it involves not only usufructuary rights (fishing, hunting) but also more symbolic attachments, such as the cultural and ritual uses of the land in question. As the Canadian Supreme Court put it

> [a]boriginal title is a right in land and, as such, is more than the right to engage in specific activities which may be themselves aboriginal rights. Rather, it confers the right to use land for a variety of activities, not all of which need be aspects of practices, customs and traditions which are integral to the distinctive cultures of aboriginal societies. Those activities do not constitute the right per se; rather, they are parasitic on the underlying title. However, that range of uses is subject to the limitation that they must not be irreconcilable with the nature of the attachment to the land which forms the basis of the particular group's aboriginal title.[82]

Claims for ancillary aboriginal rights to land involve the right to engage in a specific activity such as fishing or hunting. The right to aboriginal self-government is a relatively new phenomenon, and did not surface during constitutional negotiations.[83] Self-government claims may encompass claims for genuine rule-making power and enforcement.[84] In Canada in recent years the focus of the discourse concerning aboriginal rights has shifted from rights to land towards rights pertaining to identity and self-government.[85]

In Canada, a typical claim to aboriginal rights is formulated as a constitutional challenge to a federal or provincial statutory provision with reference to an existing aboriginal right protected under section 35(1) of the Constitution.[86] Typically, such cases involve regulations on hunting, fishing, or other forms of land use. Aboriginal rights may conflict with rules on mining or industrial development, giving rise to cases where indigenous peoples' rights might be burdens on the profitable rights and ventures of governmental and private parties. It is in such complex settings that the Canadian Supreme Court has to ascertain whether a claim is based on an "existing aboriginal right." The Supreme Court decided to proceed by defining aboriginal rights under section 35 on a case-by-case basis, "[g]iven the generality of the text of the constitutional provision, and especially in light of the complexities of aboriginal history, society and rights."[87] In its section 35(1) jurisprudence, the Canadian Supreme Court makes attempts to distinguish between already existing aboriginal rights and newly emerging (and thus unprotected) ones. In order to be able to handle such constitutional challenges, the Supreme Court established a standard of review defining existing aboriginal rights for the purposes of section 35 analysis, the fundamentals of which were defined in *R. V. Sparrow*.[88] Note that the Supreme Court first dealt with the issue of the limitation and justification in detail,[89] and tended to avoid the issue of ascertaining "existing aboriginal rights" for another six years.

In *Sparrow*, the claimant—a member of the Musqueam Band—admitted to violating the Fisheries Act,[90] but asserted that the provision of the Act violated his existing aboriginal right to fish. The Supreme Court held that in order to invoke section 35(1) successfully the Court must find that (1) the applicant exercised an aboriginal

right; that (2) the said right had not been extinguished (i.e. it still existed][91]; that (3) the challenged regulation infringed the said right; and that (4) the infringement of the said right could not be justified (*Sparrow* test). In this case the Supreme Court did not question the aboriginal right to fish for food;[92] rather, *Sparrow* became a case about constitutionally permissible limitations on aboriginal rights.[93] However, this was the first case in which the Supreme Court found it necessary to outline a comprehensive test for the purposes of section 35(1) analysis. The *Sparrow* test has two features that immediately catch the observer's attention. First, the *Sparrow* test comprises two phases: the first phase concerns establishing the aboriginal right claimed and its infringement (steps 1–3), while the second phase concerns the legitimacy of the limitation imposed (step 4).

On the face of it, this two-phase approach strikingly resembles the course taken by the Canadian Supreme Court in cases involving challenges based on Charter rights. In Charter cases the Court first identifies the right limited and then, in order to test the constitutionality of the limitation, moves to a proportionality analysis. The proportionality analysis is carried out under the general limitation clause of the Charter (section 1, *Oakes* test).[94] Section 35(1), however, is not in the Charter, thus the Charter's general limitation should not play a role in its application. In *Sparrow* the Canadian justices found that "[t]here is no explicit language in the provision that authorizes this Court or any court to assess the legitimacy of any government legislation that restricts aboriginal rights. Yet, we find that the words 'recognition and affirmation' incorporate the fiduciary relationship ... and so import some restraint on the exercise of sovereign power."[95] Thereafter, the Supreme Court charged the government with the burden of justifying its actions limiting aboriginal rights. The government's powers are limited by requirements stemming from the longstanding trust relationship between the Crown and aboriginal peoples (the government's so-called fiduciary duty).[96] When establishing the justification criteria, the Supreme Court said that requiring the federal government to provide justification for its measures limiting aboriginal rights was the best means to achieve the reconciliation of federal powers exercised in relation to aboriginal peoples under the Constitution with federal duties.[97]

Secondly, much of the *Sparrow* test was established as a gesture of providing a "purposive interpretation" of section 35(1), calling for a generous, liberal way, and must be construed in the light of history, traditions, and treaties.[98] Characteristic of the Court's purposive approach in *Sparrow* is the emphasis on awareness of the past. In the course of this exercise the government's fiduciary duty became a central concept, with special emphasis on existing aboriginal rights being "recognized and affirmed" in the Constitution.[99] The Crown's fiduciary duty is a concept with considerable ambiguity. In general terms, it describes a trust relationship between the government and aboriginal peoples in the government's handling of lands in which aboriginal peoples have an interest. According to Slattery's much-quoted work, fiduciary duty is "grounded in historical practices that emerged from dealings between the British Crown and Aboriginal nations in eastern North America, especially during the formative period extending from the founding of colonies in the early 1600s to the fall of New France in 1760. By the end of this period, the principles underlying these practices had crystallized as part of the basic constitutional law governing the colonies, and were reflected in the Royal Proclamation issued by the British Crown on October 7, 1763."[100]

The exact contents and origins of fiduciary duty are somewhat uncertain. The Supreme Court distinguished fiduciary duty from political trust, as courts would award damages for the Crown's breach of fiduciary duty.[101] At the same time, it also differs from private trust, since private-law trust relationships are based on the inherent incapacity of the people to govern themselves, while the Crown—aboriginal trust relationship is based on the premise that aboriginal people are able to govern themselves.[102] The scope of fiduciary duty for sure extends to the protection of aboriginal title (under the Royal Proclamation), and this aspect might imply the protection of land-related rights.[103] As the Canadian Supreme Court acknowledged in *Sparrow*, there is no controlling myth of origin. Instead, the "sui generis nature of Indian title, and the historic powers and responsibility assumed by the Crown, constituted the source of such a fiduciary obligation. … The relationship between the Government and aboriginals is trust-like rather than adversarial, and contemporary recognition and affirmation of aboriginal rights must be defined in the light of this historic relationship."[104]

Thus the Canadian government's fiduciary duty is about a set of principles on "good practice" that have evolved over time, in the course of the government's handling of aboriginal peoples' land, typically under treaties. While fiduciary duty might be linked with treaties and aboriginal title, before *Sparrow* its constitutional significance was unclear. As the Canadian Supreme Court itself pointed out a few years before *Sparrow*, the Indian Act does not create a per se fiduciary duty: instead, it only recognizes the existence of such an obligation.[105] In constructing section 35(1) and the relevance of the Canadian Constitution's "recognizing and affirming" "existing aboriginal rights", the Supreme Court invoked several patches of juridical (legal) argument, which were than stitched with the thread of historicity. Under the *Sparrow* test the past of aboriginal peoples and the history of aboriginal rights became the underlying narrative in the interpretation of aboriginal rights, and the permissible limitations thereof.[106]

The Canadian Supreme Court dealt with the elaboration of the criteria for ascertaining aboriginal rights (the first step of the *Sparrow* test) in detail in *R. v van der Peet.*[107] The facts of the case giving rise to the constitutional challenge were simple and undisputed. A Musqueam woman was charged with selling 10 salmon caught under the authority of an Indian fish license. The appellant argued that she was exercising "an existing aboriginal right to sell fish", and that, therefore, the fishery regulations of British Columbia prohibiting the sale of this catch were unconstitutional. In deciding the constitutionality of the fishery regulation the Supreme Court ascertained whether there existed an aboriginal right to fish under section 35(1) of the Constitution. As a first step in this analysis, the justices found it necessary to define the scope of the protection of aboriginal rights under section 35(1), a step long awaited since the launch of the *Sparrow* test. The Supreme Court undertook to determine the scope of section 35(1) in a way which reflected both the "aboriginal" and the "right" character of aboriginal rights.[108]

In *Sparrow*, the existence of the aboriginal right claimed by the applicant was not really an issue. The focus of the Court's analysis was on whether the government's actions restricting the aboriginal right claimed could be justified. *Van der Peet* revolved around the mere existence of the aboriginal right claimed. This claim placed to the fore-

front of the Court's section 35(1) analysis problems that had not fully been exposed before. In the course of this exercise, the justices used many of the judicial tools of constitutional construction already familiar from *Sparrow*, such as the purposive interpretation of section 35(1) combined with ingredients of the concept of fiduciary duty, and a considerable amount of historical reflection. Compared with *Sparrow*, for the *van der Peet* majority the utility of the Crown's fiduciary duty changed somewhat as a tool of constitutional construction. For the *van der Peet* majority, the requirement of a generous and liberal construction of section 35(1) followed from the Crown's fiduciary duty and from judicially established principles of treaty interpretation.[109] Furthermore, fiduciary duty demands that, in case of doubt, the interpretation shall be in favor of aboriginal right. The Court emphasized that the aboriginal equivalent of *in dubio pro reo*—a principle familiar in aboriginal jurisprudence from treaty interpretation—follows from the fiduciary obligation of the Crown.[110] The shift in the significance of the Crown's fiduciary duty for the purposes of constitutional construction is remarkable. One might recall that in *Sparrow*, purposive interpretation and a generous, liberal construction of section 35(1) were required by the nature of the provision,[111] while the main purpose of the fiduciary relationship was to validate the limits on the powers of government vis-à-vis aboriginal rights.

In identifying "existing" aboriginal rights, one of the major issues for historical analysis was to locate their source or origin.[112] The underlying dilemma encountered by the Supreme Court can be described in plain terms: Do aboriginal rights have an independent origin in a strictly legal sense, or do they follow from any legal act of the colonists or their heirs?[113] The source of aboriginal rights is one of the major themes of the discourse focusing on aboriginal rights, and the issue is largely unsettled. The legal uncertainty is due to, among other reasons, the changing perception of aboriginal peoples in the polity and the changes in governmental attitudes towards aboriginal peoples.[114] Existing legal acts do not resolve this dilemma, as they can be interpreted in the light of the outcome of both approaches. These problems put the words of section 35(1) in a radically different light. In *Sparrow*, the Supreme Court made efforts to decipher the implications of section 35(1) "recognizing and affirm-

ing" existing aboriginal rights. In *van der Peet*, the majority of the Supreme Court found that

> what section 35(1) does is provide the constitutional framework through which the fact that aboriginals lived on the land in distinctive societies, with their own practices, traditions and cultures, is acknowledged and reconciled with the sovereignty of the Crown. The substantive rights which fall within the provision must be defined in the light of this purpose; ... That the purpose of s. 35(1) lies in its recognition of the prior occupation of North America by aboriginal peoples is suggested by the French version of the text. For the English "existing aboriginal and treaty rights" the French text reads '[l]es droits existants—ancestraux ou issus de traités." The term "ancestral", which Le Petit Robert 1 (1990) dictionary defines as "[q]ui a appartenu aux ancêtres, qu'on tient des ancêtres", suggests that the rights recognized and affirmed by s. 35(1) must be temporally rooted in the historical presence—the ancestry—of aboriginal peoples in North America.[115]

On these grounds the *van der Peet* majority in the Supreme Court established a comprehensive test to ascertain "existing aboriginal rights", the so-called distinctive culture test.[116] The aim of the test is to identify aboriginal rights through those practices, customs, and traditions that are central to the aboriginal societies that existed prior to contact with the Europeans.[117] Requiring evidence on the origins of the aboriginal rights asserted seems to be a reasonable approach to the application of section 35(1). Leaving the difficulties of the test's application aside, it is first important to analyze the relationship of the language of section 35(1) vis-à-vis the meticulous historical analysis projected by the test outlined in *van der Peet*.

Reading section 35(1) it is quite possible to argue that a past-oriented approach is invited by the text of the provision. The Canadian Supreme Court established the need for an inquiry into aboriginal customs and traditions predating contact with Europeans, following the dictates of a purposive approach to section 35(1), with special emphasis on the Crown's fiduciary duty. Interestingly, however, fidu-

ciary duty had differing implications for the interpretation of section 35(1) in *Sparrow* and *van der Peet*. Also, the justices placed emphasis on different segments of section 35(1) in the two cases.

In *Sparrow*, the Supreme Court said that the nature of section 35(1) triggers its purposive reading. Thereafter the justices primarily relied on the words "recognize and affirm" (existing aboriginal rights), holding that these words entail the Crown's fiduciary duty, an obligation of uncertain origin and contents yet familiar from treaty jurisprudence. The incorporation of fiduciary duty in this manner resulted in the government's burden to justify its actions limiting aboriginal rights. The justices derived the need for sensitivity to history in close connection with fiduciary duty. In *van der Peet,* the Supreme Court found the government's fiduciary duty—and not the nature of section 35(1)—dictated a purposive approach. The controlling language for establishing aboriginal rights was the phrase acknowledging "existing" aboriginal rights in section 35(1). While in *Sparrow* fiduciary duty paved the way for historical analysis more or less directly, in *van der Peet* an inquiry into history is triggered by the naked words of section 35(1), where the adjective "existing" in section 35(1) is treated by the majority as sound textual guidance for establishing a comprehensive inquiry into the smallest details of longstanding aboriginal practices and customs. Interestingly, in *Sparrow* the meaning of the adjective "existing" was defined in opposition to "extinguished",[118] and not as the depository of a deep historical inquiry. In *van der Peet* the justices suggest that this interpretation may not be obvious upon reading the English text of section 35(1), but does clearly follow from its French counterpart.

At this point it might be worth looking into the application of Article 1(1)(b) of the *ILO Convention (No. 169) concerning Indigenous and Tribal Peoples in Independent Countries*. Article 1(1)(b) provides that the ILO Convention applies to "peoples in independent countries who are regarded as indigenous on account of their descent from the populations which inhabited the country, or a geographical region to which the country belongs, at the time of conquest or colonisation or the establishment of present State boundaries, and who, irrespective of their legal status, retain some or all of their own social, economic, cultural and political institutions." In addition, Article 8(2) acknowl-

edges indigenous peoples' "right to retain their own customs and institutions, where these are not incompatible with fundamental rights defined by the national legal system and with internationally recognized human rights." Phrases referring to "retained" social, economic, cultural, and political institutions and customs are reminiscent of the language of "existing" aboriginal rights, already familiar from section 35(1) of the Canadian Constitution. For the purposes of the present analysis the crucial question is whether these retained rights, mentioned in the ILO Convention, would also be identified from a searching inquiry into history—an approach that is clearly foreshadowed by lessons from Canadian jurisprudence.

In a recent case, the indigenous Thule peoples living in Greenland contested the enlargement of a military base, an act which resulted in the relocation of over a hundred people to a distance of 120 kilometers from their traditional hunting grounds. The Thule argued before Danish courts that since their ancestors were living on the land in question at the time of its colonization in 1921, and since they have retained their customs and institutions, they should be regarded as a distinct indigenous people for the purposes of their land claim. Applying Article 1(1)(b) of the ILO Convention the Danish Supreme Court found that the "assessment of whether or not the Thule tribe is a distinct indigenous people in the sense of the ILO Convention should be based *on current conditions*" (emphasis added). Thereupon the Danish Supreme Court concluded that the Thule people, "for all practical purposes", do not differ from the other indigenous peoples living in Greenland.[119] As a consequence, the Danish Supreme Court found that the ILO Convention was not applicable in the case.

As to its appropriateness, the Danish Supreme Court's finding might surprise those familiar with the fact that the "Thule Eskimo culture of Alaska, based on whaling, spread to Siberia, northern Canada and Greenland from 900–1000 A.D. onward."[120] Nonetheless, the Danish Supreme Court's finding is in line with Denmark's official position, according to which Greenland is inhabited by one indigenous people, the Inuit. More importantly, the Danish Supreme Court's emphasis on "current conditions" for the purposes of defining retained institutions seems to be in line with the standard reading of Article 1(1)(b).[121] On the one hand, one may wonder to what extent this ap-

proach is compatible with the principle of "self-identification" expressed in the ILO Convention (Article 1[2]). At the same time, the approach governing the application of Article 1(1)(b) clearly indicates that a mere reference to "retained" rights does not per se trigger an inquiry into history. By analogy, it might thus be suggested that the reference to "existing" aboriginal rights is no longer compelling in invoking judicial inquiry into the past.

In cases involving aboriginal rights the Canadian Supreme Court systematically examines arguments invoking the past.[122] In the cases analyzed the justices insisted that the inquiry into history was vital for applying section 35(1) properly. In *van der Peet* the justices seem to suggest that such an inquiry into the past is mandated by the very words of section 35(1), which calls for the constitutional recognition and affirmation of "existing" aboriginal rights. In a previous case, *Sparrow*, the Supreme Court was more of the view that attention to the past is necessary in the light of the longstanding relationship of the Crown/government with aboriginal peoples. To a certain extent, these differences might be due to differences in the facts and issues in the cases discussed. All in all, the Canadian Supreme Court insists on a test under section 35(1) that triggers a searching inquiry into the aboriginal past. Most importantly, however, for the present analysis, a careful comparison of the stances taken by the Canadian Supreme Court regarding the proper application of section 35(1) suggests that even a provision which looks relatively straightforward at the outset might not compel a particular approach to its construction, not even in the event that it seems to trigger an inquiry into a segment of the polity's past. The Supreme Court drew many of the premises of its analysis from the shuffling of such flexible means of constitutional construction as the purposive approach, and from such an admittedly unsettled concept as fiduciary duty. While the various arrangements of these means of construction made the reading of section 35(1) reached by the justices in a given case plausible, none of the solutions could be regarded as being compelled by the constitutional text.

3.3. The middle of the continuum: a brief overview

In most cases, the text of the constitution does not call for historical analysis in express terms, and in the majority of cases the written words of the constitution offer at least some guidance, preventing judicial review fora from substituting constitutional provisions with norms derived from an account of the past. In cases where constitutional review fora rely on a provision of the constitution, historical narratives usually surface when the review forum examines the background of a constitutional subject or institution for the purposes of the decision, or historical analysis may be required by a test established by the review forum in order to assist the proper application of a constitutional provision. Issues which have long been present in the public discourse, questions pertaining to the foundation of political institutions, or disputes which date back to longstanding controversies are the usual suspects for analysis with reference to their past or decades-long developments.

Simply because of the volume of such decisions it would be impossible to reflect on the entire jurisprudence within the limits of the present analysis. Instead, what is offered is a brief outline of references to the past, history, and traditions in the context of a written constitutional provision. The following overview is based on examples which were selected to demonstrate various problematic aspects of the application of historical narratives by judicial review fora, which may then be used for a more detailed, problem-oriented analysis.

3.3.1. Tests calling for an inquiry into past injustices

Constitutional review fora almost routinely establish tests requesting information about the past in the hope that historical analysis might elucidate the proper scope of constitutional rights and obligations. The following comparison reviews references to the past in the framework of U.S. affirmative action jurisprudence and Canadian equality jurisprudence, and two tests lifted from the federalism jurisprudence of the U.S. and Canadian Supreme Courts. While the tests

are applied to different subjects, they are comparable because of their focus on particular past events. Without entering into the details of the application of the various tests it is interesting to compare what various judicially crafted tests expect from a historical inquiry, and the relationship of constitutional text and history under these tests.

In the landmark *Bakke* case, Justice Powell of the U.S. Supreme Court rejected the assertion that affirmative action considerations in university admissions (a racial set-aside) could be justified in the interests of "reducing the historic deficit of traditionally disfavored minorities in medical schools and in the medical profession."[123] The rationale in favor of affirmative action programs accepted by Justice Powell was the university's interest in "the attainment of a diverse student body."[124] This stance might suggest that historical arguments have very little room in the U.S. Supreme Court's affirmative action jurisprudence. Nonetheless, when reviewing legislation containing beneficial racial classification, at least some justices of the U.S. Supreme Court require the showing of past discrimination and remedial purpose by the government. As for the clarity or indeterminacy of this criterion, it is sufficient to point to the U.S. Supreme Court's decision in *City of Richmond v J. A. Croson*.[125] In this case, the majority did not find sufficient evidence for past governmental race discrimination in the remote and recent history of the capital of Virginia, a former slave-holding state.[126] While remedial purpose seems to be crucial for the constitutionality of affirmative action programs, it is not a self-contained term at all. "A remedial purpose requirement establishes an orientation to the past but does not answer to what degree present action must fit or be dictated by the past wrong."[127] In *Grutter v. Bollinger*—commenting on *Croson*—Justice O'Connor, writing for the majority, made it clear that "we have never held that the only governmental use of race that can survive strict scrutiny is remedying past discrimination."[128]

The Canadian Supreme Court applies the equality clause (section 15[1]) of the Charter through a test launched in *Andrews*[129] and subsequently reaffirmed in *Law*.[130] Among other factors, the test requires that the challenged distinction be discriminative, that is, stereotyping, and that it further historical disadvantage or vulnerability. The Canadian Supreme Court applies this test with a purposive approach: ac-

cording to some justices, the purpose of s.15(1) is to remedy past injustice (discrimination),[131] while according to others section 15 aims to remedy discrimination that endangers human dignity.[132] Thus one may see that the test at the heart of Canadian equality jurisprudence draws heavily on historical criteria and historical narratives. When ascertaining the existence of a distinction the Canadian Supreme Court resorted to historical analysis in order to determine the right comparator[133] in establishing novel "analogous grounds" of discrimination, or when ascertaining the discriminatory effects of a distinction. Analogous grounds of discrimination are based on classifications that are not listed explicitly in section 15 of the Charter. In her judgment in *Andrews,* Justice Wilson tied the notion of the "analogous ground" of discrimination with the concept of "discrete and insular minority", referring to footnote 4 in the U.S. Supreme Court's judgment in *Carolene Products*,[134] and to Ely's thesis in *Democracy and Distrust* (1981). Justice Wilson emphasized that the concept of discrete and insular minorities is context-sensitive and that the list of discrete and insular minorities changes over time.[135] An analysis of Canadian jurisprudence suggests that a classification amounting to an analogous ground of discrimination does not have to be linked closely to any of the grounds enlisted in section 15.[136] One of the shortcomings of a categorical view of grounds of discrimination is that it is geographically and historically insensitive.[137] Instead of drawing boxes, "an analogy must be drawn between the enumerated ground and the unenumerated basis in terms of historical or social disadvantage due to discriminatory treatment."[138]

As indicated by the Canadian jurisprudence concerning the constitutional relevance of marital status, the constitutional significance of past discrimination on an analogous ground depends on the narrower context of the case. *Miron v Trudel*[139] involved a challenge against the definition of "spouse" in insurance legislation that covered only married couples but was not applicable to common-law marriage. In *Miron*, then-Justice McLachlin writing for a plurality of four, and Justice L'Heureux-Dubé concurring in judgment, both acknowledged that unmarried couples had previously suffered prejudice and stereotyping, although in recent years this disadvantage has been less prevalent. While the emphasis in the plurality judgment is on "historical" disad-

vantage, the concurring opinion points to the significance of law in perpetuating "continuing societal disapproval" and the prejudicial effects of legislation. In contrast, the four dissenters per Justice Gonthier concluded that past prejudices towards common-law relationships no longer persist. Indeed, the dissent found that marriage and common-law marriage are not comparable due to their profoundly different support obligations, therefore the case does not raise an equality issue. The dissent relies heavily on an understanding of marriage as a contract for mutual support into which the parties enter of their free will—a point which both judgments on the majority's side qualify with additional considerations, acknowledging that marital status may lie beyond the individual's control.

Seven years later, in a different context, the historical disadvantage suffered by unmarried couples fared differently before the Canadian Supreme Court. In *Nova Scotia (A.G.) v Walsh*[140] the Canadian Supreme Court heard a challenge against matrimonial property rules that do not apply the same presumption to common-law marriage as to marriage for rules on spousal and child support. Justice Bastarache writing for the Canadian Supreme Court's majority found that "[w]hile it remains true that unmarried spouses have suffered from historical disadvantage and stereotyping, it simultaneously cannot be ignored that many persons … have chosen to avoid the institution of marriage and the legal consequences that flow from it."[141] The majority stressed the economic aspect of marriage and the state's duty to respect the decision not to marry. Justice Gonthier (now with the majority) did not depart from the basic principles of the stance taken in *Miron*. The position of Justice L'Heureux-Dubé (now in dissent) was only strengthened when casting the issue of choice as a decision affecting human dignity.

Thus, while the Canadian justices did not depart from their observation in *Miron* on the historical disadvantage suffered by unmarried partners, the same experience of past injustice was given different (lighter) weight in *Walsh*. It is possible to see, although difficult to accept, that the rights of a surviving spouse under insurance policies (*Miron*) are more incidental to a marital relationship than other issues in marital property (*Walsh*). Indeed, should the two issues differ sufficiently, it might have been more appropriate for the *Walsh* majority to

distinguish Miron, instead of relying on Miron's acknowledgement of the historical disadvantage suffered by unmarried couples. Crucial in the *Walsh* majority's argument is the submission that the government should not impose on unmarried couples the legal consequences of marriage that the unmarried partners did not undertake themselves. The force of this premise is seriously challenged by Justice L'Heureux-Dubé, arguing that a lack of sensitivity towards the potential motivations for not choosing to marry amounts to a violation of human dignity. Interestingly, both positions were expressed by justices mindful of the past disadvantage burdening unmarried partners. Thus agreement on the past disadvantage suffered by the relevant group does not compel the same outcome in equal protection analysis, an interesting development in a context in which legalizing gay marriage is on the top of the political agenda in a polity that is divided over the issue.[142]

The affirmative action jurisprudence of the U.S. Supreme Court does not require a wholesale inquiry into the past. Still, it is suggested by the Court's decision in *Adarand* that remedial purpose and actual past discrimination are important components of the test, since in the end the constitutionality of the contested legislation may depend on the outcome of the Supreme Court's inquiry into this very aspect of the legislation. According to the *Adarand* logic, in determining whether an affirmative action program is tailored in sufficiently narrow terms courts have to inquire into not only whether an alternative, race-neutral program would increase the participation of minority businesses; they also have to make sure that the program is not meant to run for longer than the time required to eliminate the targeted discriminatory effects.[143]

Historical narratives are more dispersed in the context of Canadian equality review, partly due to the purposive approach advocated by the Canadian Supreme Court. In some of the cases the extent of the historical evidence required by the justices under the test might be more than voluminous. This consequence not only places heavy burdens on the rights' claimants but also on the justices facing this amount of evidence and information about the past. Furthermore, since historical analysis is always conditioned by other components of the test, and by context, the influence of historical narratives on the outcome of the

case is hard to predict even in a case in which the justices' reading of history does not change. These phenomena might make reliance on historical narratives counterproductive in taming indeterminacy. It is interesting to see that these dangers surfaced in the Canadian context, in which the text of the Charter's equality clause offers considerably more guidance (or grounds for departure) than what is available to the U.S. Supreme Court in affirmative action review. As a further point, it is important to see that in addition to requesting the interpretation of past events, both tests have a future-oriented aspect.

3.3.2. Lured by longstanding governmental practices: difficulties of definition and the relevance of the status quo

Tests used in federalism cases reveal further dilemmas about the virtues and utility of an inquiry into the past in constitutional adjudication. In *National League of Cities v. Usery* the U.S. Supreme Court held that Congress could not enforce minimum-wage and overtime legislation under the Commerce Clause against state employees who worked "in areas of traditional governmental functions."[144] As easy as the task of determining traditional governmental functions might sound, the decade following the *National League of Cities* decision was marked by serious uncertainties as to the nature and scope of traditional governmental functions—for example, whether state ownership of a mass public transportation system can be considered as the exercise of a traditional governmental function (*Garcia*). In *Garcia* the U.S. Supreme Court per Justice Blackmun pointed to dozens of lower-court decisions aimed at identifying what constituted a traditional governmental function under the test, and declared that there was no organizing principle that would distinguish instances of the traditional and non-traditional exercise of state power. Justice Blackmun continued by saying that "[r]eliance on history as an organizing principle results in line drawing of the most arbitrary sort; the genesis of state governmental functions stretches over a historical continuum from before the Revolution to the present, and courts would have to decide by fiat precisely how longstanding a pattern of state involvement had to be for federal regulatory authority to be defeated."[145]

This argument is especially interesting in the light of the Canadian Supreme Court's jurisprudence on the application of section 96 of the Constitution Act, 1867. Section 96 is the main basis of the jurisdiction of federal courts in Canada. In essence, section 96 is no more than a provision conferring the power of appointment of judges of the superior, district, and county courts (that is, the federal courts) to the governor general. The provision sets a limit on the powers of the provinces to establish inferior courts and administrative agencies. The test applied by the Canadian Supreme Court to decide whether a particular power (jurisdiction) pertains to the domain of section 96 and, thus, to the federation, calls for a historical inquiry. As the Canadian Supreme Court established in *Sobeys v Yeomans*,[146] powers which were exclusively exercised by federal courts at the time of confederation are the powers that cannot be undertaken by provincial courts or administrative agencies. For the purposes of the test the relevant date for establishing exclusive federal (section 96) jurisdiction is 1867, even for provinces which entered the confederation after that date, since when "new provinces joined the confederation they accepted the existing constitutional arrangements." [147] In case no conclusive evidence emerges from the four original provinces, the Supreme Court has to inquire into the jurisdiction of similar courts in the United Kingdom in 1867. It is apparent that the approach outlined by Justice Wilson in *Sobeys* is a very strict one and is based on a philosophy which is the polar opposite of Justice Blackmun's judgment in *Garcia*.

Indeed, the limitations of the *Sobeys* approach are apparent and were duly acknowledged by the Canadian Supreme Court: after all, the test based on the arrangement of the jurisdiction of courts in 1867 cannot be applied to claims of "novel jurisdiction." Indeed, the novelty of a claim to jurisdiction is itself prone to interpretation. As then-Justice McLachlin of the Canadian Supreme Court noted in a subsequent case, "[i]f a power is new, there can be no conflict with section 96, since it cannot have been within the jurisdiction of superior courts at the time of confederation... [T]he imposition of a few new obligations cannot suffice to create a new jurisdiction... What is required to create a new jurisdiction is a unifying concept or goal, and a sufficiently novel philosophy to belie an analogy with the powers previously exercised by superior courts."[148]

It is interesting to see that the tests in *National League of Cities v Usery* and *Sobeys* are based on the assumption that evidence of past practices is able to reveal a state of affairs that has a bearing on the present application of a constitutional provision. As jurisprudence on the "traditional governmental functions" criterion suggests, courts were not able to reconstruct the past under the test in a way that would have yielded principled outcomes on a large scale. In addition, Justice Blackmun challenged the presumption underlying the "traditional governmental functions" criterion—that is, the idea that the Supreme Court should freeze federal-state relations at a point in time chosen by the justices as the one representing the traditional state of affairs. Even if the requirement of adherence to the distribution of powers as they were in 1867 (*Sobeys*) occurs to one as more precise than the criterion of "traditional governmental functions" (*National League of Cities*), it is important to note that the preferred point (position) in time was picked by the courts in both cases and both tests call for the restoration of the status quo ante. In this respect it is irrelevant whether returning to a long-abandoned model would confer more or fewer rights to the states vis-à-vis the federal government. A scheme based on historical narratives like the above, although it may result in more rights or wider powers, makes those rights subject to the discretion of constitutional review fora under criteria and standards which are not able to produce predictable or principled outcomes in the long run. Also, one may ask why any prior status quo should fit the constitution better than the status quo of the day.

All these concerns are well illustrated in the application of public forum analysis in the U.S. Supreme Court's free-speech jurisprudence. When facing a challenge to the constitutionality of regulations of expression on government property the U.S. Supreme Court applies the criterion of "traditional public forum" to decide whether the government is acting as a lawmaker or as a property owner in imposing limits on free speech. Government property that has long been allotted to assembly and debate constitutes a traditional public forum for the purposes of the test,[149] and the "regulation of speech on government property that has traditionally been available for public expression is subject to the highest scrutiny."[150] Thus the traditional public forum criterion is one of the judicial means used to define those instances of

governmental interference in freedom of expression with regard to which the Supreme Court applies the most demanding standard of review. If such a field is defined with care and in a predictable manner, the public forum analysis can become an important device fostering judicial deference: outside traditional public fora, the governmental limitations imposed on free speech are subject to a more relaxed reasonableness review. Judicial deference, however, may only function in a predictable and principled manner if the traditional public forum criterion does deliver on its underlying promise—that is, is capable of outlining those cases in which strict scrutiny is to be applied. Failure to do so would mean that courts identify traditional public fora for the purposes of the application of the test in an ad hoc (case-to-case) fashion, thus also contributing to uncertainty in free-speech jurisprudence.

In order to examine the constitutionality of a ban on solicitation, the court had to decide whether airport terminals qualify as a traditional public forum in *International Society for Krishna Consciousness v Lee*.[151] A divided Supreme Court found that airport terminals cannot be regarded as traditional fora for free speech. Chief Justice Rehnquist, writing for the majority in this respect, reasoned that the proliferation and expansion of airport terminals is a recent phenomenon in the U.S., while solicitation of any sort at airports is an even more recent trend, thus airports have not been available for speech activities from time immemorial. Analogies with bus terminals and railway stations as spaces of free expression were rejected, as such transportation terminals are usually in private hands, and the Chief Justice per se questioned the function of airports as fora for public discourse (and not for air travel).

In sharp contrast, Justice Kennedy found that airports qualified as public fora. He found the majority's application of public forum analysis simplistic and insensitive. Firstly, the majority performed its analysis concentrating on a non-speech-related aspect of the public space under investigation. He disagreed with the majority's historical analysis, submitting that not all forms of traditional public forum were established as spaces for speech in public, using public parks as an example. Justice Kennedy submitted that airports are "of recent vintage" and as such cannot survive a search for "time-honored tradi-

tions." In this respect, he called attention to the function of the public forum doctrine that should take precedence over historical analysis, and suggested that protection should be provided to speech in spaces that are suitable for public discourse, irrespective of their "historical pedigree." Indeed, tests calling for an inquiry into history and traditions are often criticized for artificially perpetuating a former status quo and barring novel developments from constitutional recognition. In the case of public forum analysis, this well-recognized problem is further underpinned by the realization that the test depends to a large extent on the government's classification of the function (purpose) of government-owned property. As Justice Kennedy pointed out, judicial deference to the government's classification would make the Court assist the government in circumventing the primary purpose of speech protection in warding off government-imposed restrictions on freedom of expression.

Indeed, the emergence of new claims is not that illusory, as recent litigation concerning Internet access in public libraries[152] or a challenge to local trespass prohibitions in formerly public streets[153] demonstrates. Such cases might raise further doubts about public forum analysis. In *Hicks*, petitioners brought a First Amendment against a Richmond city council declaring certain streets private city property and barring non-residents from the premises, and against unwritten city-council rules requiring demonstrators and leaflet distributors to obtain prior permission for their activities on the premises. The measures adopted in Richmond are typical of recent local efforts made in response to violent and drug-related crimes in urban neighborhoods.[154] In *Hicks*, the U.S. Supreme Court per Justice Scalia upheld the city-council regulation under the overbreadth doctrine of the First Amendment, finding that the legitimate applications of the policy far outnumber its potential abuses.

Note that the contested measures taken by the city are a clear example of the peril Justice Kennedy foresaw when he talked about the varying requirements of constitutionality depending on how the owner (the government) designates the function of its property. Indeed, previously the Virgina Supreme Court struck down the regulation on public forum grounds. Nonetheless, in *Hicks* the U.S. Supreme Court did not apply public forum analysis. This way, while the

justices did examine the constitutionality of the regulation, the Supreme Court did not address the potential constitutional problem arising out of governmental efforts to privatize property that has historically been a space for the free expression of ideas under the First Amendment. Thus the judgment in *Hicks* may be seen as a minimalist stance taken by a court trying, as far as possible, to avoid addressing constitutional issues on their merits. In the light of the various features of public forum analysis, however, one may have the feeling that the Supreme Court opted for an overbreadth analysis in order to avoid the application of public forum analysis. After all, the application of the traditional public forum standard in the context of *Hicks* would have called for the clarification of basic problems in public forum analysis. First among these problems would have been to determine the relevance of the uses of a city street from time immemorial. With the Court not resorting to public forum analysis in the case, skeptics might believe that indeed the "time-honored traditions" of the polity are relevant only in some cases and to the extent to which the justices find them convenient.

3.4. The other pole: history as constitutional text in the *Québec secession reference*

In the cases discussed so far, constitutional review fora have applied constitutional provisions that make an express reference to the past, or the courts have referred to history in the context of applying a constitutional provision. Analysis based on these cases suggests historical narratives are not capable of clarifying the meaning of the constitutional text or any other norm in one, and only one, compelling sense, nor does the text of the constitution offer much—and especially not definitive—guidance as to the construction of the relevant past. Furthermore, it has also been shown that the past itself does not constrain the discretion of constitutional review fora in selecting the components building up the relevant past that is transformed into "history" via interpretation, nor does the past prescribe its own exclusively proper (true) interpretation. In addition, previously analyzed

cases suggest that while components of the past are per se interpretive, the interpretation of data about the past is guided as much by well-reasoned theories as by the prejudices of the interpreter.

From the perspective of textual support in the constitution, the *Québec secession reference*[155] is the polar opposite of the cases analyzed above. In the *Québec secession reference* the Canadian Supreme Court was petitioned by the government to decide whether the unilateral secession of a province was possible under the Canadian Constitution.[156] The reference was an attempt to clarify the constitutional relevance and potential consequences of Québec's long-voiced demands to secede from the rest of Canada.[157] Straightforward as the phrasing of the issue appears, there is a subtle point: the Canadian Constitution does not provide for the secession of provinces.

When exploring the issue of unilateral secession the Canadian justices divided their reasoning into three stages. First, the Supreme Court developed a complex theoretical framework: as a first step, the justices derived four constitutional principles from Canadian constitutional history; then, as the second step, they defined the scope of those constitutional principles with reference to constitutional jurisprudence. Afterwards, based upon this theoretical framework, the justices addressed the issue raised by the reference questions, that is, the constitutionality of the unilateral secession of Québec, in the context of the four constitutional principles. This approach was followed for a reason: "Because this Reference deals with questions fundamental to the nature of Canada, it should not be surprising that it is necessary to review the context in which the Canadian union has evolved."[158] In the case the Canadian Supreme Court decided as to Québec's unilateral secession from the rest of Canada without reliance on any particular constitutional provision, but with ample reference to Canadian history and principles derived from it.

The Canadian Supreme Court's reliance on confederation history does not make the decision stand out from among numerous instances in which courts have relied on historical narratives. What makes the Supreme Court's references to history extraordinary in the *Québec secession reference* is that in this case the justices relied on Canadian history not as an aid to constitutional construction but as a

source of principles and rules, giving rise to constitutional obligations. As the Supreme Court said, such

> supporting principles and rules, which include constitutional conventions and the workings of Parliament, are a necessary part of our Constitution because problems or situations may arise which are not expressly dealt with by the text of the Constitution... In order to endure over time, a constitution must contain a comprehensive set of rules and principles which are capable of providing an exhaustive legal framework for our system of government. Such principles and rules emerge from an understanding of the constitutional text itself, the historical context, and previous judicial interpretations of constitutional meaning...[159]

Thus, while the Canadian Constitution has no provisions on secession from the union, the Supreme Court's argument is based on the premise that the century-long operation of the constitution as a whole still provides guidance. The constitution in this broad sense contains written and unwritten rules.[160] The Supreme Court emphasized that the Canadian Constitution is "primarily a written one, the product of 131 years of evolution. Behind the written word is an historical lineage stretching back through the ages, which aids in the consideration of the underlying constitutional principles."[161] When considering the constitutionality of a unilateral attempt at secession, the justices derived four constitutional principles from the history of Canadian confederation under the constitution: federalism;[162] democracy;[163] constitutionalism and the rule of law;[164] and respect for minorities.[165]

The Supreme Court then carried out a detailed examination of the four constitutional principles, analyzing the Supreme Court's prior jurisprudence relevant to the principles. As Hogg aptly remarks, these constitutional principles "were not invoked merely for a rhetorical effect."[166] Based upon these four principles the Supreme Court held that Québec did not have the right unilaterally to secede.[167] Nevertheless, the justices said that the principle of democracy required that the will of the people demanding secession in clear terms had some effect.[168] In the words of the Supreme Court, the "federalism principle,

in conjunction with the democratic principle, dictates that the clear repudiation of the existing constitutional order and the clear expression of the desire to pursue secession by the population of a province would give rise to a reciprocal obligation on all parties to Confederation to negotiate constitutional changes to respond to that desire."[169]

The Supreme Court emphasized that breaching the requirement of negotiation would undermine the legitimacy of secession,[170] and stressed that during negotiations the same four principles must govern the conduct of the parties.[171] Thus, according to the Supreme Court, constitutional principles derived from the history of the Canadian Constitution and supported by the jurisprudence of the Supreme Court make it possible to reach secession via negotiation. If there is a clear request for secession by a province, the rest of the confederation must grant its secession. "[O]nce the decision was rendered, everyone, Québec separatists and the spokespersons for the federal government alike, cheered."[172] Two years after the decision of the Supreme Court the Clarity Act was adopted, establishing a framework for starting negotiations along the lines of the decision of the Supreme Court.[173] Yet it is also important to recall the words of Hogg, pointing out that "[t]his obligation to negotiate had never been suggested in the past, and had not even been argued by counsel before the Court."[174]

Occasions when courts have decided important constitutional issues without reference to the constitutional provisions specifically governing that issue are numerous. The shortcomings, or lack, of a bill of rights has been remedied by various constitutional review fora without reference to a constitutional provision proper. The U.S. Supreme Court undertook to insert the protection of privacy[175] or the right to travel into the constitution's edifice. Indeed, the U.S. Supreme Court found reason to protect the right to travel not only in the constitution's Due Process Clause and Equal Protection Clause, but also in the federal structure of government.[176] The Australian High Court derived constitutional guarantees of freedom of expression from the nature of democratic government,[177] while rights pertaining to criminal procedure were found in the rule of law and separation of powers.[178] Furthermore, the justices of the Canadian Supreme Court are eager to submit that the very purpose of the Charter's equality clause (s.15) is the protection of human dignity, although

the right to human dignity is not mentioned expressly therein.[179] Similarly, without any explicit textual backing, the French Constitutional Council found that the preamble to the 1946 French Constitution protects human dignity from subjugation and degrading treatment.[180] And the European Court of Human Rights made a similar claim recently in the context of privacy protection (Article 8), unperturbed by the silence of the European Convention on dignity.[181]

This should not create the false impression that judicial creativity of this kind is restricted to rights cases: courts have established important constitutional rules and obligations on the operations of government without express textual support in the constitution. One striking reminder is *Marbury v Madison*, the case associated with the establishment of federal constitutional review in the U.S. Despite its reputation, *Marbury* was not the first case to assert such a jurisdiction for federal courts,[182] nor is the finding, magnificently stated by Chief Justice Marshall in the case, compelled by any provision of the U.S. Constitution.[183] Similarly, although guarantees of the judicial independence of provincial courts are not set forth in the Canadian Constitution, the Canadian Supreme Court found it to be an important component of Canadian constitutionalism.[184] The German Federal Constitutional Court established the requirement of federal comity without much constitutional guidance to this effect,[185] and found that it has the power to review the constitutionality of constitutional amendments without clear and explicit constitutional indications.[186] And the list could cover many more cases. What makes the Canadian Supreme Court's decision in the *Québec secession reference* stand out is the justices' recourse to historical narratives in order to make up for the Canadian Constitution's silence on the issue before the bar—a feature that makes this case particularly interesting for the present analysis.

Tierney suggests that the unusual solution adopted by the Canadian Supreme Court was appropriate for the "extra-constitutional" problem that the justices were to resolve.[187] Plausible as this explanation may sound, one has to take into account that it has the potential of undermining the legitimacy of the Supreme Court's involvement in the case. If "extra-constitutional" means that the matter is not justiciable, the Supreme Court's handling of the case becomes problematic.[188] When responding to a justiciablity challenge in the case the

Supreme Court said very carefully that the "very fact that the Court may be asked hypothetical questions in a reference ... engages the Court in an exercise it would never entertain in the context of litigation. ...[I]f the Court is of the opinion that it is being asked a question with a significant extralegal component, it may interpret the question so as to answer only its legal aspects; if this is not possible, the Court may decline to answer the question."[189]

In the *Québec secession reference*, historical narratives played a central role in the Court's argument. According to Reilly, the reasoning of the Supreme Court in the case is in fact a "historical justification of extra-constitutional principles."[190] Telling the story of secessionism in Canada might be regarded as an inevitable component of judicial decisions concerning the issue of the secession of provinces. However, in the *Québec secession reference* the long durée of Canadian constitutional history became the source of the rules prescribed to govern unilateral secession. The Supreme Court presented the 1867 constitutional arrangement as "the first step in the transition from colonies separately dependent on the Imperial Parliament for their governance to a unified and independent political state in which different peoples could resolve their disagreements and work together toward common goals and a common interest."[191] One of the recurrent phrases of the decision is that the federal structure of government was created in response to the political, economic, and cultural context of the day,[192] allowing room for differences within its framework,[193] and adjusting to the emerging needs of society.[194] In addition, the justices noted that the origins of the Canadian polity and of Canadian constitutionalism are embedded in history: the expectations and aspirations of the political community are integral to the Canadian Constitution.[195]

The Court emphasized throughout this presentation that Québec has been an integral part of the Canadian constitutional arrangement,[196] and that the existing constitutional framework (federalism in particular) is the result of a development which responded to the needs and aspirations of Québec as well.[197] Furthermore, according to the Supreme Court the 1982 constitutional amendments to which Québec refused to consent "did not alter the basic division of powers in sections 91 and 92 of the Constitution Act, 1867, which is the primary textual expression of the principle of federalism in our Constitu-

tion, agreed upon at Confederation."[198] The justices suggested that the basic, original arrangement to which Québec consented had been preserved throughout the 1982 amendment process, despite Québec's rejection, and that the main reason for confederation (a federal arrangement of government) was to respect the distinctiveness of Québec.[199] This is indeed a possible reading of the historical record, but is far from being an exclusive or compelling account.

Although the historical record consulted by the Supreme Court has not been questioned as far as its factual correctness is concerned, the Supreme Court's handling of history in the case deserves closer examination. The Supreme Court did not indicate at any point that its interpretation of confederation was, or might be, controversial. There may be particular problems in the context of the secession of Québec—after all, it is expected that the federal unit (province) intending to secede from a federation and those federal units which intend to stay will have a different reading of the basic principles upon which a federation operates. The *Québec secession reference* was not the first sign by Québec that it did not agree with the very basics of Canadian federalism and constitutionalism. The immediate political context of the reference is marked by voices of Québec separatism involving two referenda on secession and three constitutional accords which Québec did not ratify. In addition to the patriation of Canada, the 1982 constitutional reform brought about the Charter of Rights, the constitutionalization of aboriginal rights, the principle of fiscal equalization among provinces, the concurrent provincial power to regulate interprovincial trade in natural resources, and a new amending formula for the constitution.

Québec's disagreement with the 1982 arrangements surfaced during the amendment negotiations.[200] The 1982 constitutional amendments were followed by two attempts at constitutional revision, the Meech Lake (1987) and the Charlottetown (1992) constitutional accords. These accords centered mainly on the rights of aboriginal peoples and the status of Québec. Both constitutional accords failed, and the "widely held sentiment in Québec that the Meech Lake and Charlottetown accords had been rejected by the rest of Canada because they 'gave too much' to Québec resulted in growing support for the sovereignist forces in Québec."[201] In 1994, a refueled separationist

government raised the issue of secession again in all potential forums, such as in the Québec legislature, before the electorate in a referendum and in Québec courts.[202] Despite such strong blows, for many the federal government's petition for reference on the issue of unilateral secession was the first real indication that secession could occur at all.[203]

Therefore, it is important to consider the Supreme Court's interpretation of events in which provinces had intended to break away from the federation or had made attempts to undermine federal arrangements. For instance, the Supreme Court mentioned the events that took place in Nova Scotia in 1867, when the new premier, Joseph Howe, made attempts to withdraw from the freshly established confederation. Howe was acting with major local support, as in the first dominion elections 18 federal seats out of 19 were taken by anti-confederation representatives, and a similar allocation of seats occurred at the provincial level. The attempts at secession were rejected by the Colonial Office in London.[204] In the light of these events it may be a little surprising that when summing up the virtues and initial success of the 1867 arrangement the Supreme Court concluded: "[f]ederalism was also welcomed by Nova Scotia and New Brunswick, both of which also affirmed their will to protect their individual cultures and their autonomy over local matters. All new provinces joining the federation sought to achieve similar objectives, which are no less vigorously pursued by the provinces and territories as we approach the new millennium."[205] These words clearly reflect the rhetoric of the Supreme Court, used to smooth occasional wrinkles in the texture of confederation history.

Furthermore, although it might not be apparent at the outset, the Supreme Court was very cautious in selecting its references, both in terms of finding the right authorities and also in avoiding certain sources. A fine example of tracking the right words and the right author is the Supreme Court's construction of support for the argument that "[f]ederalism was a legal response to the underlying political and cultural realities that existed at Confederation and continue to exist today."[206] In support of this position, the Supreme Court quoted at length the words of George-Etienne Cartier, a prominent Québec politician and a supporter of confederation, spoken at the confedera-

tion debates in 1865.[207] The words of Cartier represent one position advocated in Québec at the time of confederation. In another respect, the gesture of the Supreme Court to refer to a prominent Québec politician in support of confederation is a symbolic move, especially in the light of the fact that Cartier is the only Québec politician quoted at length in the decision.

Further examples of the Supreme Court's careful selection of sources in support of its decision may be encountered in the reasons given by the court in support of the individual constitutional principles established in the decision. The selection of prior jurisprudence for the purposes of the decision also bears the mark of the justices' preference for a pro-confederation narrative. Not long before the decision in the *Québec secession reference* the Supreme Court handed down two judgments in which the main issue centered on Québec's adversity towards the fundamentals of the 1982 constitutional arrangement: the *Québec veto reference* and *Ford v Québec*. In the *Québec secession reference* the Supreme Court carefully avoided discussing its decisions in these cases. In *Ford,*[208] the Supreme Court rejected Québec's *omnibus* invocation of the Charter's "notwithstanding clause" (section 33) aiming to exempt Québec's legal system from the reach of the Charter. Earlier, in the *Québec veto reference*,[209] the Supreme Court was requested to declare that, as a matter of constitutional convention, Québec had the power to veto constitutional amendments.[210] Based upon the evidence submitted, the Supreme Court did not find such a constitutional convention. Note that the request for reference was one of the many attempts by Québec to halt the 1982 constitutional amendment process, and the Supreme Court decided the case after the 1982 amendments came into force. In the *Québec secession reference* the Supreme Court did not analyze the effects of the *Québec veto reference* on the overall operation of the confederation, or in the narrower context of the principle of federalism. Indeed, the justices mentioned the *Québec veto reference* in support of the finding that the 1982 Constitution Act brought into force.[211]

In establishing the constitutional principle of federalism the Supreme Court relied extensively on the *Patriation reference*. In this case the Supreme Court had to decide whether there was a constitutional requirement of provincial consent to constitutional amendments.[212] A

majority of six justices in the Canadian Supreme Court found that constitutional convention required a "substantial degree" of provincial consent for amendments affecting the provinces, although the consent of all provinces was not necessary. Note, however, that such a provincial consent requirement is not unprecedented. Although Article V of the U.S. Constitution does not require unanimous state consent to constitutional amendments, the Senate Suffrage Clause of the U.S. Constitution prohibits the abolition of equal representation of any states in the U.S. Senate without the express consent of the state in question. This rule was regarded as safeguarding the position of the small states in the federal legislative process.[213]

Viewed in its broader context it is apparent that in the *Québec secession reference* the Supreme Court was seeking a grand narrative in which the spotlight shifts from Québec's various attempts at secession to a prior compromise controlling minor events of the past—a prior compromise which may serve as common ground accepted by all the parties. Relying on the Constitution Act of 1867 as a baseline, and practically discarding the less glamorous moments of confederation past, the justices outlined an uncontested success story of a long-existing federation, capable of accommodating the demands of its members over time.

This approach is disturbing, since observers noted that there are indeed "conflicts between the dominant narratives of Québec and of the rest of Canada."[214] The participants have divergent understandings of the history of the formation of the federation.[215] Thus it might be surprising that the opinion of the Court does not mention that there are competing accounts of confederation history in the discourse.[216] Although the Court talks about the 1982 constitutional reform as a successful attempt at accommodating the current needs of a diverse polity, from the perspective of Québec the history of the 1982 patriation might also be read as the story of being left outside the Canadian Constitution in a formal (positive) sense.[217] Also, it is strongly suggested by McRae that a subsequent attempt at constitutional amendment, the Meech Lake Accord of 1987, was defeated due to the differing perceptions of the "ideals of Canada held by Anglophones and Francophones."[218] Still, as far as the historical narrative followed by the Supreme Court is concerned, the justices did not write a history

that would reflect the plurality of competing readings. Instead, the justices constructed a strong, homogeneous storyline: the history of a successful confederation.[219] This approach does not seem to reflect that "[a]t the heart of the Canadian constitutional debate lies a clash of stories about Canada's history."[220] Nor does the Court indicate that there are other plotlines along which Canadian constitutional history may be reconstructed.[221]

Instead of (re)constructing a comprehensive account of confederation history responding to the above realities and challenges, the Canadian Supreme Court followed a different methodology in the *Québec secession reference* and opted for a reconstruction of confederation history according to a rhetoric that emphasizes continuity and reconciliation, stability, and the endurance of the structure of government over time. This storyline, illustrated with carefully selected fragments of the past, then became the source of constitutional rules, mostly obligations, governing the secession of a province from the rest of Canada. This approach is all the more interesting since the Canadian Supreme Court's endeavor to identify constitutional rules applicable to the issue were seriously impaired by the lack of constitutional text to this effect.

3.5. Summary of findings: towards disenchantment

Chapter Three was motivated by two premises discovered in the previous chapters: on the one hand it accepted that in the course of constitutional adjudication the text of the constitution does matter, if for no other reason than to provide a thin coating of legitimacy. The other major premise of the chapter was the observation that historical narratives are recurrent in constitutional reasoning, both in legal (juridical) and in extra-legal arguments. The main concern of the chapter was to map the relationship between constitutional provisions and historical narratives, as traceable in constitutional cases. Already during the first steps of this inquiry it became clear that while constitutions do reveal scenes from their past with relative frequency, such provisions are usually located in the preamble. At the same time, even in cases where the preamble of a constitution tells little about its ori-

gins, courts have applied and interpreted constitutions with well-traceable references to the past, history, and traditions of the polity governed by the constitution. Such references have often been used by courts to suggest that in the light of history and traditions, the reading and application of a constitutional provision would become more accessible, if not obvious.

The analysis then turned towards establishing whether a judicial inquiry into history would really deliver on such a high expectation. After all, even if this claim were to withstand a searching inquiry, one could be on the right track when searching for a method of eliminating indeterminacy in constitutional adjudication. In order to explore this relationship and its potential to eliminate indeterminacy, the analysis first focused on cases in which looking into the past was mandated (or at least commissioned) by the constitutional text. It then turned towards cases in which historical narratives, and their various modalities, were invoked by courts to elucidate the meaning, and thus aid the application, of constitutional provisions. Finally, the analysis focused on an instance in which historical narratives replaced the constitutional text, giving rise to novel constitutional obligations.

The aim of drawing up such a continuum was to aid the evaluation of findings reached in a wide array of micro-contexts. Instances in South African transitional justice jurisprudence and Canadian indigenous rights jurisprudence were reviewed in order to see to what extent an open invitation to historical inquiry in the constitutional text compels justices to conduct such an undertaking in practice. The cases suggest that, while on the basis of the respective constitutional provisions justices were willing to acknowledge the need to look into the past, the terms of the exercise were not mandated by the text of the constitutional provisions. This finding was reaffirmed by lessons learnt from South African transitional justice jurisprudence. While the epilogue to South Africa's interim Constitution condemns apartheid in clear terms and calls for amnesty in order to bridge the historical divide between the past and the present, when it came to reviewing an important piece of legislation erecting that bridge, South Africa's Constitutional Court judges did not undertake a scrupulous inquiry into the unjust past. In Canadian indigenous jurisprudence, the justices provided an array of justifications for studying the historical con-

text of aboriginal rights claims. This justification then had differing effects on the inquiry itself. This clearly indicates that when the relevant constitutional provision is read with a historical context in mind, more approaches are plausible yet none of them is compelled by the terms of the constitutional provision.

The findings suggest that, while the text of a constitutional provision might call for searching the past for clues, the nature and extent of that judicial inquiry is not compelled by the terms of the constitutional provision itself. As a comparison of South African and Czech constitutional jurisprudence suggested, a constitutional court can condemn a segment of the past without express constitutional authorization, and another court which received ample guidance from the text of the constitution on judging a repressive past might not go as far as condemning various segments of that past or evaluating the conduct of actors in either role in an oppressive regime. This is disturbing news for those who were inclined to hope that historical narratives, at least in cases in which they were called for in the constitutional text, would deliver straightforward answers, thus limiting indeterminacy.

Reaching the middle of the continuum, an overview of various judicial attempts to place a constitutional provision in its proper historical context explored further reasons for discomfort concerning the utility and role of historical narratives in constitutional adjudication. Instead of gaining reassurance from the predictive force of judicially crafted tests as means of exploring the past for guidance, a careful analysis of cases suggests that a focus on excavating the past for lessons might divert (both the observers' and the justices') attention from the constitutional issue to be resolved. On the one hand, it seems that neither self-standing accounts of history nor tests focusing on the historical aspects or traditions of an issue call for a separate, elaborate justification launched by a court. Despite such an implicit agreement, justices often seem to disagree about the focus and proper application of such an inquiry. At the same time, while justices discuss in a case the proper approach to analyzing the past, questions such as squeezing future claims into the frames of the past, or the shaping and reshaping of the terms of the inquiry into the past, and thus into the constitutional issue, seem to slip into secondary place. These ob-

servations suggest, on the one hand, that the past teaches lessons according to the terms of the inquiry imposed on it by the present. Moreover, they suggest that the past may have as many lessons to teach as there are observers motivated to listen. These findings seem to undermine any promise or expectation of curbing indeterminacy.

Indeed, these observations are further amplified in the light of the instance in which justices resorted to deriving constitutional rules from constitutional history itself, as if to make up for the gaps and silences in the text of the constitution. Even on the face of it, the approach followed by Canadian justices in the *Québec secession reference* suggests that historical narrative may be invoked with relative confidence to stand in for constitutional text even in such critical matters as the unilateral secession of a province from a federation. Although eliminating indeterminacy in constitutional interpretation might be popular and easy-to-justify rationale, it appears that historical narratives have not fulfilled their role in promoting predictability and curbing judicial discretion in constitutional interpretation. The findings of this chapter not only suggest that the entire judicial inquiry into the past is a matter of free-ranging judicial discretion; they also confirm serious doubts about the objectivity and neutrality of historical justifications.

NOTES

1 Clinton, "Original Understanding", 1188.
2 http://www.taoiseach.gov.ie/upload/publications/297.htm
3 http://www.waac.org/library/documents/const0.htm
4 http://www.cambodia.org/facts/constitution.html#Preamble
5 *http://www.oefre.unibe.ch/law/icl/ch00000_.html*
6 *http://www.oefre.unibe.ch/law/icl/hr00000_.html*
7 *http://www.oefre.unibe.ch/law/icl/mk00000_.html*
8 *http://asnic.utexas.edu/asnic/countries/indonesia/ConstIndonesia.html*
9 *http://www.oefre.unibe.ch/law/icl/ir00000_.html*
10 *http://www.republic-of-liberia.com/constitution.htm*
11 *http://www.oefre.unibe.ch/law/icl/bo00000_.html* Interestingly, Belarus's Declaration of Independence, 1990, contains no references to history. See http://www.uni-wuerzburg.de/law/bo02000_.html
12 *http://www.oefre.unibe.ch/law/icl/ez00000_.html*

13 *http://www.oefre.unibe.ch/law/icl/lh00000_.html*
14 *http://www.oefre.unibe.ch/law/icl/lg01000_.html*
15 *http://www.hrcr.org/docs/Argentine_Const/Preamble.html*
16 *http://www.law.emory.edu/GEORGIA/gaconst.html*
17 *http://www.oefre.unibe.ch/law/icl/pl00000_.html*
18 Jefferson, *Jefferson Himself*, 338.
19 *Les constitutions de la France*, 82.
20 Sajó, *Limiting Government*, Chapter One.
21 *Azanian Peoples Organization (AZAPO) v The President of the Republic of South Africa*, CCT 17/96; 1996 (8) BCLR 1015 (CC).
22 Stone Sweet, *Governing with Judges*, 99.
23 This technique is analyzed in detail in Chapter Four.
24 The 1789 Declaration and the 1791 Constitution are available in English in Blaustein and Siegler, *Constitutions that Made History*.
25 For an excellent account of the intellectual background and practical constitutional consequences in English see Rogoff, "A Comparison of Constitutionalism in France and the United States", 46–60.
26 West, *The French Legal System*, Chapter Four. The concept of the "republic" is an alternative source of legitimacy. For a detailed discussion see Chapter Four.
27 Rousseau, "La révision de la Constitution".
28 62–20 DC, of 6 November 1962. Available in English in Bell, *French Constitutional Law,* 301–302, 302.
29 On the decision in English see Bell, *French Constitutional Law*, 133–134. Also Louis Favoreu and Loïc Philip, *Les grandes décisions du Conseil constitutionnel*, 11th ed. (Paris: Dalloz, 2001), ¶2, 175 et seq.; Avril and Gicquel, *Le Conseil constitutionnel*, 33–34; Emeri and Bidegaray, *La Constitution en France*, 142.
30 *Everson v Board of Education*, 330 U.S. 1, 8 (1947).
31 For a substantive criticism see Reid, "Law and History", 220–221.
32 See *Reference re Bill 30, An Act to amend the Education Act (Ont.)* [1987], 1 S.C.R. 1148; *Reference re Education Act (Que.)* [1993], 2 S.C.R. 511; *Greater Montreal Protestant School Board v Québec (Attorney General)* [1989], 1 S.C.R. 377; *Adler v Ontario* [1996], 3 S.C.R. 609; *Public School Boards' Association of Alberta v Alberta* [2000], S.C.C. 45.
33 *OECTA v Ontario* (A-G), 2001 S.C.C. 15, para. 1.
34 Geula, "South Africa's Truth and Reconciliation Commission", 61–62.
35 Besides the epilogue, both the interim Constitution (e.g. section 8[3][b]) and the final Constitution (e.g. section 25[7]–[8]) contain express provisions for legal measures to facilitate democratic transition.
36 Webb, "The Constitutional Court of South Africa", 270.
37 The Act defines "political objective" in detailed terms in section 20(3), Promotion of National Unity and Reconciliation Act of 1995.
38 Section 3(3)(b), Promotion of National Unity and Reconciliation Act of 1995.
39 Asmal, "Dealing with the Past in the South African Experience", 2.

40 In South Africa, amnesty legislation was not the only legal means aiming to repair past harms. Further measures were suggested by the Reparation and Rehabilitation Committee, the third arm of the TRC. The final report containing recommendations is available at http://www.doj.gov.za/trc/reparations/summary.htm. For a comparative overview see Daly, "Reparations in South Africa, A Cautionary Tale".
41 See, e.g., *AZAPO*, Mahomed, J., para. 2.
42 Burnham, "Cultivating a Seedling Charter", 30.
43 Especially *AZAPO*, Mahomed, J., paras. 18–19, 42
44 *AZAPO*, Mahomed, J., para. 42. Also *AZAPO*, Mahomed, J., para. 19 for "successfully negotiated transition".
45 *AZAPO*, Mahomed, J., para. 19.
46 *AZAPO*, Mahomed, J., para. 36.
47 *AZAPO*, Mahomed, J., para. 18.
48 See *AZAPO*, Mahomed, J., paras. 17 and 18.
49 *AZAPO*, Mahomed, J., para. 17.
50 *AZAPO*, Mahomed, J., para. 21.
51 *AZAPO*, Mahomed, J., para. 21.
52 Corder, "The Law and Struggle, The Same but Different", 102.
53 Kiss, "Moral Ambition within and beyond Political Constraints", 77.
54 *AZAPO*, Didcott, J., para. 59. Note that "closing the book" in the above sense is essentially different from legislating amnesia. For contrasting the two positions see Asmal, "Fears and Hopes", 26–30.
55 *In re Gauteng School Education Bill of 1995*, CCT39/95, 1996(4) BCLR 537(CC), para. 51.
56 *City Council of Pretoria v Walker*, CCT 8/97, 1998 (3) BCLR 257 (CC) [1998], 4 LRC 203 (1998), 2 CHRLD 195.
57 Berat, "South Africa, Negotiating Change", 271–7. Also Geula, "South Africa's Truth and Reconciliation Commission", 63–64.
58 Dugard, "Reconciliation and Justice", 295–296.
59 Villa-Vicencio, "The Reek of Cruelty", 175.
60 *AZAPO*, Mahomed, J., para. 24.
61 Pl. ÚS 14/94 of 8 March 1995, available in English translation on the Czech Constitutional Court's website at http://www.concourt.cz/angl_verze/doc/p-14-94.html
62 In the course of seeking compensation for lost confiscated property, similar claims could be launched in Slovakia, the other successor of former Czechoslovakia. A potential claim to this effect, however, never received the kind of attention in Slovakia as the one in the Czech Republic.
63 Glos, "Restitution of Confiscated Property in the Czech Republic".
64 Pl. ÚS 14/94, ibid.
65 Cf. *Korematsu v U.S.*, 323 U.S. 214 (1944).
66 See also Chapter Four.

67 Note that the Czech legislature condemned the Communist regime in a separate act of parliament that was subsequently upheld by the Constitutional Court. The effect of the Czech "Act on the Illegality of the Communist Regime" was to raise the limitation period for criminal prosecution (Article 5). The act and the Czech Constitutional Court's decision are available in English in: Kritz, *Transitional Justice*, vol. 3, 366–375.

68 See also Chapter Four on the Czech Constitutional Court's decision concerning the illegality of the Communist regime.

69 "A Specter Over Europe", *The Economist*, 15 August 2002. The expert opinions commissioned by the European Parliament are available in Frowein, Johen A., Ulf Bernitz, and Lord Kingsland, "Legal Opinion on the Beneš decrees and the Accession of the Czech Republic to the European Union". For other courts coming across the Beneš decrees and disputes over property rights, see the decision of the Supreme Court of the State of Bavaria on the validity of a land transaction between a Czechoslovak city located on the Bavarian border and a Bavarian town: B.Reg. 2 Z 65/64. Reported in English as Stevenson, "Federal Republic of Germany (Bavaria), Case Note". See also the more recent decision of the European Court of Human Rights in a restitution case in *Prince Hans-Adam II of Liechtenstein v Germany*, Application no. 42527/98, judgment of 12 July 2001.

70 Burnham, "Cultivating a Seedling Charter", 30.

71 A note on terminology: section 35(2) of the Canadian Constitution Act, 1982, defines the legal meaning of the term aboriginal as covering aboriginal, Inuit, and Métis peoples. Somewhat corresponding to this terminology, the term "First Nations" is often used for Canadian indigenous peoples (excluding Inuit and Métis). In addition, the distinction between "status" (including "registered" and "treaty") Indians and "non-status" Indians is also known in Canadian law. In the Australian context, among indigenous peoples Aborigines are usually distinguished from Torres Strait Islanders. See Docherty, *Historical Dictionary of Australia*, 21 and 232. In U.S. literature the standard references for indigenous peoples are "Native American" or "Indian". In addition, it is important to be mindful of the indigenous inhabitants of Hawaii. Cf. *Rice v Cayetano*, 528 U.S. 495 (2000). The adjective "indigenous", unless specified otherwise, stands as a general reference for all "original inhabitants", irrespective of domestic terminology. Terms such as Indian or Native are used to the extent required by the reproduction of original sources.

72 A definition of the "Canadian constitution" is given in section 52(2) of the Constitution Act, 1982. On this see also Hogg, *Constitutional Law of Canada*, 6–10.

73 Other constitutional provisions pertaining to aboriginal rights are section 25 of the Charter and section 91 (24) of the Constitution Act, 1867 (formerly the British North America Act).

74 *McClanahan v Arizona Tax Comm.*, 411 U.S. 164, 172, n. 7 (1973). The "Indian Commerce Clause" is in Article I, sect. 8 [2], while the Treaty Power is in Article II, sect. 2 [2].

75 For a comprehensive account see Chesterman and Galligan, *Citizens without Rights*.

76 Patapan, *Judging Democracy*, 7.

77 Constitution (Recognition of Aboriginal People) Act 2004, assented to, 9 November 2004. The newly inserted section 1A(3)(a) of the Victoria Constitution Act, 1975, expressly provides that "The Parliament does not intend by this section … to create in any person any legal right or give rise to any civil cause of action".

78 On the failure of the 1987 negotiations see, e.g., Asch and Macklem, "Aboriginal Rights and Canadian Sovereignty", 504; on the failed Meech Lake Accord, 1990, see, e.g., Cairns, "Passing Judgement on Meech Lake". For an assessment of the Charlottetown Accord, 1992, from a constitutional perspective, and for possible future developments, see Hogg and Turpel, "Implementing Aboriginal Self-Government".

79 The present analysis will not cover indigenous peoples' treaty rights.

80 Macklem, "Aboriginal Rights and State Obligations". Macklem distinguishes "rights aiming at the preservation of aboriginal identity" as a third category of aboriginal rights.

81 *R. v Adams* [1996], 3 S.C.R. 101, and *R. v Coté* [1996], 3 S.C.R. 139.

82 *Delgamuukw v British Columbia* [1997], 3 S.C.R. 1010, para. 111.

83 For the components of the aboriginal claim for self-determination see Boldt and Long, "Tribal Traditions and European-Western Political Ideologies", 545–547.

84 See *R. v Pamajewon* [1996], 2 S.C.R. 821, and *Delgamuukw v British Columbia*, discussed in Chapter Five.

85 Macklem, "Normative Dimensions of the Right of Aboriginal Self-Government", 9.

86 The jurisdiction of the federal government to legislate over "Indians and Lands reserved for the Indians" is based on section 91(24), Constitution Act, 1867. This section forms the basis of federal legislation that may extinguish aboriginal rights or title.

87 See also *R. v Sparrow* [1990], 1 S.C.R. 1075, 1111 per Dickson, Ch.J. and LaForest, J.

88 Chief Justice Dickson and Justice LaForest wrote for a unanimous court.

89 *R. v Sparrow*, 1110. The tests applicable to permissible limitation and extension are not analyzed here in detail.

90 R.S.C. 1970, c. F-14. Pursuant to the Act the Musqueam Indian Band received an Indian Food Fishing License dated 30 March 1984, which prescribed the length of the fishing net to be used. The applicants used a longer net as an exercise of their aboriginal right.

91 *R. v Sparrow*, 1091

92 The Crown did not question the aboriginal right to fish for food. It was argued that extensive governmental regulation had extinguished that aboriginal right. The Court rejected this argument saying that the regulation did not display a

"clear and plain" intent to extinguish the aboriginal right to fish. *R. v Sparrow*, 1095–1099.

93 The standard of justification was refined in *R. v Gladstone* [1996], 2 S.C.R. 723. See, e.g., *R. v Adams*, para. 34.

94 *R. v Oakes* [1986], 1 S.C.R. 103.

95 *R. v Sparrow*, 1108. Note that the justification test was subsequently altered.

96 *R. v Sparrow*, 1108.

97 The Canadian Supreme Court linked section 91(24) with section 35(1) of the Constitution. *R. v Sparrow*, 1109.

98 *R. v Sparrow*, 1108.

99 *R. v Sparrow*, 1106.

100 Slattery, "A Question of Trust", 271–272.

101 *Guerin v The Queen* [1984], 2 S.C.R. 335, 348–350 and 355–356.

102 Slattery, "A Question of Trust", 275.

103 Bryant, "Crown-Aboriginal Relationships in Canada", 29.

104 *R. v Sparrow*, 1107. Also Bryant, "Crown-Aboriginal Relationships in Canada", 25.

105 *Guerin v The Queen*, 348–350.

106 Note that the various components of the concept of the government's duty to protect indigenous peoples' interests can also be traced in the U.S. In 1831, in *Cherokee Nation v Georgia*, 30 U.S. 1, 17 (1831), the U.S. Supreme Court described the relationship of the federal government and the Indians in terms of ward and guardian. In *U.S. v Kagama*, 118 U.S 375 (1886), the U.S. Supreme Court referred to the federal government's "obligation and thus the power to protect a weak and dependent people" on grounds other than the Indian Commerce Clause. Cf. *U.S. v Holiday*, 70 U.S. (3 Wall) 407 (1866); *U.S. v Sandoval*, 231 U.S. 28 (1913). In 1974, in *Morton v Mancari*, 417 U.S. 535, 551 (1974), the U.S. Supreme Court found that Congress had a "unique obligation" towards indigenous peoples, while recently in *Rice v Cayetano*, 529 (Stevens J., dissenting), Justice Stevens, in a dissenting judgment, described the relationship of the federal government and the aboriginal peoples as having a "fiduciary character". These concepts, however, have never acquired the kind of prominence in U.S. Indian law that would appropriately reflect the doctrine's significance in the Canadian context.

107 *R. v van der Peet* [1996], 2 S.C.R. 507. Chief Justice Lamer wrote for a majority of seven, and Justice McLachlin and Justice L'Heureux-Dubé filed separate dissenting opinions.

108 *R. v van der Peet*, para. 20, per Lamer, Ch.J.

109 *R. v van der Peet*, para. 24, per Lamer Ch.J.

110 *R. v van der Peet*, para. 25, per Lamer, Ch.J.

111 *R. v Sparrow*, 1106.

112 The argument of the majority as well as the dissent were presented along this line in *van der Peet* at para. 28 et al. Per Lamer, Ch.J., para. 106 et al. for the dissent of L'Heureux-Dubé J.

113 This dilemma is phrased and described in terms of the "contingent" and "inherent" approaches to aboriginal rights in Asch and Macklem, "Aboriginal Rights and Canadian Sovereignty", 501–503.
114 Otis, "Les sources des droits ancestraux des peuples autochtones".
115 *R. v van der Peet*, 31–32, per Lamer Ch.J.
116 A problem-oriented analysis of the *van der Peet* test is carried out in Chapter Five.
117 *R. v van der Peet*, para. 44 and 47.
118 *R. v. Sparrow*, 1091. It would be beyond the scope of the present analysis to deal with extinguishment in detail. It is sufficient to note that the Australian High Court relied on the *Sparrow* decision when establishing the test for extinguishment, see *Wik Peoples v Queensland* (1996), 187 C.L.R. 1. In the U.S. the Supreme Court of Vermont introduced a new test for extinguishment in *State v Elliott,* 159 Vt. 102, 616 A.2d 210 (1992), cert. denied 507 U.S. 911 (1993), which centers around an inquiry into aboriginal history.
119 See the Danish Supreme Court's comments of 28 November 2003. See also "Greenland: Inuit Lose a 50-Year Court Battle".
120 Miller, "Exercising Cultural Self-Determination", 234.
121 *ILO Convention (No. 169) Manual,* 7.
122 Vaughan, "History in Canadian Constitutional Adjudication", 78.
123 *Regents of the University of California v Bakke*, 438 U.S. 265, 306–307 (1978) (Justice Powell).
124 *Regents of the University of California v Bakke*, 311. Reaffirmed in *Grutter v Bollinger,* 539 U.S. 306, 321(2003).
125 *City of Richmond v J. A. Croson*, 488 U.S. 469 (1989).
126 Cf. the dissenting opinion of Justice Th. Marshall in *City of Richmond v J. A. Croson*, 528 et seq. (1989).
127 Chang, "Remedial Purpose and Affirmative Action, False Limits and Real Harms", 64.
128 *Grutter v Bollinger*, 328.
129 *Andrews v Law Society of British Columbia* [1989], 1 S.C.R. 143.
130 *Law v Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497
131 As reaffirmed in *Law v Canada* by Justice Iacobucci, para. 39.
132 See, e.g., *Egan v Nesbit* [1995], 2 S.C.R. 513, Cory, J., para. 171.
133 *Weatherall v Canada (A.-G.)* [1993], 2 S.C.R. 872, involving cross-gender frisk searches in prisons.
134 *U.S. v Carolene Products Co.*, 304 US 144 (1938).
135 *Andrews v Law Society of British Columbia*, Wilson, J., para. 6. Note that the reference was made in *obiter dictum*.
136 Gibson, "Analogous Grounds of Discrimination". See text at note 2.
137 Iyer, "Categorical Denials, Equality Rights and the Shaping of Social Identity", and Kropp, "'Categorical' Failure: Canada's Equality Jurisprudence".
138 Stychin, "Essential Rights and Contested Identities", para. 4.

139 *Miron v Trudel* [1995], 2 S.C.R. 418.
140 *Nova Scotia (A.-G.) v Walsh* [2002], 4 S.C.R. 325. Chief Justice McLachlin voted with the majority.
141 *Nova Scotia (A.G.) v Walsh*, para. 42.
142 The above discussion does not cover *M. v H.* [1999], 2 S.C.R. 3, the leading case on the constitutional status of same-sex partnerships in Canada. See also *Reference Re Same-Sex Marriage*, 2004 SCC 79.
143 *Adarand Constructions, Inc. v Pena*, 115 S.Ct. 2097 (1995).
144 *National League of Cities v Usery*, 426 U.S. 833, 852 (1976).
145 *Garcia v SAMTA* 469 U.S. 528, 544 (1985). Note that the new federalism jurisprudence of the U.S. Supreme Court drifted significantly away from *Garcia*, but *Garcia* itself was abandoned and not overruled.
146 *Sobeys Stores Ltd. v Yeomans and Labour Standards Tribunal (N.S.)* [1989], 1 SRC 238.
147 Per Justice Wilson in *Sobeys v Yeomans*, para. 37.
148 *Reference Re Amendments to the Residential Tenancies Act (N.S.)* [1996], 1 S.C.R. 186, para. 94.
149 *Hague v CIO (Committee for Industrial Organization)*, 307 U.S. 496, 515, 516 (1939).
150 *International Society for Krishna Consciousness v Lee*, 505 U.S. 672, 678 (1992).
151 *International Society for Krishna Consciousness v Lee*, 505 U.S. 672 (1992).
152 *U.S. v American Library Association*, 539 U.S. 194 (2002).
153 *Virginia v Hicks*, 539 U.S. 113 (2002).
154 Case note, "Constitutional Law".
155 *Reference re Secession of Québec* [1998], 2 S.C.R. 217. All justices were present. The judgment of the Supreme Court was unanimous and was authored by "The Court".
156 The question concerning the constitutionality of unilateral secession under Canadian constitutional law was the first of three. The second question was targeted at the lawfulness of Québec's unilateral secession under international law. The third question raised the issue of the hierarchy of domestic and international norms of secession. The questions were posed by the governor in council. The Supreme Court answered all the questions in the negative, imposing an obligation to negotiate secession under Canadian constitutional law. The focus of the present analysis is on the response of the Supreme Court with regard to the first question.
157 For a brief review of the historical background of the Québec secession movement from the perspective of constitutional analysis see, e.g., MacMillan, "Secession Perspective and the Independence of Québec", 346–352; Oliver, "Canada, Québec, and Constitutional Amendment", 531–547; Svoboda, "No Success in Secession", 754–765.
158 *Québec secession reference,* para. 34. Also id., para. 1.
159 *Québec secession reference,* para. 32.

160 *Québec secession reference,* para. 32. This reaffirms a concept on which the Supreme Court had previously relied in the *Reference re Resolution to Amend the Constitution* [1981], 1 S.C.R. 753 (the so-called *Patriation reference*) and the *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island* [1997], 3 S.C.R. 3 (the so-called Provincial judges reference).
161 *Québec secession reference,* para. 49.
162 *Québec secession reference,* paras. 55–60.
163 *Québec secession reference,* paras. 60–69.
164 *Québec secession reference,* paras. 70–78.
165 *Québec secession reference,* paras. 71–82.
166 Hogg, *Constitutional Law of Canada*, 410. For a particularly fierce criticism of the Supreme Court's approach see Martin, *The Most Dangerous Branch,* 117–123, suggesting that the justices were "making it up as they go along".
167 *Québec secession reference,* para. 91. The Supreme Court did not decide about alternative options to secede. See *Québec secession reference,* para. 105.
168 *Québec secession reference,* para. 92.
169 *Québec secession reference,* para. 88.
170 *Québec secession reference,* para. 103.
171 *Québec secession reference,* paras. 90 and 104.
172 Des Rosiers, "From Québec Veto to Québec Secession", 172. See also Wiltanger, "Sound the Trumpets", 516–521, and Ryder, "A Court in Need and A Friend in Need".
173 The Clarity Act (c.26, 2000).
174 Hogg, *Constitutional Law of Canada*, 410.
175 *Griswold v Connecticut*, 381 U.S. 479 (1965).
176 *Shapiro v Thompson*, 394 U.S. 618 (1969).
177 *Australian Capital Television Pty. v The Commonwealth of Australia* (1992) 177 C.L.R. 106.
178 See, e.g., *Leeth v Commonwealth* (1992), 174 C.L.R. 455. The phenomenon is described in Patapan, *Judging Democracy*, 41–69.
179 *Law v Canada* [1999], 1 S.C.R. 497, para. 51 (Iacobucci, J.).
180 94–343/344 DC, of 27 July 1994. Reaffirmed in 96–377 DC, 16 July 1996.
181 *Pretty v United Kingdom*, Application no. 2346/02, judgment of 29 April 2002, para. 63.
182 In *Hayburn's Case,* 2 U.S. (2 Dall.) 409 (1792), and *Hylton v U.S.*, 3 U.S. (3 Dall.), 171 (1796), the U.S. Supreme Court already established the power of the courts to decide about the constitutionality of congressional enactments.
183 Nino, *The Constitution of Deliberative Democracy*, 189–196.
184 See Chapter Five for details.
185 *Television I* case (12 BVerfGE 28), available in English in Kommers, *Constitutional Jurisprudence*, 69–74.
186 *Southwest State* case (1 BVerfGE 14), available in English in Kommers, *Constitutional Jurisprudence*, 62–69.
187 Tierney, *Constitutional Law and National Pluralism*, 261.

188 On justiciability and the rule of law see Allan, *Constitutional Justice*, ch. 6.
189 *Québec secession reference*, paras. 25 and 28. On the advisory jurisdiction of the Canadian Supreme Court see Vaughan. "Judicial Politics in Canada: Patterns and Trends", 6–9.
190 Reilly, "Constitutional principles", 211.
191 *Québec secession reference*, para. 43.
192 *Québec secession reference*, para. 43.
193 *Québec secession reference*, para. 44.
194 See also references to the continued evolution of Canada at *Québec secession reference*, paras. 45, 46, 48, and 52 ("living tree").
195 Reilly, "Constitutional principles", 215.
196 *Québec secession reference*, para. 43.
197 *Québec secession reference*, para. 43.
198 *Québec secession reference*, para. 47.
199 Des Rosiers, "From Québec Veto to Québec Secession", 182.
200 On Québec's position regarding the Charter of Rights in the 1982 amendment process see Weinrib, "Canada's Charter", 396–02. Québec has never committed itself formally to the Charter and has made several attempts to overcome it by legislative means, with little success. See, e.g., *Ford v Québec (A.-G.)* [1988], 2 S.C.R. 712 for an attempt to use an *omnibus* to eliminate the effects of the Charter over Québec as far as possible.
201 Bienvenu, "Secession by Constitutional Means", 6.
202 The Québec government's bill had the title "An Act respecting the sovereignty of Québec". Over 90 percent of eligible voters participated in the referendum of 1995. The margin rejecting secession was very narrow (1.16 percent, amounting to 54,288 votes), at http://www.electionsQuébec.qc.ca/fr/tableaux/ Referendums_Québec_8484.asp.
The instances of litigation arising out of challenges against the Québec government's bill were *Bertrand v Begin* (1995), 127 D.L.R. (4th) 408, and *Bertrand v Begin* (1996), 138 D.L.R. (4th) 481.
203 Young, "A Most Politic Judgment".
204 *Québec secession reference*, para. 42.
205 *Québec secession reference*, para. 60.
206 *Québec secession reference*, para. 43.
207 *Québec secession reference*, para. 43.
208 *Ford v Québec* [1988], 2 S.C.R. 712.
209 *Reference Re Objection to a Resolution to Amend the Constitution* [1982], 2 S.C.R. 793 (the so-called *Québec veto reference*).
210 Oliver, "Canada, Québec, and Constitutional Amendment".
211 *Québec secession reference*, para. 32.
212 *Patriation reference* [1981], 1 S.C.R. 753. The ruling of the Supreme Court narrowed the proposed convention substantially, thus making the convention easier to comply with.

213 *Federalist*, no. 62 (Madison).

214 E.g. Gaudreault-Desbiens, "The *Québec secession reference*", 803 et seq.; Reilly, "Constitutional principles", 214.

215 For an impartial account of the political climate and popular reception of the confederation arrangement in the provinces see Russell, *Constitutional Odyssey*, 27–31.

216 For an early reconstruction of the two competing narratives developed to interpret the founding ideas of the Canadian confederation see Smiley, "The Two Themes of Canadian Federalism". For a comparison of competing historical narratives see also Cook, "French Canada and Confederation".

217 McRae, "The Meech Lake Impasse", 143.

218 McRae, "The Meech Lake Impasse", 140 et al.

219 It is not inappropriate to argue that drawing the principle of federalism on the basis of the history of an operating system of federalism is somewhat tautological.

220 Gaudreault-Desbiens, "The *Québec secession reference*", 796.

221 E.g., Flanagan, "Canada's Three Constitutions", which sees the history of the Canadian Constitution as a record of the shifting powers of the Cabinet.

CHAPTER FOUR

Behind Historical Narratives: The Promise of Continuity

The previous chapters sought to demonstrate that—despite lawyers' intellectual reflexes—accounts of the past, history, and traditions are not hard facts to be taken at face value. Rather, accounts of the past (historical narratives) are the outcome of processes of interpretation. Lawyers' accounts of the past as presented in constitutional cases are as interpretive as any other historical narrative. The last of these concerns relates closely to a court's justification for selecting particular segments of the past for the purposes of settling a constitutional problem. When invoked in constitutional cases, arguments from history and traditions are presented as if they compelled certain conclusions, thus delineating the proper interpretation of the constitution in a specific case. The privileged stature of a historical narrative approved by a court in a given case stems not from qualities inherent in the preferred historical narrative itself, but from the privileged position acquired by the constitutional review forum in the public discourse. As a consequence, the normativeness of historical narratives is often veiled and amplified at the same time when these narratives are invoked in constitutional adjudication.

As already submitted in the context of the role of traditions in common-law reasoning, this normativeness derives from submission to an unknown authority[1] and is often associated with non-instrumental notions of loyalty, sympathy, and honor.[2] The normativeness of past events is asserted on a non-rational but reasonable basis.[3] It is often overlooked, however, that the normative component

of a historical argument does not follow from the course of past events themselves, but has significantly different origins.[4] Rather, as clearly demonstrated by Robert Alexy, this normativeness is based on a *premise* which indicates whether the example from the past is desirable for the present, or whether it should be abandoned. This normative premise hidden behind the veil of past events withstands separate justification.[5] This is primarily so since it is this premise that frames a court's inquiry into evidence of past practices in the first place. This premise should not be mistaken for a court's initial decision in framing the issue for the purposes of constitutional analysis. Alexy's point draws the observer's attention to a set of premises that are so elegantly masked by juridical arguments. Tracing such premises behind historical narratives is a real challenge for an analysis exploring the role of historical narratives in curbing indeterminacy in constitutional adjudication. The following two chapters are devoted to mapping two central normative justifications underlying historical narratives in constitutional adjudication in courts struggling with unsettled founding myths. This chapter examines the logic of continuity rhetoric underlying historical narratives, while the following chapter concentrates on the equally forceful rhetoric of reconciliation, often launched as a (competing) premise for engaging in an inquiry into the past.

The notion framing the present analysis relates to yet another belief (or, better, misunderstanding) shared by many representatives of the legal profession in connection with historical narratives. Lawyers' first instinct seems to be that any account of the past waiting to be unearthed by willing judges in constitutional cases best resembles a row of pearls on the sturdy thread of continuity. The analysis in the present chapter demonstrates that continuity is indeed very different from a thread holding the pearls of the past. Similar to historical narratives, accounts of continuity are themselves constructions by the narrator—in our case the court or justices in constitutional cases. Simply put, continuity rhetoric and its consequences are construed by the narrator—the court performing constitutional review in this case. As continuity does not follow automatically from an account of the past, for continuity to make a difference in constitutional analysis it first needs to be acknowledged by the court. For continuity to have constitutional or legal consequences, such consequences first need to

be defined and assigned in the narrator's account of the past: continuity itself does not have automatic constitutional or legal consequences. Tracing continuity is all the more interesting since historians, unlike lawyers, are not primarily interested in construing continuity rhetoric as the backbone of a historical narrative. In contrast, the judicial pursuit of continuity most often serves as the plotline and normative justification for invoking historical narratives in constitutional adjudication. Among lawyers, considerations about preserving an institution, a rule, or a principle through the turmoil of real-life events (constitutional or legal continuity) far outweigh the historian's concern for a proper (re)presentation of past events.

The analysis in the present chapter maps commonly held accounts of the virtues of continuity rhetoric in constitutional reasoning and contrasts them with the features and consequences of continuity rhetoric as asserted by courts in constitutional cases. Following an introductory account of problems and misunderstandings, the present chapter reconstructs and explores two sets of examples from constitutional case law which best illustrate the workings of continuity rhetoric in constitutional reasoning. It is appropriate to comment here that continuity and reconciliation rhetorics are often intertwined in constitutional cases, and clear examples of one or the other may be impossible to locate. Cases discussed in the present chapter are characteristic of the continuity rhetoric framing courts' reasoning, yet these cases are certainly not free from other rhetorical patterns, among them reconciliation rhetoric. Lessons drawn from continuity rhetoric in the present chapter will serve as a basis for uncovering the mechanics of judicial constructs of reconciliation in Chapter Five.

4.1. On the vices and virtues of continuity in constitutional adjudication

Legal reasoning as an intellectual exercise is famous and infamous for its path dependence. The promise of continuity in and beyond constitutional cases is comforting for lawyers. During the ordinary working days of established constitutional democracies, jurists are made un-

easy when constitutional continuity is broken or traditions are departed from. As federal judge and law professor Richard Posner said, somewhat sarcastically, "Neither Blackstone nor a modern judge (or shadow-judge law professor) is comfortable saying, 'This is what the law ought to be today, regardless of what it was yesterday, because we have new problems and need new solutions.'"[6] Approaches to *stare decisis* are premised on the need to preserve continuity, or at least the impression of it. Disagreement among advocates of different doctrines of precedent is usually underscored by concerns as to the extent to which revolutionary disruptions can be tolerated or accommodated within an intellectually coherent approach to *stare decisis*. Arguments resting on the premise of continuity are also plentiful outside the realm of precedent. When facing new problems or challenges, lawyers in common-law and civil legal systems alike find refuge in drawing analogies from familiar antecedents, in pointing to long-preserved practices, and in adhering to standards and principles derived from familiar patterns. Any argument advocating the observance of traditions or the need to follow time-honored practices contains a strong claim to continuity.[7] This path dependence of legal reasoning is translated into, and ensured by, patterns of reasoning residing comfortably in lawyers' intellectual habits.

A careless observer might believe that in constitutional cases heavy with historical narratives the rule or standard of behavior identified by the court in past practices is just how arguments should and do flow in constitutional reasoning when the past is consulted for guidance. As a result, historical narratives casually stretching the grip and grasp of past practices into the present are often insulated from closer scrutiny. A more attentive account, looking behind the usual forms and patterns of legal reasoning, however, reveals that in constitutional cases packed with historical narratives the assertion of continuity is indeed a plotline and normative premise for invoking history, thus the court's account of the past, history, and traditions is purposefully arranged along a pattern that reflects continuity. A better reading of such lines of reasoning familiar from constitutional cases approaches the scenario as a historical narrative composed of a sequence of carefully selected past events arranged along the plotline of continuity, leading to—as if an organic conclusion—the resolution of the constitutional problem of the pre-

sent, dressed in the magnificent costume of self-evidence. The impression of the constitution's time-resistant meaning presents the constitutional text as the depository and emblem of continuity in the polity. It is not much of a leap from there to conclude that courts guarding the proper construction of the constitution may then be presented as "agents of continuity" in the public discourse.

In constitutional cases one can detect at least two types of continuity rhetoric, which often intermingle and thus mutually boost one another's force and success. On the surface there is a continuity of events which is reconstructed as a familiar sequence of episodes from the past. This de facto sequence of events often frames a deeper genre of continuity, that is, a continuity of values, often claimed to be reflected by the sequence of events. The interaction of continuity on the surface and the continuity of deep currents can be beautifully traced in the Canadian Supreme Court's reasoning in the *Québec secession reference*. As familiar from Chapter Three, in this case, due to the lack of applicable constitutional provisions, the justices relied on a particular account of the past in order to derive from it a set of constitutional rules. In the *Québec secession reference* the Canadian Supreme Court concluded its analysis by finding that it is "apparent from even this brief historical review that the evolution of our constitutional arrangements has been characterized by adherence to the rule of law, respect for democratic institutions, the accommodation of minorities, insistence that governments adhere to constitutional conduct and a desire for continuity and stability."[8] In the Court's reasoning, the endurance of the initial constitutional arrangement over time and various political challenges had a central role. Note that the justices are not referring simply to a line of events, but also to principles—or, better, values—residing in the past, reconstructed along a continuity rhetoric. In the course of this exercise, the establishing of a link between past, present, and future was central: the four constitutional principles (i.e., federalism, democracy, constitutionalism and the rule of law, and respect for minorities) which sustained the Canadian confederation over time also gave rise to the constitutional obligation of a province to negotiate secession from the rest of the federation.

As is also illustrated by the above quote, the justices transformed their master narrative on the unaltered core of the Canadian Constitu-

tion into a normative premise resting on the promise and demand to preserve the imaginary status quo framing Canadian constitutionalism. The justices emphasized that the original constitutional design for federal-province relations had been preserved over time, despite major constitutional reforms, some of which had not received Québec's approval. The Court's account created a sense and premise of value continuity, which successfully disarmed any reading of past episodes even mildly disruptive of constitutional continuity. This is so since, while one might dispute the justices' account of particular events, it is more difficult to dispute such values as the rule of law. In this particularly mighty continuity rhetoric, legal arguments merge with historical narratives. Underscoring the claim is a clear appeal to constitutional continuity in a most formalistic sense: after all, the Canadian Constitution in force dates back to 1867. The argument of formal constitutional continuity creates an undeniably strong frame of reference. Its weak spot is that the Canadian Constitution itself does not contain a particular provision that could be applied in the case. The Canadian Supreme Court filled this textual void with a patch of de facto continuity that was carefully selected from among potential suitable historical narratives. As already analyzed at length in Chapter Three, the justices were strategic in their selection of past events and actors, and also in their interpretation of carefully filtered evidence. The sequence of past events, when presented in the larger framework of constitutional continuity, amounts to a comprehensive continuity rhetoric, in which a formalistic continuity argument and a rhetoric resting on premises of value continuity mutually reinforce one another. In this constellation a particular historical narrative of Canadian confederation history acquired such prominence that it could be used to establish new constitutional obligations, not traceable in the constitutional text.

The promise of continuity is particularly appealing for theories seeking to legitimize modalities of constitutional reasoning, and also for theorists interested in the anatomy of constitutional argument. The continuity rationale also neatly matches the promises and expectations familiar from the discourse on indeterminacy in constitutional adjudication.[9] This suggests that, while historical narratives might be invoked using justifications other than the expectations stemming di-

rectly from their (otherwise mistakenly assumed) objectivity and neutrality (non-interpretiveness), arguments with a dash of the past are hard to disassociate from imagined qualities that are believed to bring predictability and, thus, to tame indeterminacy, in constitutional reasoning. Furthermore, proceeding on the trail of continuity suggests adherence to the basic tenets of the rule of law, bringing a reinforcement of the fundamentals of constitutional government and the claim of stability. Stability and predictability are appealing qualities for very divergent theories of legal and constitutional reasoning. The appeal of stability goes well beyond rule-of-law considerations. Explaining the value of stability for originalism, Robert Clinton submitted that "it ensures that contemporary society respects the legitimacy of the constitutionally provided procedures for resolving disputes about the meaning and enforcement of its fundamental charter."[10] Reaffirming the claim to stability and predictability, scholars in law and economics find that arguments in tradition are economically efficient, as these arguments trace those rules that are socially accepted and that have been tested over time.[11]

The continuity aspect of originalist arguments is easy to identify: the rhetoric urging compliance with the "original meaning" of constitutional rules, or the observance of constitutional rules as dictated by "framers' intent", merges the force of founding myths with the storyline of centuries of consistent practice, while simultaneously generating an atmosphere of disapproval at any attempt to depart from the established rule. Note, however, that continuity rhetoric is traceable in a wide range of non-originalist arguments deployed in constitutional reasoning. Take, for instance, purposive interpretation,[12] advocating a holistic reading of constitutional provisions covering the purpose of the constitutional provision and also its historical context. The Canadian Supreme Court in *Big M*,[13] in a by now classic account of the purposive approach, established the purpose of the Charter's religion clause (section 2[b]) by consulting history. The Supreme Court looked into the historical record on protection afforded to freedom of religion stretching from post–Reformation Europe, through the First Amendment to the U.S. Constitution, to the words of the Canadian Charter,[14] concluding that "an emphasis on individual conscience and individual judgment also lies at the heart of our democratic political

tradition. … They are the sine qua non of the political tradition underlying the Charter."[15] The Canadian Supreme Court's emphasis on a constitutionally relevant tradition is apparent here, as is the continuity rationale underlying the Court's construction of the Charter's religion clause.

Note that, once presented in a temporal dimension, a continuity rationale is also present (yet less tangible) in modalities of constitutional construction which rest on premises of an unalterable core, such as textualism or its cousin, formalism. These genres of constitutional reasoning are premised on the existence of solid points of reference. Textualism puts the spotlight on the sound meaning or definition of constitutional terms. This unaltered or unalterable core is then presented as the residuary (conceptual) core of a given constitutional provision that has been present at any given moment of the constitution's application. As Akhil Reed Amar remarked recently, one might learn more about the constitution itself when exploring terms recurring in the constitutional text (intratextualism).[16] The flagship premise of his argument rests on Chief Justice Marshall's gesture in *McCulloch v Maryland*,[17] exploring various provisions in the U.S. Constitution in which the word "necessary" is used, in order then to construct the Necessary and Proper Clause. According to Amar, in these instances "Marshall uses the document itself as a kind of dictionary and concordance."[18] References to consistent reliance on such core constructions create the impression of the polity's lasting attachment to a given construction of constitutional provisions.[19]

Nor are theories of constitutional reasoning which rest on strong moral or value premises free from a continuity component. Value- or morals-based theories are manifold: they range from natural-law theories, through premises echoing conceptions of human dignity (Kantian, Christian, or indigenous understandings compete with one another), to religious teachings about the good and the just. The common component of such conceptions is a set of fundamental premises that underlie their universe of permissible and proper constitutional constructions. Such fundamental premises are usually presented as timeless and enduring—in the form of premises that have endured the test of time—or take the shape of narratives that promote the well-being of the polity until the distant future. What matters most for

the validity and applicability (and, very often, for the universality or universalizability) of such premises is the recognition and acceptance of their core in situating present dilemmas vis-à-vis similar dilemmas that have occurred or could occur at any time. Ahistorical premises are often difficult to distinguish from those that have been preserved for a long time or since time immemorial, since in construing a rhetoric of the preservation of, and adherence to, certain values, the alleged endurance of preferred premises overshadows an account of their transformation over time.

Whether in an originalist, a textualist, or a value-essentialist manner, when seeking to secure adherence to long-preserved traditions a constitutional review forum often appears to restate the obvious and reinforce rules that are claimed to be applicable to all participants in the public discourse. At the outset, an appeal to continuity in constitutional argument suggests that (i) there exists a consensus in the polity about the proper understanding of past events and the values they are called to represent (the de facto existence of a shared account of history or traditions); and that (ii) this account of the past generates a polity-wide agreement on, or is evidence for and a source of, standards of behavior to be observed by participants in the public discourse. These traits make continuity rhetoric launched in constitutional adjudication particularly deceptive.

A constitutional review forum's reliance on continuity in such a fashion also suggests—at least implicitly—that the judicial review forum has acted in order to enforce fundamental (although not necessarily constitutional) norms of the polity's operations. For constitutional scholars tired of ramblings about the countermajoritarian difficulty, what is reassuring about the continuity rationale is that it appears to resolve numerous difficulties in situating constitutional adjudication within a pluralistic, representative democracy's predominantly majoritarian decision-making processes. Assertions about shared traditions, even if made via constitutional adjudication, do permeate the polity's ongoing discursive processes of identity building, while prima facie trimming the undemocratic edges of constitutional review. Note, however, that it may be due precisely to this considerable legitimating effect that the veil of continuity rhetoric is not that simple to pierce, despite Reid remarking that "[h]istory lets

[judges] be activists 'in the name of constitutional continuity'."[20] Reid's observations should thus stand as an uncomfortable reminder about the least-welcome effect of a historical narrative invoked in the name of continuity—that is, its potential to perpetuate (rather than curb) uninvited judicial discretion in constitutional cases.

Furthermore, it is appropriate here to repeat the reminder about the relationship of historical narratives and continuity rhetoric: from the perspective of a continuity rationale, it is not history per se that is relevant but adherence to the essence of it, preserving long-held standards and observing principles that are claimed to have been preserved in the polity throughout rather different times. Consistent practice (adherence to a norm) over an extended period of time serves as a sound basis for a claim of continuity. Such arguments are typical vehicles for transforming historic continuity into a rhetoric of continuity—that is, for turning facts into norms. Indeed, when undertaking an inquiry into continuity rhetoric in constitutional adjudication, it is important to see at the outset that a de facto sequence of events ("historic continuity", for want of a better term) does not automatically translate into constitutional or legal continuity. Rather, in constitutional cases courts construe a continuity rhetoric by selecting prominent periods of the past, while omitting others. A continuity rhetoric may be constructed by choosing a preferred account from among competing historical narratives.

The present chapter will demonstrate how this technique for the building of a constitutional continuity rhetoric is also prevalent in French constitutional jurisprudence, where the *republican tradition* receives almost all the attention, while imperial times and monarchies intersecting the lines of republican governments go unnoticed. Thus it is fair to suspect that continuity is not an objective characteristic or feature of the past, but a rhetoric developed by the interpreter. An analysis of these examples reveals that a continuity rhetoric used by a court is shaped not only by hard facts from the past but also by judicial considerations (or, better, value judgments) that might be less instructive or irrelevant for other interpreters of the past.

Furthermore, constitutional court decisions from the early days of democratic transition in Central and Eastern Europe shed light on considerations guiding courts in acknowledging continuity for the

purposes of constitutional adjudication. In these decisions, constitutional courts attributed fundamentally different significance to the unique political events that brought democratic constitutional regimes in place of authoritarian governments. Continuity rhetoric is largely dependent on a court's willingness to find and see continuity in the midst of historical narratives. Yet it is not the compelling message of the time of democratic transition, but the projected (imagined) legal and constitutional consequences of acknowledging continuity that inspire courts in these cases. Thus, cases from transitional justice jurisprudence suggest that continuity in a historical, and also in a constitutional or legal, sense carries weight in constitutional adjudication only if, and to the extent that, courts decide that it should make a difference.

4.2. Constructing constitutional continuity from the building blocks of preferred pasts

As the first step in the exploration of continuity rhetoric in constitutional adjudication, this section explores instances in which constitutional review fora have engaged in constructing constitutional continuity from an account of history of their choosing. Chapter Three already pointed to instances in which courts derived constitutional rights and obligations from a particular account of history by establishing channels of continuity. Chapter Three raised concerns about the role of the constitutional text in legitimizing constitutional adjudication. After all, when courts discover new constitutional norms in the wake of self-made accounts of the past and judicially crafted continuity rhetoric, they do create a mighty substitute for constitutional provisions. It is per se problematic that such revisions of the constitutional text are performed outside the ordinary mechanisms of constitutional amendment procedures. These problems are magnified in the light of observations on the mechanics of judicial techniques for building historical narratives and constructing continuity.

The Canadian Supreme Court is not the only constitutional review forum that establishes constitutional norms on the basis of preferred

historical narratives. When defining rules and principles applicable in the constitutional review of legislation, the French Constitutional Council relies on the consolidated account of a preferred segment of the past—the so-called republican tradition. It is important to emphasize at the outset that the French republican tradition is not a concept of partisan politics. Instead, as historian Sudhir Hazareesingh summarized it, in France the

> central tenets of classical republican ideology consisted of a basic commitment to the concepts of political liberty and equality of condition, and the foundation of a political order based upon representative institutions and the principle of popular sovereignty; these principles were reflected in the French Republic's motto of liberty, equality, and fraternity. … [Republicanism] expressed a vision of society and its basic institutions … based on converging approaches to a number of foundational principles and vales: a belief in the centrality of reason and the critical role of education in the development of human individuality; a deep attachment to the nation; an abiding commitment to the transformative character of good laws; and a quasi-mystical identification with the "people."[21]

This concept of republicanism has been present in the French pantheon of political ideas since the French Revolution of 1789, as the antagonist of the *ancien régime* political ideology, monarchy, and empire. As Philip Nord has demonstrated, the legal profession, and the bar in particular, was largely seen as the depository of the republican tradition already in the nineteenth century.[22] Yet as Pierre Nora notes, the "fundamental contradiction of the French Republic derives from its double birth. As a description of *political culture* it is rich with meaning, but as a *political form* it is empty."[23] It is this concept of republican tradition that has acquired unrivalled prominence in French constitutional jurisprudence in the Fifth Republic.

To be sure, in its jurisprudence the French Constitutional Council attributes major significance to the written provisions of the constitution. The master narrative of the republican tradition was chosen, and then ardently reinforced, by the Constitutional Council in order to

create an impression of constitutional continuity for the purposes of legitimizing the Council's stance over and in spite of the often cryptic language of constitutional provisions. As already demonstrated, the Canadian Supreme Court relied heavily on narratives from constitutional history to respond to (real and imaginary) challenges that question the legitimacy of the written constitution, at least in part on formal grounds. In a somewhat similar fashion, the French Constitutional Council invokes a consolidated account of constitutional history to make up for the silence of the constitutional text, a text which is also troubled by a somewhat tainted past. Before turning to a discussion of the instances in which the Constitutional Council consulted the republican tradition for the devising of constitutional rights and obligations, it might be helpful briefly to sketch the sources of the French Constitution and their relationship to traditions and continuity.

The U.S. is a fortunate polity in being able to point to a document adopted in 1789 and its subsequent amendments as its constitution. So is Canada, with its constitution dating back to 1867 (then the British North America Act). In contrast, a stretch of stormy centuries left French history splintered with promises, experiences, fears, and over a dozen constitutions, some of which charted empires or monarchies, while others provided for republics.[24] Written constitutions tended not to serve for extended periods of time in France, thus the French "are well aware of the impermanence of constitutions."[25] So far the most enduring constitution has been that of the Third Republic, adopted in 1875, which lasted for 65 years.[26] As Carcassone said, in France "any change in political forces throughout the nineteenth century almost inevitably produced a new supreme law … [I]t has taken more than a century and a half for the French people and their political representatives to understand and accept that a constitution should be the definition of common rules rather than a partisan weapon."[27] To place the length of this period in terms of the age of other constitutions, consider that when the Civil War broke out in 1861 the U.S Constitution had been in force for 72 years. Hardly surprisingly, instead of being grounded in written documents, constitutional continuity in the French canon rests with institutions, concepts, principles, and axioms commonly associated with French constitu-

tionalism. Among these ingredients national sovereignty,[28] *laïcité*,[29] liberty, equality,[30] legality, and the concept of *état de droit* figure prominently, along with confidence in the state as the guardian of society in the name of the public interest,[31] a deep-seated distrust of constitutional review by the judiciary,[32] and confidence in legality as guarded by the Conseil d'État. The idea of the republic is a dominant component of the French constitutional canon: rooted in the heritage of the Revolution, the republic as a concept invokes the constitutional heritage of the Third Republic.[33]

The jurisprudence of the French Constitutional Council was not left untouched by the turbulence of constitutional documents and constitutional traditions. The Constitutional Council's part-taking is due to some extent to the very words of the 1958 Constitution, a textual background which was then complemented by the Constitutional Council's account of constitutional tradition proper. In its jurisprudence the Constitutional Council applies a set of rules and principles having constitutional value, the totality of which is commonly referred to as the *block of constitutional norms* (*bloc de constitutionnalité*). This block was developed by the Constitutional Council gradually over time, with reference to the preamble of the 1958 French Constitution and prior constitutional texts invoked therein. The preamble of the 1958 French Constitution opens with a reference to the solemn attachment of the French people to human rights and the principles of national sovereignty, as defined in the 1789 Declaration of the Rights of Man and Citizen, reaffirmed and complemented by the preamble of the 1946 French Constitution. Furthermore, in addition to sturdier written constitutional sources, the block of constitutional norms hosts unwritten constitutional principles that comfortably legitimize the Constitutional Council's attempts to establish constitutional rights and rules that were not included in constitutional provisions.[34]

This collage of constitutional instruments is already problematic for an observer seeking coherence in constitutions, as the various documents comprising the block reflect radically different concepts of liberties and of the state. The 1789 Declaration is the direct product of the French revolutionaries' Enlightenment liberalism, while the 1946 preamble is best read as a white paper on building a socialist democracy. In the 1982 *Nationalizations* case the Constitutional Coun-

cil was presented with an issue which brought the apparent conflict between the property provisions of the 1789 Declaration and the 1946 preamble into the spotlight.[35] The plain logic of *lex posterior derogat priori* would dictate that, being a subsequent constitutional amendment, the 1946 preamble abrogated the conflicting property provisions of the earlier 1789 Declaration.[36] Instead of opting for such a formalistic solution, the Constitutional Council relied on familiar concepts from the French constitutional tradition to resolve this tension. In response to the challenge, the Constitutional Council held that the normativeness of the 1958 Constitution, and, thus, of the 1946 preamble, the 1789 Declaration, and all the principles contained therein, stems from the fact that both constitutional preambles were approved in a nationwide referendum.[37] The Council also emphasized that, prior to the referendum approving the 1946 Constitution, there was a referendum in 1946 which rejected a constitution containing a declaration of rights different from the 1789 Declaration.[38] Thus the Constitutional Council established a clear hierarchy between the written sources of the French Constitution, with the aid of a concept already very familiar from the conceptual toolkit of French constitutional traditions—national sovereignty.

The block of constitutional norms is an elegant jurisprudential invention. It is best seen as the outcome of the Constitutional Council's attempt to consolidate the apparent ideological discrepancies and gaps in the written text of the French Constitution by distilling constitutional principles from allegedly long-held constitutional traditions of the French republics. The *Nationalizations* case is a prime example of coherence building in response to conflicting written provisions. Various unwritten constitutional principles introduced by the Constitutional Council were to make up for lacking constitutional provisions. Merging the text of the 1958 Constitution with other written and unwritten sources of constitutional rights and obligations removes the venom of arguments suggesting that, unlike the main text of the 1958 Constitution, its preamble is too vague to carry normative force.[39] Note that the block of constitutional norms itself is constantly developing, and scholars, the most watchful observers of such subtle developments, are not in complete agreement as to which unwritten principles developed by the Constitutional Council are included in the block.

Interestingly, when developing unwritten constitutional principles of varying kinds, the Constitutional Council seems to be keen on supporting its conclusions by invoking the French Constitution's written provisions. In equality cases the Constitutional Council sometimes refers to the principle of equality as such. In addition, in its jurisprudence the Council has so far pointed to Articles 2, 3, and 5 of the 1958 Constitution, lines 1, 3, 12, 14, 16, and 18 in the 1946 preamble, as well as to Articles 1, 6, 10, 11, and 13 of the 1789 Declaration.[40] Indeed, the line between the written and unwritten components of the block is somewhat hazy. For even more prominent examples in this respect, one might think of the 1946 preamble acknowledging "fundamental principles recognized by the laws of the republic" (*principes fondamentaux reconnus par les lois de la République*), and also listing a number of political and socioeconomic rights and commitments as "principles particularly necessary in our times" (*principes particulièrement nécessaires à notre temps*), phrases which are used by the Constitutional Council to recognize unwritten constitutional rules.

As Favoreu put it, in French constitutional jurisprudence fundamental principles are regarded as the expression of the continuity of republican constitutionalism,[41] while Verpeaux went as far as remarking that continuity between the principles of the 1789 Revolution and the new principles of 1946 was secured by the fundamental principles derived by the Constitutional Council.[42] Yet, as Favoreu noted elsewhere, the phrase itself hardly stands as a symbol of overwhelming consensus, as it was inserted into the 1946 preamble following a last-minute proposal and after being adopted by a bare nine-vote majority in the Constitutional Assembly. Nor can the language itself be considered striking: it was lifted from the finance law of 31 March 1931, which provided that freedom of education is a "fundamental principle recognized by the laws of the republic."[43] Yet the Constitutional Council's insistence on associating fundamental principles derived from the republican tradition with the text of the constitution—as if a reminder—remains characteristic of this segment of constitutional jurisprudence.

Even before acknowledging the applicability of the 1789 Declaration,[44] in 1971 the Constitutional Council established that freedom of association amounted to a "fundamental principle recognized by the

laws of the republic" and was worthy of constitutional protection.[45] Thereupon the Constitutional Council invalidated the government's bill aimed at imposing a prior restraint on freedom of association. Simple as such a decision might sound, the Constitutional Council was speaking in a very complex situation.[46] The government's attempt to amend the 1901 law on associations so as to authorize the prefect to refuse to register associations and then to allow—after a hearing before a judicial tribunal—for the banning of an association formed for an illicit purpose, must be seen in the broader context of the 1968 student protests and general strikes, and as an immediate follow-up to the administrative dissolution of a small left-wing political party in 1970. Outside the house, opposition to the government's attempts came from Jean-Paul Sartre and Simone de Beauvoir, prominent intellectuals associated with the political Left. The National Assembly's law committee was divided over the bill. François Mitterand, who was later to become president but who was, at the time, in the ranks of the Socialists in opposition, exclaimed: "This is the first time that a government which calls itself republican dares to contradict history and repudiate the battles of one hundred and fifty years, led by our fathers, who knew the price of tears and the price of blood. … Do not profit from your numbers to alienate a democratic heritage which is as much yours as it is ours."[47] The Senate rejected the bill twice, and when the National Assembly adopted the bill against the Senate's opposition[48] the speaker of the Senate referred the bill to the Constitutional Council for preliminary review.[49]

In this case the Constitutional Council derived freedom of association as a "fundamental principle" from the 1901 act on the freedom of association in order to corroborate the existence of this fundamental principle.[50] Note, however, that in this laconic decision of half a dozen paragraphs, each opening with the famous "Whereas" (*Considerant*), the Council offered very little guidance as to the underlying reasons and potential consequences of this surprising move. To be sure, the *Freedom of association* decision dispersed doubts about the normative force of the vague phrases in the 1946 preamble.[51] The Constitutional Council also made clear that it is able to invalidate bills which violate "fundamental principles." Thus, "fundamental principles" are taken to form part of the block of constitutional norms.[52] Over the

years the Constitutional Council has displayed an increasing willingness to invalidate statutes in response to rights- and equality-based complaints, some of which were based on fundamental principles while others were supported by the terms or concepts of the 1789 Declaration.

This almost heroic quest for continuity, otherwise referred to as constitutional legitimacy, is also traceable at a different level in contemporary commentaries seeking to conceptualize the Constitutional Council's jurisprudence along the logic of constitutional continuity as derived by the Council on the basis of the republican tradition. The first commentators, while acknowledging the novelty of the Constitutional Council's approach, did not see the 1971 *Freedom of association* decision as a groundbreaking gesture making individual rights protection possible. Instead, they perceived the Council's decision as belonging among other mechanisms used to guard and balance the exercise of legislative and executive powers.[53] The preamble was meant to orient parliament in exercising its legislative functions.[54] This reading of the *Freedom of association* decision was in line with the initial conception of the Constitutional Council's role. There seems to be a consensus between observers that, as envisioned during the drafting process, the Constitutional Council was never meant to use the 1958 preamble for constitutional review.[55] These readings situate the *Freedom of association* decision within the canons of French constitutional culture, components (reflexes and reservations) of which date back to times preceding the French Revolution. These commentaries also confirm the suspicion about constitutional continuity being an invented rhetoric, framing an inquiry into constitutional history: the Constitutional Council's *Freedom of association* decision was explained in line with the then prevailing French tradition conceptualizing the role of the Constitutional Council as a watchdog of the separation of powers—a role often explained with reference to the *ancien régime*, that is, originating from before republican times.[56] Once rights review became embedded in French constitutional jurisprudence due to the Constitutional Council's efforts, the perception of the Constitutional Council's role also changed. The new explanation presents the Constitutional Council as a defender of constitutional rights, that is, of the central ingredients of the republican tradition.

The *Freedom of association* decision is heavy with such implicit references to one particular segment of French constitutional history, thus it can read as an intertextual blueprint of the memory of republican tradition associated with the Third Republic.[57] The Constitutional Council's preference for the Third Republic is not as arbitrary as it may appear at first sight. Indeed, it can be traced back to a dilemma that was already sensed at the time the 1958 Constitution was drafted. As Foyer explained, the drafters of the 1958 Constitution could not get away without a bill of rights. Yet the government "could not purely and simply return to the laws of 1875 [i.e. the Third Republic]."[58] The way to this version of the past was paved in the preamble by references to the 1789 Declaration and the 1946 preamble. Rivero is thus of the opinion that the *Freedom of association* decision re-established constitutional continuity in France.[59] Subsequent developments contributed substantially to redefining the perception of the status and implications (meanings) of the *Freedom of association* decision in French constitutional jurisprudence. Conditions derived from constitutional jurisprudence over time clearly reflect the Constitutional Council's preference for establishing fundamental constitutional principles on the basis of the republican tradition. In the *Freedom of association* decision the Constitutional Council did not disclose a test or criteria for ascertaining "fundamental principles." As the exact contents of these fundamental principles is not defined anywhere in the French constitutions,[60] it is no surprise that, according to some commentators, the *Freedom of association* decision suggests that the power of the Constitutional Council to derive "fundamental principles" is unlimited.[61] Yet throughout the years the Constitutional Council has been relatively reserved about confirming "fundamental principles", establishing less than a dozen such principles in three decades.[62] From constitutional jurisprudence it seems that the Constitutional Council takes quite literally the 1946 preamble's phrase acknowledging "fundamental principles which are *recognized by the laws of the republic*": the Constitutional Council ascertains those fundamental principles that may be traced (i) in a legislative act enacted by a republican government, which (ii) entered into force prior to the 1946 preamble, and (iii) allows for no exception.[63]

Based on the Council's application of these conditions it seems that principles are expressed in a sufficiently general form in one or more acts of a republican legislature from before 1946, and it is important that the principles should not be repealed by subsequent legislation.[64] As a rule of thumb, imperial laws and acts enacted during the monarchy cannot give rise to fundamental principles.[65] The deadline set by the entry into force of the 1946 preamble rules out the invoking of legislation passed during the Fourth Republic. This carefully crafted limitation, however, includes ordinances passed by the provisional government.[66] Thus the approach followed by the Constitutional Council limits to republican times the temporal dimension of its own discretion in establishing fundamental principles.[67] Most recently the Council found that the principle according to which the law may allow a collective labor agreement to depart from the statute only if the derogation is more favorable to the employees, does not stem from republican law preceding the 1946 preamble and, as a consequence, cannot be recognized as a fundamental principle of constitutional stature but amounts to a fundamental principle of employment law.[68] Note, however, that, especially in the early decisions on fundamental principles, the Constitutional Council did not go into detail as to the source of the principles derived. In the first decision acknowledging freedom of education[69] the Constitutional Council simply pointed to the 1931 finance law from which the phrase "fundamental principles" was transported into the 1946 preamble.[70] It was only in a subsequent education decision in 1999 that the Constitutional Council pointed to two further statutes passed on higher education during the Third Republic.[71]

Despite a few uncertainties, the above instances of prudence and self-restraint exercised by the Constitutional Council create the impression that, when establishing fundamental principles, the Constitutional Council has little discretion due to objective limits on the exercise, and also since there are not many statutes enacted under the republican period from which to establish fundamental principles.[72] In addition, one has to be aware that a number of principles which were recognized by the Constitutional Council as fundamental were earlier established in the jurisprudence of the *Conseil d'État*, the French high administrative court.[73] For instance, the *Conseil d'État* established al-

ready in 1956 that freedom of association constituted a "fundamental principle recognized by the laws of the republic."[74] Thus, as a matter of substantive law, the stance taken by the Constitutional Council in the 1971 *Freedom of association* decision was not that much of a novelty. The main reason why the Constitutional Council's decision is revolutionary is thus not because it establishes a particular fundamental principle (i.e., freedom of association) but because it invalidates legislation with reference to the constitutional liberty contained therein.[75]

The above observations might create the impression that the Constitutional Council has little discretion in cases in which its task is to certify the existence of certain fundamental principles on the basis of a narrow set of legal rules comprising the republican tradition, and even at such moments the Constitutional Council appears to follow a beaten path. The Constitutional Council strives to preserve an impression of coherence within the block of constitutional norms, among the written rules and also among the unwritten constitutional concepts stemming from the republican tradition. The Council takes care to associate components of the republican tradition with the written words of the constitution. The Constitutional Council's jurisprudence suggests that there is only one legitimate narrative line of French constitutionalism underlying the constitutional text: the republican tradition. Using a particular account of the republican tradition the Constitutional Council crafts an almost deceptively smooth continuity rhetoric. While at certain points the Constitutional Council is quite successful at presenting a series of lessons from well-preserved republican tradition as if no other equally appropriate account of constitutional history existed, the mask of the Constitutional Council's master narrative is relatively easy to lift. The plurality of narratives of constitutional continuities and potential sources of constitutional rights and obligations in France thus revealed shows a striking resemblance to the multiplicity of accounts untangled in the Canadian context familiar from Chapter Three.

Indeed, the coherence of the account of French constitutional tradition emerging in conjunction with the constitutional text from the Council's jurisprudence is almost astonishing. Note that it is not unprecedented that the statutes of the republic do not offer clear guidance. When analyzing the 1971 *Freedom of association* decision it was

shown that, although the 1901 act does preclude prior restraints on the freedom of association, the wording the Constitutional Council used to rephrase the respective provision of the 1901 act does not per se preclude it. Nevertheless, the Constitutional Council did strike down the bill intending to impose a prior restraint on the freedom of association.[76] This aspect of the decision is interesting, since a 1908 act in Alsace-Moselle authorizes the local legislature to exercise prior approval of associations.[77] Thus the 1908 act contains a restraint very similar to the one successfully challenged before the Constitutional Council in the 1971 case. In 1988 the *Conseil d'État* held that, while the Alsace-Moselle act was completely different from the freedom of association act of 1901, the 1908 act is also part of a republican legal regime from which the fundamental principles recognized by the laws of the republic are established.[78] In 1991 the Constitutional Council refused to review the constitutionality of the 1908 act for lack of jurisdiction.[79] The underlying indeterminacy stemming from the Constitutional Council's discretion in selecting the right republican laws for the purpose of establishing a fundamental principle is furthered by the fact that the Constitutional Council does not provide detailed reasons in its decisions as to why or why not a piece of republican legislation gives rise to fundamental principles.

The ambiguities and opportunities for discretionary decision making that are opened up by often unarticulated contradictions are well shielded in French constitutional jurisprudence below the smooth surface created by the Constitutional Council. While the Constitutional Council's decision on fundamental principles seems to be relatively efficient in curbing the Council's creativity, other ingredients of the block of constitutional norms offer numerous occasions for constitutional norm making. Beyond the relatively safe domain of fundamental principles the Constitutional Council's jurisprudence is heavy with constitutional principles that are established or derived according to significantly less stringent (and less transparent) criteria than the ones applied when identifying fundamental principles recognized by the laws of the republic. In addition to fundamental principles, in its jurisprudence the Constitutional Council has acknowledged what it calls "principles particularly necessary in our times" (*principes particulièrement nécessaires à notre temps*), "principles of constitutional

status" (*principes de valeur constitutionnelle*), and the "objectives of constitutional value" (*objectifs à valeur constitutionnelle*).[80] As open ended as these phrases may sound, "principles particularly necessary in our times" are expressly mentioned in the 1946 preamble. More precisely, this phrase is the remnant of a more ambitious project of drawing up a new bill of rights, an exercise unsuccessfully attempted in 1945.[81]

Note that these phrases do not refer to traditions at any point. Quite the opposite: they seem to invoke the spontaneity of the present. This is a clear departure from the rhetoric of continuity, if not a rupture. In its jurisprudence the Constitutional Council does not overlook these references to the contemporary and the recent. The Constitutional Council suggested for the first time in the 1975 *Abortion* decision that there are principles of constitutional status other than "fundamental principles" and principles listed in the 1946 preamble.[82] These different types of principles were introduced by the Constitutional Council itself and were usually established with reference to the 1946 preamble.[83] For instance, among "principles of constitutional status" the Constitutional Council acknowledged human dignity with reference to the opening phrase of the 1946 preamble.[84] Although "objectives of constitutional value" are not mentioned expressly in the text of the 1958 French Constitution either, according to the Constitutional Council they too form part of the block of constitutional norms and are to be regarded as instrumental for implementing constitutional values.[85] As such, they may be relied upon to invalidate unconstitutional legislation: subjects of constitutional value are usually invoked as a limitation of an otherwise protected right.[86] Typically the objectives do not amount to constitutional rights but make it the duty of the legislator to provide for the realization of an ideal.[87] Among the objectives of constitutional value the Constitutional Council acknowledged the search for criminals and the prevention of threats to public order, the preservation of media and information plurality, and access to decent housing.[88]

This short overview of the unwritten sources of the French Constitution suggest that the Constitutional Council does not shy away from introducing new genres of constitutional norms and new substantive constitutional rules defining the scope of constitutional rights and the limitations of government action. The creativity of the Con-

stitutional Council is striking with respect to identifying unwritten sources, especially when compared with the efforts of the Council to appear principled and reserved in confirming fundamental principles. At the same time, the decisions also highlight one potential of fundamental principles tied so closely with the republican tradition in the manner construed by the Constitutional Council. After all, the Constitutional Council's construction of republicanism for the purposes of constitutional reasoning clearly has the potential to freeze constitutional rights along the lines of a previous status quo. The unwritten sources of the French Constitution other than fundamental principles can thus be understood as ancillary aids to constitutional reasoning. However, since in the domain of unwritten constitutional principles the Constitutional Council enjoys considerable discretionary powers, it is up to the Constitutional Council to acknowledge that a particular unwritten rule amounts to a fundamental principle—in which case seemingly more stringent although not overly transparent criteria apply to its confirmation—or, instead, that the rule constitutes another type of unwritten principle, in defining which the Constitutional Council is less restricted by the bounds of the republican tradition. As a relatively recent series of decisions on principles of juvenile justice suggests, the line between various casts of unwritten constitutional principles is unclear.

In a 2002 decision (subsequently affirmed in 2003 and 2004) the Constitutional Council acknowledged a new fundamental principle concerning juvenile justice. The Council's reasoning introduces previously unseen developments, therefore the strategy followed by the Council deserves closer attention.[89] In the decision the Constitutional Council circumscribed the scope of the fundamental principle regarding juvenile justice measures in the following terms. First the Constitutional Council declared that the need to adapt criminal sanctions to the age of juvenile offenders has been recognized by the laws of the republic since the beginning of the twentieth century. The Constitutional Council then pointed to two statutes, one from 1906 and the other from 1912, and to an ordinance from 1945, which reflected such considerations. The Constitutional Council continued in more general terms, finding that republican legislation preceding the entry into force of the 1946 Constitution never ruled out the possibility of

punishing juvenile offenders instead of opting for purely educational measures. Thereafter, returning to the 1945 ordinance, the Constitutional Council said that under that regulation punishment was clearly an option, including, among other measures, up to 13 years in prison. Finally, the Constitutional Council emphasized that the presumption of innocence, the proportionality of punishment, and the right to defense as recognized in the 1789 Declaration and other guarantees of the criminal process set forth in Article 66 of the Constitution were also to be observed in the case of juvenile offenders.[90]

It is apparent from the above line of reasoning that republican legislation does not offer sufficient guidance amounting to an unconditional rule of behavior that can be cast as a fundamental principle. While there are specific rules on juvenile criminal offenders in republican statutes, in this case it clearly remained for the Constitutional Council to define the scope of a fundamental principle on the basis of statutory provisions and an ordinance on the criminal sanctions permissible against juvenile offenders, which were scattered around republican legislation.[91] As if to make this conclusion appear less haphazard, the Constitutional Council invokes well-established constitutional guarantees of the criminal process as a framework for its finding on the fundamental principles applicable to juvenile offenders. This recent example from French constitutional jurisprudence seems to indicate that the Constitutional Council is willing to stretch the self-made limits of recognizing fundamental principles. This development is all the more surprising as in recent years, prior to the juvenile justice case, the Constitutional Council has been particularly reluctant to acknowledge fundamental principles, despite frequent and strong suggestions from petitioners approaching the Constitutional Council.[92]

What makes it even more difficult to distinguish fundamental principles from other unwritten constitutional rules is the Constitutional Council's reliance on the republican tradition to underscore any unwritten constitutional principle. It has already been mentioned that certain unwritten components of the set of constitutional norms may derive only from legislation passed by a republican government, and the republican tradition may serve as a source of general principles of law. In the field of fundamental rights the scope of fundamental prin-

ciples and the republican tradition are practically identical: the republican tradition cannot be invoked to establish the constitutionality of a bill unless the republican tradition gave rise to fundamental principles recognized by the laws of the republic.[93]

Outside the field of fundamental rights the republican tradition is referred to as the basis for establishing constitutional principles applicable to the organization and operation of government, applied mainly by the Conseil d'État and, more recently, by the Constitutional Council.[94] In some cases the reference to the republican tradition is indirect, that is, review fora mention a principle as being "essential to our constitutional law" or a "general principle of our constitutional law."[95] It is important to note, however, that the republican tradition is not part of the "block of constitutional norms" on its own, as it may not serve as an independent ground on its own to invalidate legislation. Nonetheless, the republican tradition is an essential component of the deep structure of the French Constitution.

In addition to the unwritten components of the block of constitutional norms in the Constitutional Council's jurisprudence, one may also encounter the so-called general principles of constitutional status, the stature of which in the block is less straightforward.[96] To a certain extent, the term echoes the concept of "general principles of law" developed in the jurisprudence of the Conseil d'État. Examples of general principles are the protection of liberty, respect for the rights of citizens, and equality in all respects.[97] Rivero identified four main sources from which the Conseil d'État draws general principles such as (1) the principles of 1789; (2) general principles derived from private law by analogy; (3) principles drawn from the "nature of things"; and (4) ethical principles.[98] In addition, the Conseil d'État derives general principles from other sources, such as the republican tradition.[99] Over time, the Constitutional Council has incorporated the general principles into its own jurisprudence. Still, there is uncertainty as to whether the general principles are part of the "set of constitutional norms."[100] Nonetheless, despite the Constitutional Council's confirmation of the general principles, "these principles have been associated with the body of decisional law (*la jurisprudence*) of the Conseil d'État, rather than with the Constitution or other texts [of constitutional value]."[101]

By affirming unwritten constitutional norms—and especially by formulating fundamental principles—the Constitutional Council imports, or rather resurrects, constitutional rules that were introduced by previous republican governments. The claim that a principle or rule was observed by a previous republican government supplies the rule with an additional layer of legitimacy. After all, fundamental principles are not invented by the Constitutional Council ex nihilo: the Constitutional Council only reaffirms principles that were enacted and observed in a previous republican regime.[102] The limit on the discretion of the Constitutional Council in establishing fundamental principles is a fairly vague one, as it does not attach any substantive criteria to the decision of the Constitutional Council. "Republicanness" is a formal and not a substantive criterion; it does not prescribe components of "democratic form of government" or the like. Instead, it refers to the relevant segment of the past (a regime that was a republic and not a monarchy) that may be considered for the purposes of locating the origin of various constitutional rules not mentioned explicitly in the 1958 French Constitution.

The relevance of these reservations is best reflected using the example of the presumption of innocence. The presumption of innocence, protected explicitly in the 1789 Declaration (Article 9), may alternatively be traced back to a royal declaration by Louis XIV of 1788.[103] Thus it can be traced back to a republican tradition rooted in a revolutionary source, or, alternatively, traced back to monarchical sources. Does the monarchical origin of the presumption of innocence undermine its republican pedigree? Does the Constitutional Council follow a proper route when it is silent about the 1788 royal declaration, referring only to the 1789 Declaration? In addition, it should be noted that the Constitutional Council refers to past legislation in general terms—for example, by the number of the act and not by the number or language of the respective provisions, an approach which grants considerable interpretive freedom to the Council. The claim that, in its jurisprudence, the Constitutional Council relied on sources that reflected a republican spirit is to be received against this background.[104] In the light of the above it is hardly surprising when Troper finds that the "Constitutional Council … gave itself … the power to interpret those old, vague, and ambiguous texts and to de-

termine what those fundamental principles were. The fatal point was that this power seemed, in the eyes of many, to be discretionary, and therefore political."[105]

The discretion of the Constitutional Council is considerable in the field of prescribing unwritten constitutional norms, where the republican tradition as such (falsely) appears to be the Constitutional Council's own intellectual construct, which made a lasting impact on the observers of constitutional jurisprudence. Falsely, since such a reading does not acknowledge the concept of republicanness that has been present in French public discourse since the Revolution, nor does it give proper credit to the jurisprudence of the Conseil d'État. Even if one regards the French concept of fundamental principles as the expression of constitutional continuity, and the preamble of the 1958 Constitution as one of the most visible depositories of French constitutional continuity,[106] it is important to note that only those parts of the republican tradition are preserved that are chosen by the Constitutional Council. To begin with, the Constitutional Council's affirmation of the normativity of the preambles and the Declaration, and the unwritten constitutional principles of republican origin contained therein, may also be regarded as the Constitutional Council's rejection of a competing strain of constitutional "tradition" from before 1971, according to which declarations of rights and the like are not enforceable.[107] These observations thus at least raise doubts about the consistent continuity rhetoric launched by the Constitutional Council with reference to the republican traditions—or to the traditions of the Third Republic, to be more precise.

The 1958 French Constitution, which is the constitution of the Fifth Republic, is heavy with tension between formal constitutional continuity and unwritten constitutional traditions. The hunt for legitimacy in constitutional matters results in constitutional continuity in a most formal sense competing with continuity narratives that draw on unwritten concepts associated with constitutionalism in French professional and public discourse.[108] These concepts associated with French constitutional traditions are not to be taken for self-standing sources of constitutional law. It is important to see that while these concepts are widely used both in academic and legal circles, and also in political contributions, the words stand for fuzzy concepts that

have been carried across many conflicts and contexts. The ingredients of the French constitutional tradition far from comprise a homogeneous whole, and sometimes, as some of the above examples illustrate, it is even problematic to separate the republican line from the sediments of the *ancien régime*, and monarchical and imperial alternatives. The heterogeneity of concepts in written constitutions and the plethora of French constitutional traditions result in awkward tensions that are often difficult to reconcile while preserving the legitimacy of the constitution in force. It is the republican tradition as construed by the Constitutional Council that keeps this boat afloat.

Despite the French Constitution's thorough infusion with the republican tradition, somewhat paradoxically the republican pedigree of the institutions so carefully safeguarding the republican record is somewhat ambivalent. The high judicial forum exercising judicial review in France, the Conseil d'État, used to be one of the first interpreters of the preamble of the 1946 Constitution, and it has applied the preamble to invalidate norms which were enacted before the entry into force of the 1946 Constitution.[109] Its jurisprudence continues to influence the Constitutional Council's jurisprudence and perception of republican traditions. Yet the Conseil d'État does not boast a straightforward republican pedigree. Indeed, the body which has evolved into a guarantor of legality in more than one French republic is a prominent Bonapartist sediment, having been established by Napoleon in 1799.[110] This pill is difficult to swallow, even if Napoleon was said to have been accomplishing a reform of public administration which the Revolutionaries "failed to engender."[111]

As Bell noted, the members of the Constitutional Council are more than simple public officials: they are "spokespersons of the republican constitutional tradition."[112] Nonetheless, the Constitutional Council created in the 1958 Constitution is a republican institution with an ambivalent pedigree. The original design limited standing to a few high dignitaries and set the Constitutional Council's jurisdiction in narrow terms, allowing only for preliminary review of legislation.[113] Standing was granted to sixty deputies or senators only in 1974, while standing to private individuals has been rejected. This restricted understanding of constitutional review is usually explained as a reflection of traditional French reluctance towards rights review by courts.[114]

This fear of government by the judiciary mirrors fears which originate in negative experience gained during the *ancien régime* preceding the Revolution. In search of a revolutionary antecedent, the powers of the Constitutional Council might also be conceptualized as a modern, rationalized entrenchment of Abbé de Sieyès' concept of the "jury of constitutional revision", or might be fitted within Benjamin Constant's conception of the "judicial power to judge other powers."[115] Recently Dominique Rousseau noted that, during its operation, the Constitutional Council turned out to be the very opposite of what its architects initially envisioned,[116] thus one might wonder what this entails for fitting the Constitutional Council within the republican tradition proper of the day.

The 1958 Constitution was adopted after the constitutional amendment procedure prescribed in its predecessor, the 1946 Constitution of the Fourth Republic, was considerably tinkered with to clear the way before the draft constitution proposed by General de Gaulle's government and subsequently adopted by a nationwide referendum.[117] From the perspective of formal constitutional continuity this procedural glitch might easily be seen as problematic, along lines reminiscent of the logic challenging the validity of the constitutional amendments adopted in 1982 in Canada without Québec's consent. Certainly, the shadow of military rebellion cast over the process by General de Gaulle[118] does also taint the formal or procedural pedigree of the 1958 French Constitution. Thus the written text of the 1958 French Constitution itself does not stand unquestionably as a depository of constitutional continuity, at least in the eyes of some, even if this view does not affect the normativity of the Constitution in the most formal sense.

Indeed, the government established by the 1958 French Constitution can easily be seen as a departure from some French constitutional traditions and explained in other terms. After all, General de Gaulle—who shared a similar position in this respect with Marshal Pétain—considered the "institution of the Third Republic in great part responsible for the dramatic situation in which France found itself in 1940."[119] Those who, like General de Gaulle, attributed overwhelming significance to the expression of national sovereignty, would see all formal or procedural shortcomings resolved by the sub-

sequent referendum.[120] Such recourse to direct democracy is easily translated in the French context as accounting for the general will (J.-J. Rousseau) and fits comfortably within the allegory of the nation (Sieyès).[121] As Rogoff showed, "Sieyès's legacy to French constitutionalism was decisively to undermine the sanctity of written constitutions. By applying the theoretical insights of Rousseau to the constitutional controversy before the nation in early 1789, Sieyès drew on the practical implications of Rousseau's theory and supplied it with compelling emotional force. But, 'in repudiating claims for a traditional constitution, Sieyès had also undermined the capacity of any constitutional arrangement to withstand the subversive effects of the principle of national sovereignty'."[122]

According to another strain of French constitutional parlance the concept of the republic stands for a parliamentary regime, while the de Gaulle plan adopted in the 1958 Constitution has strong presidentialist features.[123] Yet the 1958 semi-presidential government is not a Bonapartist regime either.[124] These factors were translated by François Mitterand (after an unsuccessful bid for the presidency and long before he became president himself), who famously dubbed the Fifth Republic a "permanent coup d'état." This language vividly evokes the gesture of Louis Napoleon, who was elected in 1848 to become president of the Second Republic, only to declare the end of that republic after four years and the establishment of the Second Empire.[125] Furthermore, as historian Pierre Birnbaum points out, narratives seeking to establish the legitimacy of the Fifth Republic with reference to continuity must account for the fact that, in the Vichy government, "senior civil servants of the republican state could have, without any great qualms or misgivings, long obeyed a regime under Nazi command; … and that, after the war, they could have pursued administrative advancement under the reinstated republic."[126]

Indeed, the officially sanctioned master narrative of the Fourth Republic, which made its impact on the Fifth Republic, presented a powerful alternative to the continuity rhetoric underlying the republican tradition. The self-legitimization ideology of the de Gaulle regime in post–World War II France rested on the premise of preserving the "spirit of the resistance", in armed opposition to the ideology of Nazism and Marshal Pétain's collaborating Vichy government. This

strategy effectively precluded any serious accounting for Vichy's deeds, including its racism, until after General de Gaulle's resignation in 1969. The student revolts of 1968 signaled the weakening of the resistance narrative. Another important blow was delivered in 1971 by the documentary *The Sorrow and the Pity* (*Le Chagrin et la pitié*, 1971), a film that was banned from French television until 1981.[127] Despite public and professional discourse intensifying over the "Vichy syndrome", the French president, François Mitterand, was reluctant to apologize to the victims of the deportations carried out by the Vichy government, even in 1992.[128] President Mitterand's reluctance is not hard to explain in the light of his short involvement with the Vichy government, before he joined the resistance movement in 1943. The criminal prosecution of some of the highest (and most notorious) officials of Vichy France for crimes against humanity was undertaken in the 1990s. It was only in 1995 that the then French president, Jacques Chirac, officially acknowledged the responsibility of the French state. The silence and artificially perpetuated oblivion is all the more disturbing since, as Grosswald Currant, notes "[j]ust as many of Vichy's roots lay in France's republican past, many of modern France's roots lie in its Vichy past."[129] Note that disenchantment with the Fifth Republic has not ceased, and prominent members of the French intellectual elite, haunted at least in part by the convoluted making and founding myths of the Fifth Republic, are actively speculating about a Sixth Republic.[130]

It is against this background that the Constitutional Council attempts to muster a more or less coherent continuity rhetoric legitimizing the 1958 Constitution. The continuity rhetoric as applied by the French Constitutional Council is a means of soothing potential tensions between various, sometimes competing, legitimizing narratives (e.g. nation, republic) and the formal shortcomings of the written text of the 1958 French Constitution. The French Constitutional Council's coherence-building exercise is made even more convincing by another aspect of the French constitutional and legal culture, which allows the Constitutional Council to speak in one voice and issue condensed decisions with curiously cryptic bits of reasoning, without the inconvenience of dissenting opinions.[131] This latter line of "French constitutional tradition", however, is elegantly transposed

with a competing line of French political tradition requiring the validation of positions undertaken in matters of public interest in the course of rational discourse and debate.[132] The foregoing is not intended to suggest that French constitutional history is unique in being layered with numerous continuities inviting competing and conflicting interpretations. Indeed, most constitutions covered by the present analysis have had troubled pasts, are burdened by volatile founding myths, and have later come conveniently to frame regrettable injustices committed by governments and their agents. Accounts of such troubled pasts inhabit the space from which and for which a continuity rhetoric is constructed.

The French concept of constitutional continuity resting on the republican tradition resembles the strategy of interpretation followed by the Canadian Supreme Court in the *Québec secession reference* in numerous respects. In France, via this constitutional-archeological process, the Constitutional Council established numerous constitutional rules with reference to the republican tradition. In the Canadian case, constitutional provisions and constitutional jurisprudence were presented along the master narrative of the success of the Canadian Constitution and were subsequently transmogrified into new constitutional rules. In the *Québec secession reference* the Canadian Supreme Court derived four constitutional principles from constitutional practices observed under Canadian constitutional rules in force. The French Constitutional Council identified various rules forming part of the "block of constitutional norms" that stem more or less directly from legal rules of republican origin. In both cases, constitutional review fora derived not previously codified constitutional rules via legitimizing procedures in which the formal normative validity of enactments (constitutional rules, jurisprudence, or statutes) was merged with values attached to the existence or lasting observance of those rules. When deriving constitutional rules, both judicial review fora constructed the past through the screen of a dominant continuity rhetoric: the Constitutional Council relied on the conceptual framework of the republican tradition of France, while in the Canadian case the Supreme Court relied on the enduring success of arrangements in the federal constitution. The continuity rhetoric used in the Canadian and French cases is consciously developed by the respective judicial re-

view fora to support the legitimacy of the existing constitutional arrangement and also to keep its transformation at bay. In order to achieve this purpose, both constitutional review fora resorted to a particular account of the past, while suppressing other equally appropriate interpretations. This mastering of a continuity rhetoric was essential in both contexts for remedying the shortcomings of the written constitutional text by preserving or restoring its legitimacy through the carefully crafted lens of constitutional continuity.

4.3. Seeing continuity and making it make a difference: lessons from transitional justice jurisprudence

An analysis of French and Canadian constitutional jurisprudence reveals how constitutional review fora create a continuity rhetoric and present it in association with the constitutional text and historical narratives to give rise to previously unacknowledged constitutional rules. One must be mindful of the fact that constitutional continuity does not follow automatically from a de facto sequence of events. A critical analysis of continuity narratives in constitutional adjudication must inquire further into the force of continuity rhetoric. This section demonstrates that in order for continuity to make a difference to (i.e., to exist for the purposes of) constitutional adjudication, constitutional courts need to acknowledge it and attribute significance to it. Instances from transitional justice jurisprudence have been chosen to illustrate this point. Legislators and constitutional courts have followed characteristically different paths regarding the acknowledgement of legal continuity and its practical consequences for transition to democracy. Patterns of these solutions do not point to an exclusively preferable solution or understanding of constitutional continuity at times of transition. Instead, they show that constitutional continuity with the previous regime matters for the successor regime to the extent that the actors of the emerging new regime choose. One such model in this respect is Jefferson's draft constitution for Virginia, which provides in its closing section that the "laws heretofore in force in this colony shall remain in force…."[133] An example from the oppo-

site side is Article 4 of the Singapore Constitution, providing that the constitution applies to the constitutionality only of those statutes that were enacted *after* its entry into force. This section considers the role constitution makers and constitutional courts have played in determining the effect of continuity on newly emerging democratic constitutional regimes.

Transition to democracy was undertaken in South Africa, as well as in Hungary, on the basis of constitutional continuity with the previous undemocratic regime. New constitutional rules were enacted pursuant to the rules laid down in the predecessor regimes' constitutions. The validity of this claim is beyond doubt in the case of Hungary, where democratic transition did not bring a new constitution: instead, a series of amendments were passed transforming the old 1949 Constitution.[134] The first round of these changes were passed by the last Communist Parliament, which enacted the first major package of the constitutional overhaul, as negotiated at the multiparty Round Table Talks.[135] As Paczolay explained, in Hungary "all of the political forces ensured that the political changes would be peaceful and that there would be an agreement with the Soviet Union. From a narrow constitutional point of view, scrupulous attention was paid to ensure that changes were carried out within the constitutional and legal systems."[136] In South Africa a similar drive to ensure the legal and constitutional propriety of the transformation of apartheid into a democracy can also be traced. As de Lange points out, the existing legal framework of the apartheid regime was used as a framework for the negotiations. This solution was preferred by the agents of the old regime and was also useful in mitigating the vulnerability of the liberation movement, since the actions of its representatives were criminal at the time.[137] Many rounds of multiparty negotiations preceded the making of the interim Constitution of 1994, which then served as a framework for the making of the final Constitution, which entered into force in 1997.[138]

Despite such similarities in establishing the legitimacy of the new, democratic constitutions, constitution makers and constitutional courts in the early years of these emerging democracies followed different strategies in accounting for the past and the constitutional continuity thus inherited. In these strategies accounts of constitutional

continuity mingle with attempts at reconciliation.[139] In South Africa the interim Constitution contains express provisions on facing the legacy of the past when it prescribes legislation on amnesty in the epilogue; in addition, both the interim and the final Constitution provide expressly for property restitution.[140] These provisions represent an open admission of past injustice and an understanding that past injustice should be remedied by the successor regime. In addition to these provisions, the interim Constitution accounted for legal continuity at several points. The interim Constitution kept in force all legal norms already in force (section 229), and—as a general rule—brought them under its control (section 4[1]). The interim Constitution also provided expressly for its own application in pending cases, calling for the application of old laws as if the new rules had not entered into force (section 241[8]). In *Mhlungu* the Constitutional Court interpreted this provision as a jurisdictional rule, securing the position of courts already dealing with a case, and stressed that this provision did not limit the application of the new (interim) Constitution in any other respect.[141] This interpretation opened the way for invoking decisions of the Constitutional Court that invalidated an old criminal provision applicable in already pending criminal cases.[142] This brief overview of constitutional provisions indicates that in addition to considerations of reconciliation, in South Africa the constitution drafters and also the Constitutional Court were mindful of the effects of constitutional continuity in the days of democratic transition.

Somewhat differently, although the Hungarian Constitution also "constitutionalizes" transition, it does not provide for special legislation with regard to coming to terms with the past. The strongest textual hint in this regard is contained in the preamble of the Hungarian Constitution, which calls for "a peaceful transition to a rule-of-law state based upon a multiparty system, parliamentary democracy, and social market economy." Nonetheless, despite a constitutionalized commitment to transition, the Hungarian Constitution does not provide expressly for settling accounts with the past: unlike the interim and final Constitutions of South Africa, beyond this vague reference to various aspects of democratic transition the Hungarian Constitution does not contain express provisions on any means aimed at remedying past injustice. Also, while in the early days petitioners of-

ten referred to the preamble in relation to the transition to a market economy, the Hungarian Constitutional Court—unlike the French Constitutional Council—was reluctant to attribute normative force to the provisions of the preamble.[143] Also in contrast to the South African model, the Hungarian Constitution does not expressly provide for constitutional continuity either. In the light of such a weak textual background it is not that surprising that in reviewing transitional justice legislation the Hungarian Constitutional Court put the preamble aside and instead relied on the specific provisions of the Constitution and jurisprudential devices attached thereto.

The fundamental difference between South African and Hungarian jurisprudence regarding the constitutionality of the rules on coming to terms with the past might be assessed along the following lines. While constitutional continuity with the previous regime was acknowledged in the South African interim Constitution, the South African Constitutional Court's transitional justice jurisprudence centered on a different concept which also figures in the interim Constitution, in the epilogue: the concept of reconciliation. In contrast, the main concepts framing the review of transitional legislation in the jurisprudence of the Hungarian Constitutional Court are legal continuity and the rule of law.[144] Although adherence to the rule of law is mentioned in the Hungarian Constitution (Article 2[1]), the concept of legal continuity was not provided for therein in express terms: legal continuity as a concept and all its constitutional consequences were developed by the Hungarian Constitutional Court in full detail for the first time in the *Retroactive criminal justice* decision of 1992.[145] While the concept of legal continuity thus developed became a signature trait of Hungarian transitional justice jurisprudence, it is important to note here that, in addition to the famed legal continuity rhetoric, the Hungarian Constitutional Court developed other principles to review transitional justice legislation, principles which resemble the rhetoric of reconciliation so familiar from South African jurisprudence. A discussion of judicial perceptions of reconciliation follows in Chapter Five. The forthcoming analysis explores the Hungarian Constitutional Court's argument in developing a continuity rhetoric and the constitutional consequences thereof.

The subject of the Hungarian *Retroactive justice* case was a bill proposing to lift the statute of limitations for crimes which were not

prosecuted for political reasons under the previous regime.[146] In addition, the bill was to extend the statute of limitation with respect to crimes, the prosecution of which was not yet time barred. This scheme was supposed to make indictable all crimes which had not been prosecuted for "political reasons." The sponsors of the bill argued that "the rule of law cannot be used to shield injustice."[147] At the time, Hungarian professional and public opinion was divided on the issue of retroactive criminal justice. Some suggested that rule-of-law considerations precede all demands for punishing the perpetrators of the previous regime,[148] while others argued that the retroactive prosecution of the perpetrators is not precluded and might even be demanded according to rule-of-law considerations.[149] When the president of the republic requested preliminary review, a unanimous Constitutional Court abolished the retroactive criminal justice bill in its entirety.[150]

The decision of the Constitutional Court in the *Retroactive criminal justice* case is based on the premise of legal continuity and the rule of law. The Constitutional Court premised its entire argument on submitting that, although from a political perspective the transition was revolutionary, the new democratic regime had still come about pursuant to the rules prescribed by the old legal system.[151] The phenomenon thus introduced was later named "revolution under the rule of law."[152] In the words of the justices, the "old law remains in force. As for validity, there is no difference between norms 'from before' and 'from after' the Constitution. The legitimacy of the various regimes of the past fifty years is irrelevant in this respect, more precisely, it has no significance in constitutional analysis."[153]

From legal continuity between the new democracy and the old regime it follows that all legal norms—old and new alike—must be in conformity with the new, democratic constitution.[154] Admittedly, unlike in South Africa, where the constitution expressly provides for keeping the old laws in force and reaffirming the supremacy of the constitution over them, there is no such specific rule in the Hungarian Constitution. However, before the *Retroactive criminal justice* decision the Constitutional Court did test the constitutionality of various legal norms enacted under the previous regimes. Thus, in retrospect, the application of the constitution for measures of transition, and for the

legal norms of the new as well as the old legal regime, does not appear so out of the ordinary in the context of Hungarian constitutional jurisprudence. Therefore, odd as the Hungarian Constitutional Court's insistence on legal and constitutional continuity may sound, in the *Retroactive criminal justice* case the justices did no more than summarize the status quo for the purposes of constitutional analysis. Přibaň argues that the concept of "revolution under the rule of law" in the above terms is a legal fiction that was launched to make up for the legitimacy deficit of the emerging democratic regime. In the absence of gestures of popular sovereignty expressed by "the people", and, also, without a sound basic norm (*Grundnorm*) in the Kelsenian sense, constitutional courts in Central and Eastern Europe invent subsidiary rules, like this legal fiction, to at least imitate the sovereign or its equivalent.[155]

In this case the Hungarian Constitutional Court clearly said that it was not willing to subject transitional legal rules to a "transitional standard" of constitutionality.[156] Thereafter the justices outlined constitutional principles applicable to criminal law in a rule-of-law state. Still talking in abstract terms the Hungarian justices emphasized that ex post facto rule making was prohibited in criminal law.[157] Based on the concepts outlined in general, the Constitutional Court entered a detailed constitutional analysis of the bill and rendered its decision in abstract terms. The Hungarian Constitutional Court's emphasis on legal continuity was not an acknowledgement of the legitimacy of the previous regime.[158] Instead, the approach chosen by the justices enabled them to deliver a principled opinion regarding retroactive criminal justice,[159] the decision relying on a "more neutral and formalistic understanding of the rule of law."[160] The opinion of the Court does not contain references to the immediate political context and historical background of the case. The Constitutional Court did not intend to diminish the political or historical significance of democratic transition, and the justices made it clear that continuity is continuity for the purposes of constitutional analysis, in order to protect the integrity of the legal system.[161] In so doing, the Hungarian justices avoided passing judgment on past injustices and also refused to become submerged in the public discourse on punishing the real perpetrators of 1956. Indeed, based on the decision of the Hungarian Con-

stitutional Court it would be hard to say that, out of all the past crimes made prosecutable by the retroactive criminal justice bill, "those perpetrated against Hungarian citizens during the attempted revolution of 1956 were uppermost in the legislators' minds."[162]

Interestingly, earlier in one of the *Compensation* cases the Constitutional Court argued that the uniqueness of the reconstruction measures must be part of the context upon which the constitutionality of these measures was determined. In this case, the Constitutional Court said that, in the course of the reconstruction of the system of ownership that would close the book on the past, reconstruction and the creation of new forms of ownership were to take place in accordance with the constitution, from the perspective of both the old and the new owners.[163] In the *Retroactive criminal justice* case, however, the Constitutional Court established in clear terms that "the historical circumstances shall be considered within the requirements of the rule of law and for the purposes of its establishment. It is not acceptable to refer to historical circumstances and to justice under the rule of law in order to circumvent the safeguard of the rule of law. It is impossible to build a rule-of-law state against the rule of law."[164]

Somewhat paradoxically, the Hungarian Constitutional Court decided to act on a continuity narrative while refusing to consider the respective past. This position is indeed characteristic of the Hungarian Constitutional Court's relationship to particular historical narratives framing constitutional cases. The *Retroactive criminal justice* case is not the first one in the line of constitutional jurisprudence touching on accounts of the bloody suppression of the 1956 revolt and the rehabilitation of executed prime minister Imre Nagy. The Constitutional Court's abolition of capital punishment in 1990 cannot be understood properly without due note of the force of the "Imre Nagy narrative", which, mostly by chance, brought together actors from right across the political spectrum in support of the abolition of capital punishment, thus providing the Constitutional Court's decision with a considerable layer of legitimacy.[165] However, in his concurring opinion in the *Capital punishment* case, Chief Justice Sólyom emphasized that the Court had reached its decision based on abstract principles and not as a symbolic reaction to the evils of a political regime which used human lives for its own purposes.[166] Despite hints at an alternative ap-

proach in the compensation decision mentioned above, the Hungarian Constitutional Court decided not to discuss the repressive past in its transitional justice jurisprudence.

To summarize, the Hungarian Constitutional Court used the principle of legal continuity to prevent and preclude assertions about special constitutional standards for crimes committed with the vetting of the previous regime. With this move the Constitutional Court neutralized the past and past wrongs, thus constitutional continuity was established without serious condemnation, regret, or shame about past injustice. Admittedly, the prohibition on retroactive legislation as a criterion of the rule of law was acknowledged long before the Hungarian Constitutional Court came into existence. The Hungarian Constitutional Court's contribution concerns placing democratic transition on the footing of legal continuity and rule of law ordinary, while rejecting constitutional exceptions in the name of extraordinary historical circumstances. It would be no great exaggeration to say that the entire issue of retroactivity emerged as a result of the Constitutional Court's insistence on legal continuity in this most formal sense. Without the Hungarian Constitutional Court's assertions on the consequences of the rule of law and legal continuity, the prohibition on retroactive criminal legislation would not have become an insurmountable obstacle to calling the perpetrators of governments' wrongs before a criminal court.

Schwartz recalls that the Hungarian Constitutional Court was intensely criticized for not condemning the Communist regime from a high moral ground in the case. Taking an unusual step, in a radio interview Chief Justice Sólyom decided to explain the Constitutional Court's decision, stressing the moral imperatives informing the decision.[167] This gesture clearly reflects a systemic dilemma which—if possible—is far more significant for the success of democratic transition than calling before justice the perpetrators of the criminal deeds of the previous regime. Constitutional continuity with the previous regime is difficult to accept as it entails value continuity between two governments, the latter of which seeks sharply to distinguish itself from the former precisely in its preferences with respect to founding values. Moreover, continuity with the previous regime might entail continuity of personnel in various public offices and public employ-

ment, ranging from courts to police to educational institutions. The paradox of continuity was sensed in South Africa, and the introduction of the Truth and Reconciliation Commission might be seen as an attempt to resolve this situation. After all, in a successor regime operating on the grounds of constitutional continuity, officials of the previous regime might simply continue in the new one, thus perpetrators would be in the position to investigate the atrocities constitutive of past injustice. Constitutional continuity is thus clearly an enemy of the trust-building exercise which is a precondition of a successful transition to democracy.[168] Personnel discontinuity in public employment can certainly be achieved by the purging or lustration of inherited institutions.[169] However, from the perspective of the legitimacy of the new democratic regime it helps to entrust to a new institution the symbolic task of undoing the past. In South Africa the Truth and Reconciliation Commission was one such institution, along with the newly established Constitutional Court. In Central and Eastern Europe, newly established constitutional courts were perceived as if it were their task to orchestrate the transition to democracy in a manner that would also boost the legitimacy of the new regime. These dilemmas lead to the comment made by Czarnota that the continuity inherent in negotiated transition is the "original sin" of democratic transitions.[170]

These dilemmas are not unique to Hungary or South Africa but are characteristic of the setting which Teitel describes as the paradigm of transitional justice.[171] As Teitel explains: "[b]ecause transitions' defining feature is their normative shift, legal practices bridge a persistent struggle between two points: adherence to established convention and radical transformation. … In contexts of political upheaval, transitional jurisprudence comprises a partial and nonideal conception of justice: provisional and limited forms of constitutions, sanctions, reparations, purges and histories. … As law's function is to advance the construction of political change, transitional legal representations are more vividly affected by political values in regimes in transition than they are in states where the rule of law is firmly established. … While the rule of law in established democracies is forward-looking and continuous in its directionality, law in transitional periods is both backward-looking and forward-looking, retrospective and prospec-

tive, continuous and discontinuous."[172] As Teitel put it elsewhere, in this complex process of democratic transition, facilitated by so many actors, "[w]hat seems right is contingent and informed by prior injustice … [and] it is the legal responses that themselves create transition."[173]

The relevance of these observations is clearly underscored in the light of Czech transitional-justice legislation and constitutional jurisprudence. In 1993 the Czech Parliament passed the *Law on the Illegality of the Communist Regime and Resistance to It*.[174] The statute opens with a list of grievances, referred to as "crimes", suffered under the leadership of the Czechoslovak Communist Party between 1948 and 1989 (Article 1[1]).[175] The act provides that "officials, organizers, and agitators" in the Communist "political and ideological sphere" are regarded as responsible for the crimes of the Communist regime (Article 1[2]); it denounces the Communist regime as "illegal and contemptible" (Article 2[1]) and declares the Communist Party a criminal organization (Article 2 [2]). Furthermore, in one of its substantive provisions the act lifts the statute of limitations between 25 February 1948 and 29 December 1989 "for criminal acts if, due to political reasons incompatible with the basic principles of the legal order of a democratic state, [a person] was not finally and validly convicted or the charges [against him] were dismissed" (Article 5). The language of the Czech act is very strong, and emotional passages condemning the past regime clearly outweigh provisions with normative significance.

Although such judgmental passages are missing from the Hungarian retroactive criminal justice bill, the basic idea behind the Czech law, and even the language chosen, resemble that of the Hungarian retroactive criminal justice bill. In order to open the prosecution of acts left unpunished by the Communist regime, the legislators sought to manipulate the statute of limitations. The Czech Constitutional Court, in its very first decision, upheld the law on the illegality of the Communist regime and its provisions on lifting the statute of limitations[176] on grounds radically different from those adopted by the Hungarian Constitutional Court in its *Retroactive criminal justice* decision.[177] The difference between the Constitutional Courts' positions is all the more interesting since, in the Czech case, the challenge was also based on the requirements of the rule of law and the prohibition

on retroactive criminal legislation contained in the Czech *Charter of Fundamental Rights and Basic Freedoms* (Article 40[6]). Note that these were the very legal grounds invoked by the Hungarian Constitutional Court in invalidating the retroactive criminal justice bill a year before the Czech decision.[178]

The Czech Constitutional Court's decision is premised on acknowledging partial constitutional discontinuity with the Communist regime in the following terms:

> The Czech Constitution accepts and respects the principle of legality as a part of the overall basic conception of a law-based state; positive law does not, however, bind it merely to formal legality, rather … law is qualified by respect for the basic enacted values of a democratic society and also measures the application of legal norms by these values. This means that even while there is continuity of "old laws" there is a *discontinuity in values* from the "old regime." … [N]ot even the continuity of law signifies recognition of the legitimacy of the Communist regime. … The legitimacy of a political regime cannot rest solely upon the formal legal component because the values and principles upon which a regime is built are not just of a legal, but first of all of a political, nature.[179]

Thus the Czech Constitutional Court argued that certain aspects of Socialist legality would not survive constitutional review under the new Czech Constitution. In this case, the Constitutional Court focused in particular on those instances where the criminal prosecution of Communist wrongs was not undertaken during the Communist regime.

In reaching its conclusion the Czech Constitutional Court attributed particular significance to the fact that, under the Communist regime, prosecution of certain crimes was barred not as a matter of positive law but due to ideological or political considerations which prevented criminal prosecution of certain wrongs well in advance. This line of reasoning assisted the Constitutional Court in rejecting petitioners' arguments based on legal certainty. According to the Constitutional Court the state of affairs preventing criminal prosecu-

tion during Communist times created legal certainty for offenders, as wrongdoers could expect not to be prosecuted. The Constitutional Court argued that "[t]his 'legal certainty' of offenders is … a source of legal uncertainty to citizens… In a contest of these two types of certainty, the Constitutional Court gives priority to the certainty of civil society, which is in keeping with the idea of a law-based state."[180] On these grounds the Czech Constitutional Court found that the law on the illegality of the Communist regime lifting the statute of limitations for crimes not prosecuted for political reasons for the period between 1948 and 1989 was in conformity with the Czech Constitution.

Let us now consider the Czech Constitutional Court's stance in the light of the decision adopted by the German Federal Constitutional Court in the case of the East German border guards. The legal problem in this case was that, while due to the German Unification Treaty the criminal law of the GDR would have been applicable to the shootings committed by the border guards at the Berlin Wall, GDR law as applied at the material time would never have yielded convictions for the shootings. The constitutional justices called on Radbruch's formula to identify criminal provisions applicable to the case, according to which, when positive law is in intolerable conflict with justice, it must give way to justice.[181] This formula is widely regarded as German legal philosophy's response to the horrors of Nazism performed within the legal framework inherited from the Weimar Republic. Note that in explaining the Hungarian Constitutional Court's insistence on legal continuity János Kis argued that the justices' insistence on principles stemming from legal continuity extinguished the grounds for natural-law arguments.[182]

Leaving aside the challenging academic polemic on whether, and to what extent, Nazism can be compared to Communism, on a more practical level it is important to point out that in post-Communist Central and Eastern Europe Germany was the only country which had a model for coming to terms with the past (*Vergangenheitsbewältigung*).[183] Continuity building by post-Communist constitutional courts can be seen as an attempt to seek normalization. Establishing continuity or removing certain periods from constitutional continuity proper is an important means of redefining the polity, and of identifying victims and perpetrators and their legal rights and obligations.

Thus when constitutional courts construe constitutional continuity, justices actively participate in public discourse at the polity's formative moments. Sometimes courts are mindful of the effects of their decisions, although continuity building might have unexpected consequences.

The Hungarian Constitutional Court's adherence to a highly formal conception of legal continuity premised on silence about the relevant past was strategic in at least two respects. Firstly, the Hungarian justices intended to make sure that only one standard of constitutionality applied for all legal measures, including transitional justice legislation. The practical force of such a principled stance is best highlighted by the decision of the European Court of Human Rights (ECTHR). Oddly, it was in *Rekvényi v Hungary,* a case from the early period of Hungary's transition to democracy, in which the ECTHR relaxed the standard of protection offered to political freedoms using the unordinary times of transition to democracy as a pretext for justifying restrictions on the political freedoms of the police. The ECTHR said that "the obligation imposed on … police officers to refrain from political activities is intended to depoliticise the services concerned and thereby to contribute to the consolidation and maintenance of pluralistic democracy in the country. … This objective takes on a special historical significance in Hungary because of that country's experience of a totalitarian regime which relied to a great extent on its police's direct commitment to the ruling party."[184] The line of reasoning followed by the ECTHR is exactly the route which the Hungarian Constitutional Court was intent on avoiding when the justices consistently refused to create legitimate exceptions in times of transition under the auspices of the new democratic constitution.

As has been demonstrated, the Hungarian Constitutional Court was keen not to pass judgment on the past in the *Retroactive criminal justice* case. This silence was all the more curious as the Hungarian justices exercised preliminary review in the case, thus it was more than likely at the time that the Court would not say the final word on prosecuting the perpetrators of the previous regimes. After reviewing two other bills on retroactive criminal justice the Hungarian Constitutional Court finally ruled that lifting the statute of limitations is constitutional to the extent that (1) the statute of limitations under Hungar-

ian law did not apply to the offence at the time it was committed; or (2) the said offence constitutes a crime under international law and the statute of limitations does not apply under international law.[185] The Hungarian Constitutional Court ended the saga of retroactive criminal justice by attaching these conditions to the future application of the act. While constitutional justices avoided discussing past events which were shaping the emerging democratic polity, other actors of the political sphere and transitional justice scene did benefit from the psychological momentum and capital gained in the wake of the Constitutional Court's refusal to let the bill pass for such abstract constitutional considerations. As Éva Kovács elegantly demonstrated, over the years the "Imre Nagy narrative" shifted from being a victim narrative to a perpetrator narrative and was then inflated into an alibi to support political endeavors.[186] Thus the Constitutional Court's self-imposed silence left its mark on the public discourse.

The Czech context was also heavy with victims' accounts of past injustices of various kinds. In the Czech Republic, official suppression of memories of the disapproved past, and especially the 1968 Prague spring, triggered "commemorations of people who were purged and of events that were censored, and [the dedication of] underground samizdat publications to them."[187] With the fall of Czech Communism in 1989, the "memory campaign" did not cease but fuelled public apologies for past injustice and the adoption of transitional justice measures that are commonly associated with doing justice with respect to past wrongs. The language of the dissenter and dissident discourses referring to the "existential revolution", infused with Vaclav Havel's famous slogan about "living in truth", framed the discourse of democratic transition and served as the legitimizing rhetoric in the Czech Republic.[188] In this context the Czech Constitutional Court—unlike its Hungarian counterpart—was willing to evaluate the past following in the Czech legislature's footsteps. Somewhat later, the Czech Constitutional Court again resorted to shaping constitutional continuity from carefully selected segments of the past when establishing the constitutionality of the Beneš decrees.[189] The practical implications of this position were clear early on: upholding the constitutionality of the Beneš decrees meant precluding compensation for the Sudeten Germans' claims. Nonetheless, the legal effects of the illegal-

ity of the Communist regime were far from clear in many respects. Despite the Czech Constitutional Court's clear position on the statute of limitations, Czech courts of ordinary jurisdiction refused to respect the Constitutional Court's decision even in cases where criminal charges were brought against the highest-ranking officials of the Czechoslovak Communist Party and Communist government.[190] In 1997 the Superior Court of Prague refused to convict Milos Jakes and Josef Lenart, who were charged with treason for their role in inviting the Soviet military invasion to suppress the 1968 Prague Spring, finding that the statute of limitations had expired in the case.[191]

In the light of the criminal court's resistance, one might wonder about the homogeneity of the value system behind the new, democratic Czech Constitution, principles of which figured so prominently in the Constitutional Court's 1993 decision. Furthermore, it is important to see that the effects of the open clash between the Czech Constitutional Court and ordinary courts are not confined to the prosecution of Communist Party officials, or to transitional justice jurisprudence. The ordinary court's refusal to follow the Constitutional Court's lead signals a systemic shortcoming in legal systems where constitutional courts operate alongside courts of ordinary jurisdiction. To the extent constitutional courts do not have jurisdiction to review decisions of ordinary courts, such differences of opinion between the highest courts will undermine the protection of individual rights.[192]

Furthermore, as the following cases illustrate, uncertainty triggered by the disagreement of ordinary courts and the constitutional court might linger in spite of a successful constitutional complaint. Indictments for espionage and treason following a regime change put practical concerns about constitutional and legal continuity in full gear. When new democratic governments had to pass judgment on the spies of the Communist regime, multiple—often conflicting—continuities surfaced. These cases were typically fashioned as instances of treason or espionage, dragging criminal courts into a schizophrenic state. When a person who provided information on the operations of the Communist government to Western forces during Communism is charged with treason, the logic of substantive criminal law would require criminal courts to convict the perpetrator for acting against the security and vital interests of the Communist government,

a despised regime which had disappeared in the meantime. The Polish polity remains divided over Ryszard Kuklinski, a Polish military colonel who was sentenced to death in absentia and then rehabilitated for handing over military secrets of the Warsaw Pact to the U.S. Central Intelligence Agency. While some see him as a hero and a symbolic figure of resistance, others still take him for a traitor—of Polish Communism, or of the Polish nation.[193] Note that in Germany the loyalty component so central to trying former spies is further complicated by unification: under German criminal law, former GDR citizens are indictable for having spied on the FRG for the infamous former GDR secret service (the Stasi), while former FRG citizens are not indictable for spying on the GDR for the FRG.[194]

When Frantisek Vojtasek, a former Czechoslovak military attaché to France, applied for his high treason and espionage conviction to be annulled under the Czech rehabilitation law, he argued that reporting on Czechoslovakia was a form of resistance to the regime.[195] The Supreme Court refused, saying that "the task of courts does not consist in the assessment, on the basis of their own views, of the political and other circumstances and consequences of the occupation of Czechoslovakia by foreign troops after 21 August 1968."[196] Following a constitutional appeal, the Czech Constitutional Court reversed its decision, stating that in this case the object of the offenses was lacking, as "[d]uring the incriminated period … the existence of a sovereign state was a mere fiction, for the Czechoslovak state, while in its internal relations presenting itself as a totalitarian system, was in actuality the mere vassal of the foreign power which was occupying its territory."[197] Thus, in the treason judgment the Czech Constitutional Court went even further in denouncing the Communist regime. As if reflecting on the criminal courts' unwillingness to give up on the rhetoric of legal continuity, the Czech Constitutional Court moved to deny the sovereignty of the Communist state altogether. Upon such a premise, legal continuity with the Communist regime is out of the question.

The potential for such open clashes between the high judicial bodies was also present in the Hungarian context, and prosecutions of previously undisturbed perpetrators of past crimes did not go smoothly despite the Constitutional Court's vetting of the legal

framework. The first case involved lower-ranking military officers who ordered mass shootings by firing squads during the 1956 revolt.[198] In the wake of the procedure the chief justice of the Supreme Court and the prosecutor general petitioned the Hungarian Constitutional Court in an abstract review procedure, claiming that in its previous retroactive criminal justice decisions the constitutional justices did not provide sufficient guidance as to the applicable substantive law. In addition they claimed that legislation essential for carrying out such prosecutions was still lacking. To the surprise of many, the Constitutional Court agreed with the petitioners.[199] Thereupon several prosecutions followed, in relation to which Morvai noted that "no politicians or high-ranking party or government officials have been prosecuted so far. Proceedings were carried out against two main groups of defendants: volunteers of the Communist riot police and 'medium-ranking' (professional) military officers."[200] This conclusion is in line with Teitel's overall observation about criminal prosecutions carried out in the course of democratic transition: high-ranking, prominent Communist Party and government officials largely escaped prosecution under criminal provisions, the constitutionality of which was highly questionable (with the exception of the few who were convicted for other, less symbolic crimes), while the bulk of criminal prosecutions were carried out against medium- or low-ranking members of the machinery, who scarcely resemble the perpetrators that these special criminal justice rules were meant to target when enacted.[201] It only furthers the irony of the situation that, despite the statutory illegality of the Communist regime, in the Czech Republic (as in Hungary) the Communist Party was never banned. Indeed, the Czech Communist Party remains in the political sphere without having reinvented or renamed itself, and proudly claims continuity with the achievements of its predecessor.[202]

Based on the above, one might find that competing legal continuities are per se problematic in criminal cases, even if one believes that prosecutions in which these competing continuities yield different results are limited in number. These cases suggest that constitutional or legal continuity is a subjective interpretation and might be the outcome of discretionary judgment when the task of a court is as technical as the calculating of the limitation period in a criminal case. In ju-

risdictions where constitutional review is not, or not solely, performed by a constitutional court, courts may differ about the periods relevant for the purposes of establishing legal continuity proper. Furthermore, when conducting inquiries in such cases courts might be guided by intellectual habits that produce unforeseen outcomes. Přibaň argues that the Czech Constitutional Court accepted the moral authority of the Czech parliament for fear of the emerging democratic government's unsound legitimacy. At the same time, in so doing the Constitutional Court acted on premises about government which largely reflect the premises also reflected by the recently condemned Communist government.[203] Thus it is clear that the Constitutional Court is not the sole interpreter or arbiter of legal continuity in a legal system. In this respect it is appropriate to recall Krygier, who claims that, due to the weak legal traditions and legal culture of Central European democracies, which are without legal and political institutions displaying a genuine commitment to the rule of law, law, and thus constitutional law, is destined to remain hollow and ineffective.[204] Competing legal continuities, when in parallel with conflicting institutions and agents, do undermine foreseeablity and legal certainty. This is how the judicial creativity unleashed in creating constitutional continuity and defining its constitutional consequences is ultimately capable of weakening the institutional legitimacy of judicial fora entrusted with safeguarding constitutionalism.

4.4. Conclusion without closure: deceived by continuity in constitutional reasoning

The analysis undertaken in this chapter explored the operation of continuity rhetoric in constitutional reasoning. The aim of the exploration was to confirm the hypothesis concerning the nature of references to continuity in constitutional reasoning, that is, that continuity is the outcome of judicial construction or interpretation, an exercise which is not constrained by historical narratives. Lessons from French constitutional jurisprudence and from constitutional court decisions in Hungary and the Czech Republic provided convincing

evidence in support of this hypothesis. An overview of the jurisprudence of the French Constitutional Council demonstrated that, when affirming certain unwritten principles that have been embedded in the French republican tradition, the Constitutional Council had a central role in first building the edifice of the republican tradition. Examples from jurisprudence illustrate how careful and strategic the French Constitutional Council was in selecting the building blocks of the intellectual and constitutional construction known as the republican tradition from among many potential ingredients presented by often competing historical narratives.

Such a trend of continuity building is also clearly traceable in post-Communist constitutional adjudication, in both Hungarian and Czech transitional justice jurisprudence. Lessons derived from the comparison of the Hungarian and Czech cases suggest that de facto continuity does not result automatically in constitutional continuity. Instead, it follows from the Czech cases that constitutional continuity exists to the extent a court is willing to acknowledge it. Furthermore, as Hungarian jurisprudence reveals, in constitutional adjudication continuity rhetoric may be fully functional without much reliance on historical narratives. A comparison of Czech and Hungarian constitutional jurisprudence suggests that, while a formalistic legal continuity narrative might offer foreseeability, it is not capable of bringing closure with respect to past injustice as it is not sensitive to the historical narratives surrounding continuity in a mechanical sense. These findings seem to confirm the suspicion with respect to the interpretiveness of continuity rhetoric and the creative role of constitutional courts in this process.

The analysis of continuity rhetorics in constitutional adjudication is further informed by exploring the relationship between the constitutional text, historical narratives, and the rhetoric of continuity. Students of indeterminacy in constitutional reasoning will no doubt be astonished at the scope of judicial discretion traced behind continuity rhetoric and its effect in shaping the constitutional text. To begin with, in the French context only very well informed observers are capable of tracing the textual background of continuity rhetoric among the provisions of the 1958 French Constitution. Furthermore, a comparison of Hungarian and South African constitutional rules and ju-

risprudence demonstrates that continuity rhetoric is one of several options at the disposal of the constitutional court even in cases where a constitutional court is entrusted with reviewing measures aiming to settle accounts with a repressive past. As seen in Hungarian jurisprudence, the constitutional prescription on constitutional continuity may be traced in the most general constitutional clause on the rule of law (Article 2[1]).

This remark is not meant to suggest that a constitutional provision safeguarding the rule of law as such in express terms is not an appropriate container for considerations of constitutional continuity, legal certainty, and the like. It is meant to suggest that, while the rule of law (or *Rechtstaat*, or *état de droit*) is a multifaceted and multilayered concept, the very language of a constitution's rule-of-law clause does not compel the acknowledgement of constitutional continuity with a previous, oppressive regime. Furthermore, a rule-of-law clause does not compel constitutional continuity any more intensively than the protection of the right to life, as had been ruled by the Polish Constitutional Tribunal—in the absence of a more specific provision to this effect—under the Polish Constitution's rule-of-law provision.[205] At the same time, as the South African example aptly demonstrates, even more specific constitutional provisions outlining the consequences of constitutional continuity are not destined to become central to transitional justice jurisprudence. These findings seem to support previously established conclusions about how historical narratives fall short of reducing indeterminacy in constitutional adjudication.

The cases analyzed in the present chapter clearly demonstrate that continuity rhetoric is not capable of reducing indeterminacy in constitutional reasoning, partly because it is itself interpretive, and partly because it operates at large, independent of (or, rather, irrespective of) the provisions of the constitution. Instead of reducing the indeterminacy overshadowing the constitutional text, continuity rhetoric has been utilized by constitutional review fora as grounds for establishing unwritten constitutional principles. In the Hungarian and Czech cases, constitutional courts derived concepts from their unique understandings of constitutional continuity that informed the courts' construction of the requirements of the rule of law. In these cases, conceptions of constitutional continuity as constructed by the constitu-

tional courts were used as aids to explain the requirements of the rule of law. In French and Canadian constitutional jurisprudence, constitutional continuity as constructed in constitutional cases is far from being so ancillary a consideration. Instead, in these latter contexts constitutional continuity became a self-standing source of constitutional rules, rights, and principles of government.

It is important to note that, whether ancillary or core sources of constitutional rules, in constitutional cases conceptions of continuity rest and depend on judicial imagination. Caught between the constitutional text and historical narratives, continuity rhetoric may play an important legitimizing function. It is crucial to point out that the legitimizing function of continuity rhetoric did not require any validation that would have depended on historical narratives. As the above examples show, continuity narratives may be invoked to support a particular construction of the constitutional text—with or without taking into account the events of the respective pasts, as happened in the Czech and Hungarian cases. Secondly, as instances from Canadian and French constitutional jurisprudence display, continuity rhetoric can be used to establish new constitutional rules. In the course of recognizing unwritten constitutional principles, continuity narratives have served as a compass in finding the right pieces of the respective past. Furthermore, French jurisprudence also illustrates the role of continuity narratives in strengthening the otherwise limping legitimacy of the Fifth Republic's constitution. The grand narrative of the republican tradition stretching over centuries and regimes, as understood by the French Constitutional Council, was used to patch the technical shortcomings in the making of the 1958 French Constitution. In cases where the reasoning of a constitutional court rests on continuity rhetoric, the rights and principles informing the scope and limitations of those rights are distributed among the members of the polity according to sheer value judgments. As cases studies in the present chapter forcefully demonstrate, historical narratives, and continuity rhetoric in particular, are thus best understood as means of disguising, or legitimizing, the project of identity building inside and outside constitutional adjudication.

NOTES

1 Shils, "Tradition and Liberty", 112.
2 *A Dictionary of Conservative and Libertarian Thought*, 264–265.
3 On the distinction see Aron, *Politics and History*, 60.
4 Posner, "Past-Dependency", 588–592. In this essay, Posner "rediscovers" Nietzsche's essay "On the Uses and Disadvantages of History for Life" (1874) for the purposes of legal and constitutional reasoning.
5 Alexy, *A Theory of Legal Argumentation*, 239.
6 Posner, "Past-dependency", 580.
7 On this problem see also Chapter One.
8 *Reference re Secession of Québec* [1998], 2 S.C.R. 217, para. 48.
9 See introduction.
10 Clinton, "Original Understanding", 1262.
11 Pritchard and Zywicki, "Finding the Constitution", 412–413.
12 See also Chapter Two.
13 *R. v Big M Drug Mart Ltd.* [1985], 1 S.C.R. 295, 344, quoted in Chapter Two.
14 *R. v. Big M Drug Mart Ltd.*, 344–346.
15 *R. v. Big M Drug Mart Ltd.*, 346.
16 Amar, "Intratextualism."
17 *McCulloch v Maryland*, 17 U.S. (4 Wheat) 361 (1819).
18 Amar, "Intratextualism", 758.
19 The relationship of the text's "meaning" and the "practice" (interpretation) relying on a text is a complex one and will not be explored here. Untangling whether meaning is induced by practice, or—on the contrary—whether practice is triggered by meaning, does not affect the validity of the finding regarding the continuity component of textualist theories.
20 Reid, "Law and History", 204.
21 Hazareesingh, *Political Traditions in Modern France*, 65–66.
22 Nord, *The Republican Moment*, 115 et seq.
23 Nora, "Republic", 792 (my emphasis).
24 For an excellent overview of the entry into force and interaction of the French constitutions see Emeri and Bidegaray, *La Constitution en France*, Chapter One.
25 Blondel, *The Government of France*, 47.
26 On this in more detail in English see Rogoff, "A Comparison of Constitutionalism in France and the United States", 60.
27 Carcassone, "The Constraints on Constitutional Change in France", 152.
28 For a discussion see Chapter Three.
29 For an account in English see Troper, "French Secularism, Or Laïcité."
30 See Ozuf, "Liberty, Equality, Fraternity."
31 In English see, e.g., Bell, *French Legal Cultures*, 48–49, and Birnbaum, *The Idea of France*, 165 and passim.

32 For an overview in English see Knapp and Wright, *The Government and Politics of France*, 1–46.
33 Quermoune, "République", 921.
34 See Favoreu, "Bloc de constitutionnalité."
35 Under the 1946 preamble, "All property and all enterprises that have or that may acquire the character of a public service or de facto monopoly shall become the property of society." Yet the 1789 Declaration contains the right to property (Article 2) and in Article 19 it provides that "Since the right to Property is inviolable and sacred, no one may be deprived thereof, unless public necessity, legally ascertained, obviously requires it, and just and prior indemnity has been paid."
36 This construction would have cleared the road before the Socialist government's nationalization scheme challenged in the case.
37 81–132 DC of 16 January 1982, "Considerant 15". Excerpts are available in English in Bell, *French Constitutional Law*, 273–275.
38 81–132 DC of 16 January 1982, "Considerant 14".
39 Favoreu, "Bloc de constitutionnalité", 87.
40 On this, see Favoreu and Philip, *Grandes décisions*, 280, ¶6 et seq.
41 For a detailed analysis see Favoreu, "Les principes fondamentaux" (Mathieu).
42 Verpeaux, "Les Principes fondamentaux."
43 Favoreu, "Principes fondamentaux reconnus par les lois de la République", (Duhamel) 825.
44 The Constitutional Council invoked the principle of equality protected by the 1789 Declaration in decision 73–51 DC of 27 December 1973, "Considerant 2". Available in English in Bell, *French Constitutional Law*, 346–347.
45 71–44 DC of 16 July 1971 on freedom of association (especially "Considerant 2"). For the decision in English see Bell, *French Constitutional Law*, 272–273. Favoreu and Philip, *Grandes décisions*, 247, ¶13.
46 For the background of the case see Favoreu and Philip, *Grandes décisions*, 241 et seq. For a detailed account in English see Lindseth, "Law, History and Memory", 73 et seq.
47 On this quote see Lindseth, "Law, History and Memory", 75–76.
48 This option is available under Article 45(4) of the French Constitution, 1958. There is no super-majority requirement for such a vote in the National Assembly.
49 See Article 61(2) of the French Constitution, 1958.
50 Note that the 1901 act was the very statute the legislature chose to amend by the challenged amendment: 71–44 DC of 16 July 1971, "Considerants 2 and 4". See Stone, *Judicial Politics in France*, 92.
51 Favoreu and Philip, in *Grandes décisions*, 249, note that the 1971 *Freedom of association* decision was not the first in which the Constitutional Council acknowledged the normative force of the preamble, yet it was the first time that the Council had been so clear and explicit about it.
52 Favoreu and Philip, *Grandes décisions*, 249.

53 Favoreu, "La place du Conseil constitutionnel dans la Constitution de 1958."
54 Luchaire, "Commentary", 52.
55 Foyer, "The Drafting of the French Constitution of 1958", 32–33; Rousseau, *Droit du contentieux constitutionnel*, 23 et seq.
56 Aucoin, "Judical Review in France", 446–448.
57 For an excellent account of the traces of the republican tradition in the *Freedom of association* decision in English see Lindseth, "Law, History and Memory", 59 et seq.
58 Foyer, "The Drafting of the French Constitution of 1958", 30.
59 Rivero, "Les libertés", 157.
60 See Rivero on quote in Favoreu and Philip, *Grandes décisions*, 244 ¶8.
61 Stone, *Judicial Politics in France*, 68.
62 In English see Bell, *French Legal Cultures*, 202. See also Carcassone, *La Constitution*, 410–411 ¶525.
63 See 88–244 DC of 20 July 1988, "Considerant 12", and DC 89–254, 4 July 1989, on privatization, "Considerant 13". See Favoreu, et al., *Droit constitutionnel*, 153. On this in English see Bell, *French Legal Cultures*, 202.
64 Ameller, "Principes d'interpretation constitutionnelle et autolimitation de juge constitutionnel."
65 Lascombe, *Droit constitutionnel*, 249. Cf. Robert, *Le juge constitutionnel*, 28.
66 See 97–393 DC of 18 December 1997 on family allowances, "Considerant 27". See Favoreu and Philip, *Grandes décisions*, 899 ¶14.
67 Lascombe, *Droit constitutionnel*, 249.
68 2002–465 DC of 13 January 2003, "Considerants 2–3", and 2004–494 DC of 29 April 2004, "Considerant 9".
69 77–87 DC of 23 November 1977. Excerpts are available in English in Bell, *French Constitutional Law*, 319–320.
70 Verpeaux, "Les Principes fondamentaux reconnus par les lois de la République."
71 99–414 of 8 July 1999, "Considerant 6".
72 Lindseth, "Law, History and Memory", 78.
73 Avril and Gicquel, *Le Conseil constitutionnel*, 41; Emeri and Bidegaray, *La Constitution en France*, 174.
74 CE 11 juillet 1956 (*Amical des Annamites de Paris*). Avril and Gicquel, *Le Conseil constitutionnel*, 41 ; also Favoreu and Philip, *Grandes décisions*, 248 ¶15. On the issue in English see Bell, *French Constitutional Law*, 73 et seq.
75 The Constitutional Council's gesture was also facilitated by a shift in political power (i.e., General de Gaulle's departure from political office).
76 See Favoreu and Philip, *Grandes décisions*, 246 ¶11.
77 Note that, at the time of the enactment of the law, Alsace-Moselle was part of Germany. While today Alsace-Moselle is an integral part of France, it preserves legal rules from between 1871 and 1919, among them the act mentioned above. Most remarkably, Alsace-Moselle does not fall under the 1905 French concordat requiring the strict separation of church and state. As a result, priests of three

denominations are paid out of the budget and bishops are appointed by the president of the republic upon the pope's proposal. See Troper, "French Secularism, or Laïcité", 1278–1279. Note that Alsace-Moselle also came under German sovereignty during World War II.

78 Stirn, *La tradition républicaine dans la jurisprudence du Conseil d'État*, 215.

79 91–299 DC of 2 August 1991, "Considerant 5". The French Constitutional Council's jurisdiction is restricted to preliminary review of legislation. Following their promulgation statutes cannot be reviewed by the Constitutional Council. See Article 61, French Constitution, 1958.

80 The present chapter does not cover other unwritten components of the block of constitutional norms in detail.

81 Terneyre, "Principes politiques, economiques et sociaux principes particulièrement nécessaires à notre temps", 829.

82 74–54 DC of 15 January 1975, "Considerant 10". Available in English at http://www.conseil-constitutionnel.fr/langues/anglais/a7454dc.pdf.

83 Robert, *Le juge constitutionnel*, 18–19.

84 94–343/344 DC of 27 July 1994, "Considerant 2". Available in English at http://www.conseil-constitutionnel.fr/langues/anglais/a94343dc.pdf. Reaffirmed in 98–403 DC of 29 July 1998.

85 E.g., the continuity of public service as a permissible limit on the right to strike in 79–105 DC of 25 July 1979. For details and examples see Bell, *French Constitutional Law*, 71–72. For extracts in English see id., 322–323.

86 Lascombe, *Droit constitutionnel*, 249.

87 Le Bos and Le Pourhiet, "Principes généraux du droit", 828.

88 In English see Bell, *French Legal Cultures*, 203.

89 2002–461 DC of 29 August 2002 on the criminal justice bill, "Considerant 26". See also 2003–467 DC of 13 March 2003 on internal security, "Considerant 36" and 2004–492 DC of 2 March 2004 on transnational organized crime, "Considerant 37".

90 2002–461 DC of 29 August 2002 on the criminal justice bill, "Considerant 27".

91 Verpeaux points out that the classification of the 1945 ordinance as a piece of republican legislation is problematic not only for formal legal reasons, but also chronologically. Verpeaux, "Les Principes fondamentaux reconnus par les lois de la République."

92 The latest suggestions rejected for recognition among fundamental principles by the Constitutional Council include, for example, equality of votes cast (98–407 DC of 14 January 1999); the exclusive assignment "general social contribution" to the financing of social security (2001–447 DC of 18 July 2001, "Considerant 16"); the principle according to which the law may allow a collective agreement to depart from a statute only if the derogation is more favorable to the employees (2002–465 DC of 13 January 2003, "Considerants 2–3" and 2004–494 DC of 29 April 2004, "Considerant 9"); or the fundamental principle of the right to social security (2004–504 DC of 12 August 2004, "Considerant 10").

93 88–244 DC of 20 July 1988 on amnesty, "Considerants 11 and 12". Avril and Gicquel, *Le Conseil constitutionnel*, 127; also Vimbert, *La tradition républicaine*, 203–204.
94 Vimbert, *La tradition républicaine*, 207 et al.
95 Vimbert, *La tradition républicaine*, 223–224. For a general overview of the republican tradition in the jurisprudence of the Conseil d'État see Stirn, *La tradition républicaine dans la jurisprudence du Conseil d'État*.
96 For a while, general principles of constitutional value were understood by scholars as if they belonged in the block of constitutional norms, but according to Favoreu this is no longer the case. Favoreu, "Bloc de constitutionnalité", 87.
97 Rogoff, "A Comparison of Constitutionalism in France and the United States", 76–77.
98 Rivero on quote in Bell, *French Constitutional Law*, 73.
99 Stirn, *La tradition républicaine dans la jurisprudence du Conseil d'État*, 216.
100 For views see Favoreu, et al., *Droit constitutionnel*, 155.
101 Rogoff, "A Comparison of Constitutionalism", 77. Vedel remarks that introducing the general principles took great creativity: Vedel, "La Constitution comme garantie des droits", 207.
102 Vimbert, *La tradition républicaine*, 255.
103 Jean Pradel, "Les principes constitutionnels du procès pénal."
104 Vimbert, *La tradition républicaine*, 205. Vimbert notes, with regard to freedom of conscience, that the Constitutional Council could also have referred to the 1905 (republican) act on the separation of church and state.
105 Troper, "Constitutional Justice and Democracy", 277.
106 Favoreu, "Les principes fondamentaux" (Mathieu), 237 et seq.
107 See Favoreu and Philip, *Grandes décisions*, 324 ¶34.
108 See, e.g., Avril, *Les conventions de la constitution*.
109 See Stirn, "La tradition républicaine dans la jurisprudence du Conseil d' État", 215.
110 Bell, *French Legal Cultures*, 31. For a brief account of the Conseil d'État's institutional history, see Costa, *Le Conseil d'État*, 1–8.
111 Hazareeshing, *Political Traditions in Modern France*, 71.
112 Bell, *French Constitutional Law*, 35. Also Stirn, *La tradition républicaine dans la jurisprudence du Conseil d'État*, 213–214.
113 Article 61, 1958 Constitution. Other powers include the supervision of referenda and elections, and the power to police the curious French constitutional boundary between legislative and executive competencies.
114 Maus, "The Birth of Judicial Review of Legislation in France."
115 Jaume, "Le contrôle de constitutionnalité de la loi."
116 Rousseau, *Droit du contentieux constitutionnel*, 28.
117 On details in English see Foyer, "The Drafting of the French Constitution of 1958", 15–18.
118 Elster, "Forces and Mechanism in the Constitution-making Process", 371 and 393.

119 Luchaire, "Commentary", 47.
120 On this see also Chapter Three.
121 On the concept of the nation and its relation to the 1958 French Constitution see also Chapter Two.
122 Rogoff, "A Comparison of Constitutionalism in France and the United States", 56–57 (original notes omitted).
123 Blondel, *The Government of France*, 47–48.
124 Rogoff, "A Comparison of Constitutionalism in France and the United States", 63.
125 Hazareesingh, *Political Traditions in Modern France*, 78.
126 Birnbaum, *The Idea of France*, 151.
127 For an account see Rousso, "The Reactions in France", 53–55. For an excellent account in English see Birnbaum, *The Idea of France*.
128 For an account in English see Booth, "Communities of Memory", 249–250.
129 Grosswald Curran, "The Legalization of Racism in a Constitutional State", 3. For a discussion of the consequences see the present chapter.
130 See Allies, *Pourquoi et comment une VIe République*, and Duhamel, *Vive la VIe République!* reviewed in English in "One, Two, Three, Four, Five, and Counting: A Sixth French Republic?."
131 See Luchaire, "Contributions", and Vedel, "Contributions".
132 See Rousseau, "Contributions."
133 http://www.yale.edu/lawweb/avalon/jeffcons.htm.
134 Act No. 21 of 1949 on the Constitution of the Republic of Hungary, as amended by Act No. 31 of 1989, the first comprehensive democratic amendment to the Hungarian Constitution. For a summary of the first set of democratic amendments see Ludwikowski. *Constitution-making*, 180–183.
135 On this see Sajó, "The Round-Table Talks in Hungary", and Halmai, "The Making of the Hungarian Constitution".
136 Paczolay, "Constitutional Transition", 561.
137 De Lange, "The Historical Context", 19.
138 The first few rounds of negotiations among 19 parties were called the Convention for a Democratic South Africa (CODESA), and after several halts these were expanded in 1993 to include 26 participants. The forum was then renamed the Multi-party Negotiating Process (MPNP). The MPNP drew up the interim Constitution of 1994 and the 34 Constitutional Principles. For informed accounts on the making of the South African Constitution in detail see Spitz and Chaskalson, *The Politics of Transition*.
139 See Chapter Five for a detailed analysis.
140 See Articles 121–123 of the interim Constitution and Article 25(7) of the final Constitution.
141 *S. v Mhlungu*, CCT/25/94; 1995 (3) SA 867 (CC); 1995 (7) BCLR 793 (CC). Mahomed, J. (majority judgment), paras. 23, 28, 20, and 24.

142 In *Mhlungu* the Constitutional Court said that the applicant could challenge the applicability of some criminal-law rules, the unconstitutionality of which was established by the Constitutional Court in *S. v Zuma and two others*, CCT 5/94, 1995 (2) SA 642; 1995 (4) BCLR 401. *S. v Mhlungu*, Mahomed, J., para. 47. *Mhlungu* and *Zuma* were decided on the same day.
143 E.g. 32/1991 (VI. 4.) AB decision, ABH 1991, 142 (in *obiter dictum*).
144 Paczolay, "Constitutional Transition."
145 11/1992 (III. 5.), AB decision.
146 The full title of the bill was "On the Prosecutability of Grave Crimes Committed between 21 December 1944 and 2 May 1990, which were Not Prosecuted for Political Reasons." On the making of the bill see Halmai and Scheppele. "Living Well is the Best Revenge", 158–160.
147 Quote in Kis, "Az első magyar Alkotmánybíróság", 61.
148 See, e.g., Nehéz-Posony, "Visszamenőleges igazságtétel".
149 See Morvai, "Emberi jogok, jogállamiság és a 'visszamenőleges' igazságszolgáltatás."
150 For an analysis in English of the decision from the perspective of the doctrine of legal continuity in the context of the retroactive criminal justice laws see Paczolay, "Constitutional Transition and Legal Continuity", 570–573, also Trang, "Beyond the Historical Justice Debate".
151 11/1992 (III. 5.), AB decision, ABH 1992, 81.
152 Sólyom, "The Role of Constitutional Courts in Transition to Democracy", 138.
153 11/1992 (III. 5.), AB decision, ABH 1992, 81.
154 11/1992 (III. 5.), AB decision, ABH 1992, 80.
155 Přibaň, *Dissidents of Law,* 89–90.
156 See also 11/1992 (III. 5.), AB decision, ABH 1992, 83. Sólyom, "Introduction", 26.
157 11/1992 (III. 5.), AB decision, ABH 1992, 84–87.
158 Paczolay, "Constitutional Transition", 562.
159 According to Paczolay, in this case the Constitutional Court applied a neutral principles approach. Paczolay, "Constitutional Transition", 573.
160 Sólyom, "Introduction", 38.
161 Holló, *Az Alkotmánybíróság*, 66.
162 Zifcak, "Retroactive Justice in Hungary", contrasting the Hungarian case with the decision of the Czech Constitutional Court on the illegitimacy of the Communist regime (PI. ÚS 19/93), discussed below.
163 28/1991 (VI. 3.), AB decision, ABH 1991, 84.
164 11/1992 (III. 5.), AB decision, ABH 1992, 82.
165 On this, see my "Lessons from the Abolition of Capital Punishment in Hungary".
166 23/1990 (X. 31.), AB decision, ABH 1990, 99–100, Sólyom, Ch. J., concurring opinion.
167 Schwartz, *The Struggle for Constitutional Justice*, 100.

168 De Lange, "The Historical Context", 29.
169 Lustration will not be discussed in detail.
170 Czarnota. "Foreword", v.
171 Teitel, *Transitional Justice*, 213–230. Cf. Posner and Vermeule, "Transitional Justice as Ordinary Justice", disputing the legitimacy of singling out such situations as unique and labeling them as "transitional", thus inviting the manufacturing of exceptions.
172 Teitel, *Transitional Justice*, 216.
173 Teitel, "Transitional Historical Justice", 216.
174 Act No. 198/1993 (9 July 1993). The full text of the act is available in English in *Transitional Justice*, vol. 2, 366 et seq.
175 Thus far the words of the act echo Article 1 of the Czechoslovak *Act No. 480/1991 on the Era of Non-Freedom*, declaring that between 1948 and 1989, the "Communist regime violated human rights as well as its own laws". Quote from Pl. ÚS. 19/93, discussed below.
176 Pl. ÚS. 19/93. The full text of the decision is available in English translation on the official website of the Czech Constitutional Court at http://www.concourt.cz/angl_verze/doc/p-19-93.html.
177 For an informed treatment of the decision see Přibaň, *Dissidents of Law*, 89–94 and 100–109.
178 Note that both constitutional courts entertained arguments on other constitutional grounds which are not discussed in the present analysis.
179 Pl. ÚS. 19/93.
180 Pl. ÚS. 19/93.
181 BVerfGE 95, 96; NJW 1997, 929; 18 HRLJ (1997) 65 (English translation). A full-scale analysis of the role of natural-law arguments in transitional justice jurisprudence cannot be undertaken here. On this see Teitel, *Transitional Justice*, 12–18. See also the European Court of Human Rights' subsequent decision in the border guards' case in *Streletz, Kessler and Krenz v. Germany*, applications nos. 34044/96, 35532/97, and 44801/98, judgment of 22 March 2001.
182 Kis, "Az első magyar Alkotmánybíróság", 62.
183 On this see Olick, "What Does It Mean to Normalize the Past?" See also Chapter Five.
184 *Rekvényi v. Hungary*, application no. 25390/94, judgment of 20 May 1999, para. 41.
185 53/1993 (X. 13.) AB decision, the third retroactive criminal justice case. Earlier, the Constitutional Court, in another preliminary review case, reviewed another bill in 42/1993 (VI. 30.), AB decision, the second retroactive criminal justice case. For a detailed account see Halmai and Scheppele, "Living Well is the Best Revenge", 164–168.
186 According to Kovács this transformation (inflation) was fueled by revenge. See Kovács, "Íme az Istennek ama báránya, aki elveszi a világ bűneit", 35.
187 Eyal, "Identity and Trauma", 20.

188 Přibaň, "Legitimacy and Legality after the Velvet Revolution", 29–55.
189 The Czech Constitutional Court's decision on the Beneš decrees is discussed at length in Chapter Three.
190 Wagnerowa, "The Effects of the Decisions of the Constitutional Court."
191 When the government first indicted Jakes in 1995, the charges were returned for formal shortcomings. On the 1997 prosecution attempt see "Constitution Watch–Czech Republic", Fall 1997. The two were again acquitted in 2002. The Czech government decided to drop the case completely in late 2003, leaving the two Communist officials free from a treason conviction. Harris, "Government Drops Treason Appeal."
192 While individual constitutional complaint, as adopted in Germany (Basic Law, Article 93[1][4a]), appears to be an efficient means against such a shortcoming, the new democracies of post-Communist Central and Eastern Europe, which copied the German model of judicial review more than faithfully in numerous respects, tended not to adopt individual constitutional complaint as familiar from the German system.
193 O'Rourke, "Eastern Europe: Life in the Shadows–A Spy's Legacy is a Complicated One."
194 See the leading decision of the German Federal Constitutional Court (BvL 19/91), quoted in English at length in *Gast and Popp v Germany*, application no. 29357/95, judgment of 25 February 2000. The German Constitutional Court's position on the merits was not contested before the ECHR.
195 "Constitution Watch—Czech Republic" (Fall 1997).
196 Reasoning of the Czech Supreme Court, quote from the Czech Constitutional Court's subsequent decision in the case, discussed below. Pl. ÚS IV 98/97, available in English on the Czech Constitutional Court's official website at http://www.concourt.cz/angl_verze/doc/4-98-97.html.
197 Pl. IV ÚS 98/97.
198 See Halmai and Scheppele, "Living Well is the Best Revenge", 169–171, and Morvai, "The (Retribution for the) 1956 Revolution".
199 36/1996 (IX. 4.), AB decision.
200 Morvai, "The (Retribution for the) 1956 Revolution", 28.
201 See Teitel, *Transitional Justice*, 44–46.
202 Rupnik, "The Politics of Coming to Terms with the Communist Past."
203 Přibaň, *Dissidents of Law*, 103-104.
204 Krygier, "Transitional Questions about the Rule of Law", esp. 23–24.
205 On this see Brzezinski and Garlicki, "Judicial Review in Post-Communist Poland".

CHAPTER FIVE

The Fruits of Reconciliation: A Bittersweet Harvest

Chapter Four began an exploration of the normative premises underlying courts' reliance on historical narratives in constitutional cases. The examination targeted the rhetoric of continuity, inquiring how judge-made continuity rhetoric takes shape and, also, how such continuity rhetoric contributes to shaping identities in polities operating under constitutions with troubled founding myths. In addition to constructing constitutional continuity, justices entrusted with applying such constitution myths often invoke historical narratives in order to settle accounts with the past (reconciliation). Building on these previous findings, Chapter Five seeks to unravel the effect of reconciliation rhetoric on the relationship between the constitutional text and historical narratives. It is worth pointing out that, while continuity rhetoric at least appeared as a conspicuous or embedded feature of historical narratives, the plotline of reconciliation seems clearly external to historical narratives. Thus, with regard to reconciliation rhetoric it is relatively easy to detect the narrator's agenda when invoking the past. At the same time, it is also important to point out that continuity and reconciliation rhetoric are not mutually exclusive.

The project of reconciliation, both in a legalistic and in a more comprehensive sense, is often intermingled with judicial attempts at constructing continuity within the bounds of well-preserved intellectual schemata, and also as consciously undertaken judicial missions to establish continuity. Under a constitution surrounded by troubled founding myths, continuity building, at least in part, is exchanged for

coping with traumas experienced by a segment of the polity in the past.[1] Although the impact of court decisions reached in this way in the broader context of polity-wide reconciliation will also be touched upon incidentally, the participation of courts in reconciliation as a societal project will not be focused on directly in the forthcoming analysis. It is important to point out in advance that reconciliation in the technical legal sense does not always entail reconciliation in the sense of coming to terms with the past. When preserved in constitutional argument, a tension between these two understandings of reconciliation might produce constitutional outcomes that trigger practical problems and awkward moments over an extended period of time. The analysis in this chapter is devoted to uncovering these moments in constitutional reasoning.

The phenomenon of constitutional review fora dealing with reconciliation is of particular interest for a study of reasoning in constitutional adjudication, since constitutions typically do not impose a reconciliatory mission on constitutional courts. The epilogue of the South African interim Constitution is an outstanding exception in this respect.[2] Since the South African truth and reconciliation process, the concept of, or at least the term, reconciliation is hard to detach from democratic transition. The literature on the TRC's contribution to polity-wide reconciliation with the legacy of apartheid is abundant and rich.[3] While the present chapter is informed by the lessons of the South African experience, it will not offer a systematic account of the operations of the Truth and Reconciliation Commision (TRC) and its aftermath. Instead, other constellations have been chosen for an exploration of the rhetoric of reconciliation, where it serves as an extra-legal premise, the legitimacy of which might rest on additional, meta-constitutional justifications. Following a brief look at various implications and perceptions of reconciliation, the analysis turns first to Canadian jurisprudence in order to demonstrate how shifts in the reconciliation rhetoric accompanying continuity rhetoric prompt uncertainty in constitutional adjudication. The second set of case studies, on Hungarian transitional justice jurisprudence, covers cases in which the tension between attempts at preserving constitutional continuity and reconciliation rhetoric placed lasting stress on the constitutional order during and beyond the democratic transition. The last part of

the analysis drawing upon indigenous jurisprudence will demonstrate how judicial habits aimed at preventing radical changes and preserving continuity in the deep structure of the constitutional and legal order, might cause reconciliation attempts to founder.

5.1. The many faces of reconciliation and their many implications

It is a challenging task to evaluate judicial attempts at seeking reconciliation, as reconciliation is yet another concept without a settled meaning. In a narrow, technical sense it is used in reference to attempts to bring various parts of the constitutional canon into a coherent or harmonic (if not homogeneous) state, and also to attempts to fit emerging new claims into the constitutional edifice. Reconciliation in this sense is best understood as the consolidation of constitutional norms. This rather technical conception of reconciliation is familiar to lawyers and constitutionalists. Justices in constitutional cases typically insist that constitutional provisions should not be constructed in isolation; instead, the integrity of the constitution as a whole is to be preserved in the course of interpretation. These judicial attempts at manufacturing coherence present examples of reconciliation in a most technical or legalistic sense.

Indeed, reconciliation as coherence seeking can be detected in most strategies of constitutional construction. Among the most comprehensive strategies of manufacturing coherence in constitutional interpretation is the concept of the "structural unity of the Basic Law", a device of constitutional construction introduced by the German Constitutional Court at the very beginning of its operation, in the *Southwest State* case.[4] According to the German justices "[a] constitution has its inner unity, and the meaning of any one part is linked to that of the other provisions. Taken as a unit, a constitution reflects certain overarching principles and fundamental decisions to which individual provisions are subordinate."[5] It was with reference to the structural unity of the Basic Law that the German Constitutional Court claimed the power to review the constitutionality of constitu-

tional amendments—without an explicit granting of jurisdiction to this effect.[6] Certainly, refusing constitutional amendments does protect the integrity of the constitution, as it opens up the potential to fend off any alteration to the constitutional edifice by the *pouvoir constituant*. Although there are problems in accepting the constitutional review forum as the ultimate editor of the very document on which the legitimacy of the exercise of the constitutional review jurisdiction rests, the German Constitutional Court is not unique in having invested itself with power to this effect. The Indian Supreme Court famously asserted the power to review constitutional amendments in order to protect the constitution's basic structure. This stance was taken by the justices in spite of the fact that the Constitution of India prescribes an amendment process and does not contain any prohibitions on constitutional amendment.[7]

Within the judicial doctrines protecting the structural unity of the Basic Law (Germany) or the constitution's basic structure (India) lies a deeper commitment underscoring a coherence-building strategy, which is more comprehensive than simply disallowing changes to the constitutional text. Judicial strategies emphasizing the integrity of the constitution are infused with visions and value statements about the constitution and what it is meant to protect. According to Chief Justice Sikri of the Indian Supreme Court, the basic structure of the Indian Constitution is based on the aim to protect individual dignity and liberty.[8] While in its reasoning the Constitutional Court pointed to the Basic Law's Eternity Clause (Article 79[3]),[9] in weaving together textual and structural arguments[10] the justices were also informed by the framers' experience surrounding the fall of the Weimar Republic and the rise of the Third Reich.[11] As the German Constitutional Court put it in a subsequent case, the purpose of the Basic Law's Eternity Clause is "to prevent both abolition of the substance or the basis of the existing constitutional order, by the formal legal means of amendment … and abuse of the constitution to legalize a totalitarian regime."[12]

Such value statements underscoring judicial coherence-building strategies signal reconciliation in a less legalistic sense, in which the terms of the constitution are brought into line with certain external criteria defined by the justices. In the German case this external factor

is the history of past injustice and a determination never again to let such horrors take place. As the German Federal Court of Justice explained in response to a constitutional challenge directed at the criminal offense of Holocaust denial:

> [t]he historical fact itself, that human beings were singled out according to the criteria of the so-called Nuremberg Laws and robbed of their individuality for the purposes of extermination, put Jews living in the Federal Republic in a special relationship vis-à-vis their fellow citizens; what happened [then] is also present in this relationship today. It is part of their personal self-perception to be understood as part of group of people who stand out by virtue of their fate and in relation to whom there is a special moral responsibility on the part of all others, and that this is part of their dignity. Respect for this self-perception, for each individual, is one of the guarantees against repetition of this kind of discrimination and forms a basic condition of their lives in the Federal Republic.[13]

Note that the notion of the feared past is context dependent. A misperception of sensitivity as well as insensitivity towards the regrettable past and past injustice may extend past injustice and institutionalize it within the deepest structures of the polity.

As the latter observations foreshadow, constitutional review fora engaged in coherence-building projects often seek reconciliation in a less legalistic sense. Reconciliation in this second, more comprehensive sense is about coming to terms with the past, an aspiration which the polity-wide trauma of mass human rights violations and the days of democratic transition brought into the foreground of legal scholarship. Providing a full-fledged account of understandings of reconciliation and their consequences would far exceed the limits of the present work. The analysis can only attempt to draw attention to those aspects of reconciliation that may be referred to as "coming to terms with the past", which are relevant for an understanding of the operation of historical narratives in constitutional adjudication in the shadow of troubled founding myths. Restricted as this task appears, it is not without challenges. First, it is important to explain what hap-

pens to the past precisely when reconciliation, in the form of coming to terms with the past, is talked about. This clarification is all the more important as accounts of the past (historical narratives) are themselves intellectual constructs.

The phrase "coming to terms with the past", as used for our present purposes, is explained in Theodor Adorno's famous essay, in which he distinguishes coming to terms with the past (*Aufarbeitung der Vergangheit*) from "mastering the past" (*Vergangenheitsbewältigung*).[14] Adorno called for a confronting of the Nazi past and the Holocaust in reaction to the dominant German official line of normalization of the past that marked the 1970s and 1980s.[15] "Coming to terms with the past" was also a dominant theme of the South African reconciliation process, where a successful entry into democracy was conditioned on dealing with the legacy of apartheid.[16] In these settings the horrors of past injustices are grave and the immense difficulties in processing such pasts do not require further elaboration. A discussion of judicial rhetoric on coming to terms with the past, however, must also account for instances in constitutional reasoning where it covers dealing with past events that have disrupted the smooth flow of continuity in a historical narrative, such as Québec's secessionism. This is by no means meant to equate what may appear as a disturbing inconvenience with the legacy of severe past injustices inflicted by oppressive regimes. Instead, the aim is to point out that when courts are building historical narratives along a continuity rhetoric they try to smooth over smaller and grave disruptions in continuity by invoking the plotline of reconciliation. Coming to terms with the past (reconciliation) is instrumental for peaceful coexistence within a polity. Of course, the intensity of the reconciliation rhetoric differs depending on the gravity of the past harms addressed by the courts. However, the mechanics of instances of reconciliation rhetoric of varying intensity do share a number of common traits, which will be explored.

Outside the realm of lawyers, coming to terms with the past (reconciliation) is often promoted in the company of such tags and concepts as memory, forgetting, revenge, forgiveness, shame, trauma, and justice—grand terms often accompanied by strong moral, ethical, psychological, and emotional implications.[17] Providing a critical, comprehensive overview of these concepts would transcend the limits of

the present chapter. Instead, the following pages will concentrate on issues that are more closely related to the forthcoming reflections on constitutional jurisprudence on coping with a past heavy with injustice. To begin with, it is difficult to say much on the relationship between memory and forgetting in the wake of Paul Ricoeur's grand volume.[18] For the purposes of the present analysis on the role of historical narratives in constitutional reasoning it is still important to stress that memories of past events are not to be confused with a historical record of the past. For French historian Pierre Nora, history and memory (as an account of history) are antithetical, as history is an "intellectual and secular production", while memory is subject to permanent revision and deformation.[19] Such a distinction between history and memory is at least in part rooted in historians' professional reflex, according to which history is the subject and outcome of an elite intellectual exercise and critical reflection, while memory is associated with a set of oral accounts of the past and organic (living) traditions under constant transformation, lacking critical oversight and heavy with error.

While studies in collective memory, cultural memory (of which Pierre Nora himself is an important contributor), and cultural trauma have led to the fading of this barrier, the distinction between a proper account of the past and a distorted, arbitrary recollection has to be accounted for. As another French historian, Henry Rousso, put it in milder terms, "[m]emory is a mental representation of the past, but it has only a partial rapport with that past. It can be defined as the presence or present of the past."[20] Individual and collective memories are shaped by numerous factors. When addressing the subject of coming to terms with grave instances of past injustice one must be aware that suffering trauma also distorts memories: one symptom typically suffered by survivors of trauma is a disappearance of memory.[21] Traumatic memory as a unique phenomenon in trauma victims has long been described in psychology and psychoanalysis as a rather unique relationship to past events, lacking interpersonal or social dimensions.[22] Recent literature on cultural trauma has made attempts to expand these observations on traumatic memory beyond the nucleus of the individual to a wider scale of the polity and culture[23]—an attempt which is believed by its critics to amount to no more than an aestheti-

cization of trauma.[24] Beyond the problems of traumatic memory and the recent debate on cultural trauma one must be aware that, as Peter Burke pointed out: "[W]e have access to the past (like the present) only via the categories and schemata (or as Durkheim would say, 'collective representations') of our own culture."[25] In addition, collective memories of past events are shaped by the simple passage of time (distanciation), by serving present interests, by being arranged along narrative lines and in the individuals' cognitive processes, and also via social rehearsals.[26]

One of the most intriguing and controversial factors shaping memories of past events is forgetting. For some, a proper account of the past is viewed as instrumental in seeking justice with respect to past injustice, while forgetting is cast as an occurrence to be avoided at all costs. In this respect, two observations are in place. It was pointed out by Nietzsche that forgetting itself is essential for a human and humane account of the past.[27] On the other hand, for a legal approach to reconciliation as dealing with past trauma, forgetting does not only refer to the fading of memories of past events in one's own or a polity's account of the past, but also to pre-mastered strategies of oblivion. Officially sponsored and enforced strategies of oblivion with respect to the uncomfortable past are fairly frequent, and indeed are often particularly successful in shaping peoples' memories of past events. Note that officially required oblivion often results in a particular genre of official memory, which is heavy with the void left behind by segments of the past that have been edited out and with (questionable) interpretations of the parts that are preserved. Certainly, government censorship and forced oblivion do not automatically result in removing the disapproved segment of the past from the historical record. However, governmental practices fostering forgetting do shape processes of remembrance. Nonetheless, despite the distortion caused by government-imposed oblivion, it is somewhat misleading sharply to contrast memory and forgetting.[28]

Furthermore, depending on the narrator's perspective various legal measures believed to be instrumental in coming to terms with the past might be associated with different concepts from the non-lawyerly list of concepts. Take amnesty as an example. Amnesty as a transitional justice measure is as old as the polis of Athens.[29] It might

be explained (and even condemned) as a legally perpetuated means of government-sponsored forgetting that "puts the past out of sight."[30] This understanding is certainly in sharp contrast to the South African Constitutional Court's concept of amnesty, as explained in the *AZAPO* case.[31] In the South African truth and reconciliation process, amnesty was conditioned upon full disclosure of past crimes, and truth seeking. The South African Constitutional Court insisted that amnesty, as understood in the TRC's context, did not stand for an "act of oblivion", despite the word's root in the Greek concept of *amnestia*.[32] Such convictions and admissions made during the TRC hearings mark wrongs which are not per se destined to be forgotten. Taking these findings into account, it might be more useful and more realistic to view forgetting as a factor shaping memories, instead of a phenomenon that is the polar opposite of remembrance.[33] These above observations are in line with Todorov's summary and warning that "memory is never the integral reconstitution of the past, but always no more than a choice, a construct; and … sedimental operations are not predetermined by the subject matter recurring to memory, but very much by agents who remember, with a particular goal in view. And if reconstruction of the past in itself is not a bad thing, certain *uses of memory* are more noble than others."[34] One cannot ignore the emphasis Todorov places on the uses of memory. Reconciliation as coming to terms with the past is one of the purposes for which memory or memories of past events are used. The moral and ethical dimensions of the uses of memory are overwhelming, and processes of reconciliation are most often cast in the context of moral obligations.[35]

Nino's theses on confronting the crimes of oppressive regimes sheds light on the numerous ethical, moral, and practical dimensions of coming to terms with the past that the legal community has to confront. Nino's major concern is to untangle difficulties associated with retroactive criminal justice measures and coping with retributive justice. He argues that criminal trials respond to the very authoritarian processes that fostered mass human rights violations in the first place; generate collective consciousness about past wrongs and contribute to a public exchange thereon; and also serve as channels for victims' emotions and narratives, thus contributing "to the victims recovering their self-respect."[36]

For some, like Avishai Margalit, coming to terms with past injustice (reconciliation) cannot be complete without the victim forgiving the offender. While one might question whether victims' forgiveness is a necessary attribute of a successful mission of reconciliation,[37] Margalit's argument demonstrates how, in this morally overcharged context, memory, forgetting, and forgiveness are intricately intertwined, when submitting that "[t]otal forgiveness entails forgetting—that is, blotting out rather than covering up. The initial decision to forget, however, does require remembering, otherwise forgiveness has no meaning. 'Natural' forgetting of an injury is not forgiveness and has no moral value."[38] In this logic, the victim is driven to forgive the offender not out of a general human duty to forgive, but due to a victim "not wanting to live with the feelings of resentment and the desire for revenge."[39] To the extent that removing the drive to seek revenge is central to reconciliation proper, Margalit's argument carries significant weight, pointing well beyond the problem of forgiveness.

Sajó discusses another morally charged route potentially leading from grave past injustice to reconciliation via the concept of shame. Drawing on the psychology of shame he argues that "[m]embers of the community (the citizenry), whose earlier members were exposed to being involved in genocide and discrimination, should feel shame for the misdeeds of their forefathers. Otherwise, the community will seemingly identify itself with the earlier generation of the murderers. … As long as a community does not feel, and more importantly does not *express*, shame … the shameful condition persists. Expressions of shame may/should include begging for reconciliation and leniency through legislation; at a minimum, some symbolic compensation to victims."[40] While criticizing this accounts as incompatible with biblical understandings of guilt and shame, Fletcher admits that Sajó's conception of shame offers a solution which allows for drawing legal consequences from a collective experience in a culture which rests on a conception of individual responsibility and does not tolerate collective guilt.[41]

Transforming the past into memory is essential for creating a democratic political culture. Memory in this understanding is an instrument for making the past into a part of the present.[42] Lawyers, legislators, and courts play important roles in shaping memories and proc-

esses of remembering. In a number of her works on transitional justice Teitel reflects on the role of the production of history in democratic transition. Emphasizing that "[i]n transitional history making the story has to come out right",[43] Teitel argues that in the midst of transition the exposure of knowledge of the past signals the possibility of change.[44] In the course of this process, learning and knowing about the past connects the polity with its future.[45] Teitel suggests that legal procedures ritualize the path to acquiring a collective knowledge about the past. In this highly formalized and ritualized learning process, law comes to define and transform identities, and legal definitions separate victims from perpetrator and praiseworthy from shameful motivations. Teitel also adds that the passage of time has a paradoxical effect on memory and transitional justice measures. On the one hand, distance from the events allows a better reflection on the past, is likely to make more information available, and, therefore, might be expected to expand the basis of redress. At the same time, with the passage of time reparations are likely to become symbolic.[46]

While the records of the South African TRC, preserved on tapes and in archived transcripts and submissions, preserve an invaluable segment of the historical record of apartheid, one must be aware that the TRC hearings and rules of evidence screened the information admitted in this vast archive.[47] As a technical matter, legal rules on the declassification of state archives and legal rules on access to those archives directly determine the record of the past. Access to the archives of former Communist secret services has been a hot issue in most emerging post-Communist democracies. While access to secret service archives is often approached from the perspective of its empowering or blackmail potential, one must also see how those archives contain crucial resources on recent history. Indeed, mentioned among the virtues of the South African truth and reconciliation process is that it recovered information previously unavailable, proving that between 1990 and 1994 more people died of violence in South Africa than during the preceding thirty years. Agents of the apartheid state and security forces (the "third force") were responsible for provoking violence in order to demonstrate to the international community that without apartheid South Africa would become ungovernable. Violence thus triggered by the apartheid state

in exchange led to even harsher means of governmental suppression during apartheid.[48]

Another factor which is often mentioned in connection with criminal trials and the truth commission is their unique contribution to the public discourse.[49] In South Africa the polity-wide impact of the TRC is not possible to understand fully without noting that the hearings were widely televised. All studies on the TRC's acceptance in public opinion, guilt attribution, and the relevance of people appearing or people staying away should be seen through that lens.[50] At the same time, one cannot avoid seeing that in addition to criminal prosecutions and other broadcasted legal events, the public discourse on past injustice is also shaped by fiction films and documentaries, a wide variety of television programs, and popular works on history. As Rousso warns, "for the general public today a film, history book, television program, and newspaper article can all have the same pedagogical impact when it comes to speaking of the past."[51] Courts carrying out constitutional review participate in the discourse by situating the past in the present in such a complex web of events, factors, and impressions.

As the above analysis shows, concepts of memory, forgetting, forgiveness, and reconciliation are shaped by many disciplines, and legal scholarship is often on the receiving end of those discourses. Even when prominent lawyers engage in discussing these concepts, one might sense a certain distance between specific legal rules and academic exchanges. This is all the more problematic since, as Minow notes, "memory is central to law … and to legal methods. Negotiating a duty of fidelity to the past with the inevitable guide of the present, law at the most general level has much to teach about what can remain true about a remembered past."[52] The following analysis will concentrate on a relatively small segment of the law's experience in dealing with the past. The focus will be on constitutional cases in which courts use the rhetoric of reconciliation as the undercurrent and normative premises of historical narratives. Indeed, in constitutional reasoning reconciliation cannot easily be detached from continuity building as widely practiced by lawyers. The habits of the legal mind, and the patterns of thinking followed by lawyers within and outside the doctrine of precedent, prompt justices to search for and

to find guidance in previous events, practices, and mistakes. The intimacy of the relationship between continuity building and reconciliation surfaces once it is understood that continuity rhetoric and reconciliation both approach the past while keeping the present and also the future in mind.

5.2. Canada: continuity and reconciliation rhetoric hand in hand

The following sections review how, if at all, courts manage reconciliation rhetoric in constitutional cases. An exploration in this direction takes the interpretiveness (and often volatility) of historical narratives for granted, and does not shy away from finding that "courts write bad history." For an inquiry into the plotline of reconciliation behind the historical narratives in constitutional cases, contexts already analyzed serve as ample, if disquieting, illustrations. First, the analysis returns to the already familiar terrain of Canada's unwritten constitutional principles.[53] Focusing on the development of unwritten constitutional principles as emerging in Canadian constitutional jurisprudence, this section investigates how the Supreme Court's latent reconciliation mission has delivered on consolidating the Canadian constitutional framework. The context of Québec secessionism is not regarded as a setting in which a court had to facilitate coming to terms with grave government-inflicted injustices and suffering, as witnessed in the transitional justice context.[54] An inquiry centering on Canada's unwritten constitutional principles aptly illustrates how a court-crafted plotline of reconciliation, carried on alongside a continuity rhetoric applied in a highly sophisticated manner, operates in constitutional adjudication.

Although in some contexts, as in the U.S., the idea of an "unwritten constitution" does generate considerable unease and resistance,[55] as our look at French jurisprudence revealed it is certainly not unprecedented for a judicial review forum to rely on a "set of constitutional norms" instead of just the written text of "the constitution."[56] In its jurisprudence the Canadian Supreme Court has long recognized

unwritten constitutional rules, such as constitutional conventions,[57] and parliamentary privilege.[58] The most recently confirmed item on the list of unwritten constitutional norms is the confidentiality of cabinet meetings.[59] The royal prerogative is yet another unwritten source of the Canadian Constitution of British descent that courts consistently recognize.[60] In addition to the variety of sources familiar from British constitutional law, the Canadian Supreme Court has also recognized the so-called unwritten constitutional principles of federalism, democracy, constitutionalism and the rule of law, and respect for minorities, and has thereupon imposed a novel constitutional obligation: the duty to negotiate secession in the famous *Québec secession reference*.[61] Untangling the relationship between previously recognized unwritten constitutional norms and the constitutional principles in Canada reveals the transformative role of the Canadian Supreme Court's historical narratives and the real impact of the justices' desire to achieve consolidation (reconciliation). As Walters points out, questions about the stature of unwritten constitutional principles are questions about the rule of recognition (H.L.A. Hart) behind the Canadian Constitution.[62] Furthermore, as witnessed in the *Québec secession reference*, the judicial search for a rule of recognition in the context of unwritten constitutional principles is about building a constitutional identity upon the narratives of continuity and reconciliation.[63]

The exploration focusing on Canada's unwritten constitutional principles might begin along the most conventional route, calling the preamble of the Canadian Constitution to aid. Unwritten constitutional norms of the Canadian Constitution are commonly traced back to the preamble of the 1867 Constitution Act, which pronounces that the provinces forming Canada are entering into a union under a "Constitution similar in Principle to that of the United Kingdom." In the *Québec secession reference* the Supreme Court explained the purpose of the preamble in the following terms: "Allowing for the obvious differences between the governance of Canada and the United Kingdom, it was nevertheless thought important to thus emphasize the continuity of constitutional principles, including democratic institutions and the rule of law."[64] Two fine details in this quote are worthy of further attention, as they are informative about how the Supreme Court's efforts at consolidating the Canadian Constitution (reconcilia-

tion) reached a turning-point in the *Québec secession reference*. These two moments, to be explored in detail below, expose the process in which unwritten constitutional principles came to serve as means of (re)shaping important traits of Canadian constitutional identity through subtle reflection on the fundamentals of Canadian founding myths. In the course of this process unwritten constitutional principles, which were once seen as general concepts useful for the construction of particular written constitutional provisions, were transmogrified into self-standing constitutional norms which could subsist more or less independently of particular written constitutional provisions, thus becoming standalone grounds for constitutional review. This transformation is due at least in part to the shift in the concept of reconciliation, on the basis of which these unwritten constitutional principles were launched.

Firstly, in the above quote the Supreme Court refers to the "continuity of constitutional principles" as potential means of preserving constitutional continuity in Canada. To today's observers it is of little importance that in this case the Supreme Court was ready to recognize four such constitutional principles derived almost solely from Canadian constitutional history,[65] yet, at the time the decision was handed down, the Court's words landed in a rather different context, the exploration of which is essential for an understanding of their force in Canadian constitutional jurisprudence. To begin with, before the Supreme Court handed down its decision in the Québec secession reference, constitutional principles were barely visible in the Canadian constitutional framework and did not seem to be destined for a great career. In the *Manitoba language rights reference* the Supreme Court acknowledged the rule of law as a constitutional principle,[66] while in the *Provincial judges reference* the independence of provincial judges was admitted to the hall of unwritten constitutional norms in 1997.[67]

In these early cases a constitutional principle was meant to be "called to aid to illuminate provisions of the statute in which it appears."[68] This is the language of reconciliation in a very technical sense: unwritten constitutional principles are meant to consolidate the various provisions of the Canadian Constitution. In the *Provincial judges reference* the Canadian Supreme Court had to decide whether the Canadian Constitution safeguarded the financial security (and thus

independence) of provincial judges. The fundamental problem in the case was that the guarantees of judicial independence set forth in the Canadian Constitution apply to the federal judiciary, but not to provincial courts.[69] The Supreme Court refused to extend the scope of constitutional provisions applicable to federal courts to include the provincial judiciary. Instead, the Canadian justices held that the "express provisions of the Constitution should be understood as elaborations of the underlying, unwritten, and organizing principles found in the preamble to the Constitution Act, 1867."[70] Chief Justice Lamer went the farthest in the *Provincial judges reference* when he referred to the preamble as the "grand entrance hall to the castle of the Constitution", through which foundational principles enter the edifice of the Canadian Constitution.[71] Yet, as Hogg notes, in this case the "assertion of an unwritten constitutional principle was technically an *obiter dictum*, because the Court decided the case on the basis of the explicit guarantee of judicial independence in s.11(d) [of the Charter of Rights]."[72]

In contrast, in the *Québec secession reference* constitutional principles without strong textual support entered the scene. The Supreme Court itself remarked that

> [b]ehind the written word is an historical lineage stretching back through the ages, which aids in the consideration of the underlying constitutional principles. These principles inform and sustain the constitutional text: they are the vital unstated assumptions upon which the text is based. […] Although these underlying principles are not explicitly made part of the Constitution by any written provision, other than in some respects by the oblique reference in the preamble to the Constitution Act, 1867, it would be impossible to conceive of our constitutional structure without them. … The principles dictate major elements of the architecture of the Constitution itself and are as such its lifeblood.[73]

As this quote indicates, when redefining its position regarding unwritten constitutional principles, in the *Québec secession reference* the Supreme Court was willing to abandon not only the constitution's pre-

amble but, to a large extent, the constitutional text itself. In this new understanding the purpose of constitutional principles is not simply to clarify constitutional provisions or to fill gaps. It seems as if the constitutional principles were driving the application of the written constitution, making possible not only its coming into effect, but also its smooth operation in the long term.[74] In *Ell*, a more recent case on judicial independence, the Supreme Court treated the Canadian Constitution's preamble as the "textual affirmation of an unwritten principle of judicial independence", concluding that the "preamble acknowledges judicial independence to be one of the pillars upon which our constitutional democracy rests."[75] In decisions following the *Québec secession reference* the Supreme Court regularly relied on the principle of judicial independence, freeing the principle from the ties of the constitutional text and even using it to strike down legislation.[76] These developments are in line with the Canadian Supreme Court stressing in the *Québec secession reference* that the "principles are not merely descriptive, but are also invested with a powerful normative force, and are binding upon both courts and governments."[77] In this new role, constitutional principles can no longer be seen as principles aiding the consolidated interpretation of the constitutional text. Here, the project of reconciliation is entering a higher, more comprehensive terrain.

In the *Québec secession reference* the Court's rhetoric concentrated on smoothing the differences between the accounts of the Québecois and the Rest of Canada, as if the justices were seeking to introduce a consensual account of Canadian constitutional history and, also, of the rules and obligations of the Canadian Constitution.[78] For instance, the Supreme Court said that "[f]ederalism was a legal response to the underlying political and cultural realities that existed at Confederation and continue to exist today. … Federalism was the political mechanism by which diversity could be reconciled with unity."[79] Also: "The principle of federalism facilitates the pursuit of collective goals by cultural and linguistic minorities which form the majority within a particular province. This is the case in Québec, where the majority of the population is French-speaking, and possesses a distinct culture."[80] A consolidating tone may also be sensed in the Supreme Court's other decisions invoking unwritten constitutional principles. In cases devel-

oping the unwritten constitutional principle of judicial independence, instead of setting out the specifics, the justices emphasize how a constitutional norm or principle of British origin had been a source of inspiration in Canada,[81] was "inherited" and transformed[82] or preserved in Canada,[83] or is "informing" Canadian constitutional practices.[84] At first sight, the generality of such references is in sharp contrast to the searching inquiry and attention to detail in other tests applied by the Canadian Supreme Court when calling for an inquiry into old English common law and statutes.[85] In addition, it is striking that in these cases the justices are talking not about imported British principles but about imported seeds or ideas, which then grew into genuine constitutional principles in Canada.

This aspect of the transformation of constitutional principles is best understood in the light of the second detail worthy of closer attention in the quote framing the present discussion on the Canadian Supreme Court's reconciliation rhetoric. At this point in the *Québec secession reference* the Supreme Court acknowledges the role of the preamble in preserving constitutional continuity between the United Kingdom and Canada. One might agree that there is no point in denying Canada's relationship with the law of the United Kingdom, as this link legalized the Canadian Constitution until 1982. According to Oliver, the preamble's reference to the laws of the United Kingdom can be read as suggesting that the written constitutional texts were supposed to be supplemented by unwritten rules (that is, constitutional conventions) from the very beginning.[86] As the Supreme Court said in the *Provincial judges reference*, the concept of the written constitution as a sample of the rules of a broader, unwritten constitution was the consequence of the fact that the Canadian Constitution "has emerged from a constitutional order whose fundamental rules are not authoritatively set down in a single document, or a set of documents, [therefore] it is of no surprise that [the Canadian] Constitution should retain some aspect of this legacy."[87] The manner in which, and the extent to which, the continuity symbolized by the preamble was meant to be preserved, however, is not clear. Pointing out an important distinction between the application of the norms of the British law and principles originating in the British constitution, Walters forcefully suggests that the preamble cannot be read to turn the rules

of the British Constitution into justiciable constraints imposed upon Canadian legislative powers.[88]

The latter remark indicates a tension which, in the long run, might be even more formative of the Canadian constitutional experience than Québec secessionism. While Canada was formally patriated in as late as 1982, the supremacy of the British law over the Canadian legal system had already been abolished in 1846 by the *Colonial Laws Validity Act* (section 3).[89] Despite the cutting of formal ties, the imprint left by the British legal system (both British and imperial law) and the heritage of the colonial past in Canada still needs to be accounted for when it comes to explaining basic concepts of Canadian government and rights protection. This discussion about influences and constitutional heritage becomes all the more lively in the light of Dicey's sarcastic comment, suggesting that in the preamble the adjective "United" had better been followed not by "Kingdom" but by "States", in order properly to reflect the essential features of the Canadian model.[90] While this remark has been elegantly dismissed on numerous occasions, most recently by Tremblay,[91] allusions to U.S. constitutional jurisprudence have the potential to become forceful reminders and even counter-narratives. Efforts during the drafting of the Charter to avoid a "substantive due process mishap",[92] which then also left their mark on the Canadian Supreme Court's early Charter jurisprudence,[93] remain the classic reference for such an eventuality, shaping important traits of Canadian constitutional identity.

At this point it might be appropriate to situate judicial attempts at reconciliation in a setting where concerns about indeterminacy in constitutional adjudication and the legitimacy of constitutional review also have a part to play. While the reconciliatory mission behind constitutional principles is clear, it still remains the case that the unwritten principles failed to bring consistency in the Canadian constitutional architecture in certain important dimensions. So far the Supreme Court has not defined the status of these unwritten constitutional principles vis-à-vis other sources of the Canadian Constitution. In the *Québec secession reference* the Supreme Court said that "there are compelling reasons to insist upon the primacy of our written constitution. A written constitution promotes legal certainty and predictability, and it provides a foundation and a touchstone for the exercise of constitu-

tional judicial review. However, we also observed in the *Provincial judges reference* that the effect of the preamble to the Constitution Act, 1867, was to incorporate certain constitutional principles."[94]

Here the Supreme Court does indeed acknowledge the problems indicated. The use of this language, however, might lead one to wonder whether constitutional principles should precede the text of the constitution due to their origin in the assumptions underlying the constitutional text.[95] In the light of these words it is still appropriate to claim that, as constitutional principles derive not from the words of the constitution but from its history, they are situated above the written text in the hierarchy of constitutional norms. This position is supported by the fact that, based upon constitutional principles, in the *Québec secession reference* the Supreme Court prescribed rules supplementing, or maybe substituting, the amending formula of the Canadian Constitution. This being the case, constitutional principles appear to perpetuate, rather than decrease, inconsistency, and thus, uncertainty.

In addition, it is at the least problematic when a judicial review forum has to determine the contents of a constitution. This concern was already exposed in Justice LaForest's dissenting judgment in the *Provincial judges reference*, reminding that "[j]udicial review … is politically legitimate only insofar as it involves the interpretation of an authoritative constitutional instrument. … This legitimacy is imperiled, however, when courts attempt to limit the power of legislatures without recourse to express textual authority."[96] This objection is a difficult one successfully to eliminate, as it is at its most potent when one is uncertain about the stature of unwritten constitutional principles declared by a court. Canada's unwritten constitutional principles appear especially problematic, since even an explanation positioning the Supreme Court in the broader context of the public discourse appears to fall short. It is all the more troubling, since a robust public discourse (of which the constitutional review forum is unquestionably a part in a modern constitutional government) is instrumental in achieving polity-wide reconciliation over conflicting accounts of the past.

Polity-wide processes of reconciliation, or coming to terms with the past, are based on historical narratives, and a court's position on historical narratives is one of many legitimate takes on the past. When

the Canadian Supreme Court was about to confirm constitutional conventions, the justices formulated a test in order to ascertain the convention claimed.[97] In contrast, with regard to unwritten constitutional principles no such test was disclosed by the Court.[98] This is not to suggest that no pattern of reasoning is traceable in cases where the Supreme Court established unwritten constitutional principles. Taking into account more recent jurisprudential developments, Cousineau observed that—despite this absence of settled criteria of evaluation—in recognizing unwritten constitutional principles the Supreme Court takes three types of factors into account: historical evidence; "organic evidence" (that is, the compatibility of the principle claimed with other constitutional values); and functional evidence (that is, concerning the role of the principle in preserving the fundamental values of the Canadian government and society).[99] However, so far these factors or criteria have not been merged by the Supreme Court into a test proper. Note that insistence on such a settled test is not without good reason. A test or a disclosed set of criteria available to others would invite alternative viewpoints and would also provide guidance for a better understanding of the court's position. Without a test based on neutral criteria, it is difficult to dispel the impression that constitutional principles are established at the justices' sole discretion.[100] Without a set of intelligible criteria, unwritten constitutional principles lead to reconciliation at best when and how the court sees fit.

It may be the case that the factors considered by the Court allow for the consolidation of the British constitutional heritage with the 1982 Canadian constitutional developments and beyond, taking a continuity rhetoric and then mitigating it with accounts of reconciliation where needed. However, one should still bear in mind Peter Russell's comment that the "Confederation compromise was sheltered from the strain of a full public review in all sections of the country, but at the cost of not forming a political community with a clear sense of its constituent and controlling elements."[101] It is hard not to see constitutional principles as a postmodern contribution to that "sheltered compromise." Furthermore, until now traces of the legal culture and perspectives of an important segment of the Canadian confederation, Canada's aboriginal peoples, were largely unnoticeable in the

court-driven reconciliation project.[102] The fundamental concern voiced here is not simply that, lacking such a test, the Supreme Court's position on particular unwritten constitutional principles is under-informed or contestable, or that the unwritten constitutional principles thus derived do not properly reflect the perspectives of those concerned. Rather, since these unwritten constitutional principles frame the terms of polity-wide reconciliation processes,[103] they might adversely affect the position of the participants of the discourse outside the walls of the Supreme Court. At the same time, a reconciliation mission carried too far with the aid of unwritten constitutional principles might endanger the integrity of the Canadian Constitution and undermine the judiciary's institutional legitimacy in performing constitutional review.

5.3. Reconciliation winning over continuity in Hungarian transitional justice jurisprudence

The preceding discussion of Canadian jurisprudence on unwritten constitutional principles followed a court shuttling between various conceptions of reconciliation, and the constitutional consequences thereof. The present section on Hungarian transitional justice jurisprudence follows a court in pursuit of the creation of a legal framework capable of undoing past injustice for the purposes of the transition to democracy. As chapter four showed, Hungarian constitutional justices were indeed very keen to preserve the integrity and coherence of the constitution, an aim they sought to achieve by continuity rhetoric. In this section, other instances of Hungarian transitional justice jurisprudence will be consulted in order to reflect upon the interaction and collision between the already familiar continuity rhetoric and judicial attempts at mastering reconciliation.[104]

As already mentioned, the Hungarian Constitution does not contain express provisions with respect to dealing with past injustice. When proposed legislation, seeking to bring before justice the perpetrators of crimes committed by the agents of previous repressive regimes, was contested, as a matter of principle the Hungarian Consti-

tutional Court refused special standards of constitutionality. The Constitutional Court insisted on constitutional continuity between subsequent regimes and pledged to review the constitutionality of measures of transition under the "ordinary" provisions of the Hungarian Constitution. In cases involving the compensation of victims of previous oppressive regimes, however, the Constitutional Court's stance was not dominated by a strict insistence on preserving "everyday constitutionalism." In the compensation cases the Constitutional Court introduced reconciliatory premises that hindered the enforcement of those legal claims that would have been operable under the logic of the continuity rhetoric pursued by the Court in the criminal justice cases. Without attempting to provide a comprehensive account of the Hungarian process of the compensation of victims, the following analysis intends to concentrate on the tension between continuity and reconciliation rhetoric in the Constitutional Court's jurisprudence.[105]

In the wake of Hungary's democratic transition, potential claims and expectations connected in one way or another with the loss or transfer of property during the previous regimes formed a puzzling maze. The terms used here are "fuzzy" and "blurred", as this description fits best the state of affairs that gradually evolved following World War II.[106] The incoming Communist regime almost completely annihilated private property, and in this process various legal means were used, from criminal confiscation to forced collectivization and expropriation. Once democratic transition commenced, in early policy plans claims for restitution and compensation for lost property were merged with strategies for property reform, which was widely seen as a necessary means of transforming an economy based on Communist ownership and central planning into a functioning market economy.[107] There was no doubt that, in the process of creating the Communist system of ownership, many individuals had suffered. Property restitution and compensation for lost property were cast in the wider context of economic reconstruction, and merged with measures for privatization and reprivatization.[108] As László Sólyom, the first chief justice of the Hungarian Constitutional Court, observed, in Hungary "[p]rivatization was connected with nationwide expectations that the 'unjust' expropriations of the 1940s and 1950s would be reviewed and made retroactive, or that the earlier owners would be fully compen-

sated."[109] Interestingly, however, the idea of full compensation for all victims who suffered property loss was not even raised by the political parties in charge of orchestrating democratic transition.[110]

The concept of economic reconstruction in this convoluted form, including questions of privatization, reprivatization, and forms of compensation for and restitution of lost property, was presented to the Hungarian Constitutional Court in 1990 in the form of a request for abstract constitutional interpretation of the Constitution's equality, property, and expropriation clauses.[111] The petition, submitted by the first democratically elected government, outlined a scheme including privatization of state-owned property and partial compensation. In the case the Constitutional Court created delineations that determined the fundamental concepts for dismantling the system of Communist ownership. These determined not only the basics of Hungary's economic reconstruction but also the premises of doing justice in connection with harm incurred with respect to private property due to government action under previous regimes.[112] Importantly, in the case the Constitutional Court distinguished between the (re)privatization of property on the one hand, and remedial compensation for lost property on the other. The Constitutional Court claimed that (re)privatization is a means of economic reconstruction, and ultimately the owner (that is, the government) is at liberty to decide in this matter.[113]

In contrast, as outlined in the government's proposal, the purpose of compensation is reparation for past harms, and not for lost property. The government is under no legal obligation to provide such compensation, nor is anyone entitled to claim or receive it.[114] In the scheme sanctioned by the Constitutional Court in 1990, compensation takes place *ex gratia* and not as of right. The details of the compensation scheme were further refined in a series of decisions arising out of challenges directed at various bills and acts on compensation. Early on the justices emphasized that the government has a wide discretion in determining what constitutes a ground for compensation, and also the amount to be paid.[115] The Court also said that compensation may be partial and may be supplied in installments, addressing certain types of claims or victims at a time.[116] Furthermore, since compensation takes place not as a right but on an *ex gratia* basis, the

standards of rights protection and criteria for the justification of rights restrictions do not apply. The standard of constitutionality is lower than in a discrimination analysis under the constitution's equality clause (Article 70/A), because the classification is not made with regard to a constitutional right. According to the Court, the constitution only requires the recipients to be treated as subjects with equal dignity, with no arbitrary distinctions imposed.[117] It would not be inappropriate to explain compensation legislation enacted in the aftermath of this decision as attempts made by parliament (at least to pretend) to live up to the standards and concepts prescribed by the Constitutional Court.[118] The principles initially outlined for compensation for lost property were later also applied to compensation for moral (non-pecuniary) harms.[119] The Constitutional Court applied these premises not only to the compensation legislation passed in the 1990s but also to an executive measure adopted by the cabinet in 2000, which prescribed additional payments to some victims who had previously received compensation.[120]

The Hungarian Constitutional Court was requested to review the classification of victim assigned to distinct victim groups for the purposes of compensation for moral harms, as well as the amounts of compensation granted to various classes of victims. The Court emphasized that such decisions require a comparison between classes of victims and factors for which there are no objective criteria of assessment.[121] Although with significant reluctance and caution, the Constitutional Court did alter the classification of victims in the 1992 Compensation Act[122] on several occasions. For instance, the Constitutional Court found it unacceptable that under the Compensation Act the same class of victims would include those who suffered deportation to Germany to forced labor camps and to extermination camps, deportation to Soviet forced labor camps, and other deprivations of liberty (incarceration) which occurred on the basis of a judgment by a Hungarian court.[123] The justices also abolished a classification which excluded from the compensation scheme those persons who had served in forced labor battalions but who had not served in fighting units on the frontline. The Court pointed out here that although members of forced labor battalions had not been convicted by a Hungarian court but were drafted by military authorities, they were

still kept in conditions that were essentially similar to the circumstances of a forced labor camp.[124]

Disputes over the compensation and classification of victims did not come to an end easily. In as late as 2003, the Constitutional Court reviewed a cabinet decree that introduced a scheme providing for further payment to some but not all victims who had previously received compensation for past injustice under the compensation laws. Accepting the government's classification of the measure, the Constitutional Court acted upon the premise that these new grants were not made within the statutory compensation scheme, but amounted to a sui generis welfare assistance scheme. In selecting various groups of victims who would qualify for grants, the cabinet acted within its original decree power and was not exercising delegated legislation under the compensation laws. Therefore, the cabinet could independently introduce a new assistance scheme to some, but not all, previously compensated victims on an *ex gratia* basis.[125] However, looking at the classes created in the cabinet decree, the Constitutional Court found that the classification that included only those victims who had spent at least three years in Soviet internment or in a Soviet forced labor camp following the decision of the Soviet authorities, was under-inclusive, as it left out prisoners of war who had also been kept under similar conditions. According to the Court, it was inappropriate to leave out prisoners of war on the grounds that their internment had not been ordered by Soviet courts or authorities, since these victims had been exposed to similar physical conditions and suffering.[126] These cases suggest that, despite the relatively low standard of review and lack of objective criteria for assessing victim status and suffering, the Constitutional Court became deeply involved in redrawing the delineation lying at the basis of the compensation scheme. Despite the Constitutional Court's interference, however, the very low standard of review still allowed for significant differences in the *ex gratia* compensation regime and the subsequent welfare assistance scheme, which left many of the victims bitter about the amounts handed out.

In addition to cases involving the classification of victims in compensation legislation, time and again the Constitutional Court was required to rule on the amounts paid in compensation. In the latter cases the Constitutional Court took a deferential approach and clearly

rejected reviewing the discrepancies between the amounts paid, as long as the amounts were at least substantially similar.[127] The limits of legislative discretion were, however, revealed in a relatively late compensation case in which the Constitutional Court held that granting 30,000 HUF as compensation for deportation was unacceptably low when compared to compensation provided to other groups who suffered bodily injury and were thus exposed to similar suffering.[128] The Constitutional Court made it clear that the amount paid as compensation to victims who were sentenced to death yet never executed must be the same, irrespective of the form of deprivation of liberty (forced labor camp or other deprivation).[129]

As already mentioned, the Constitutional Court instantly accepted the proposition of the government on partial compensation.[130] The title for compensating harms in relation to property was identified by the justices using the peculiar term *novation*. The Court reasoned that compensation for lost property was based on the government's gesture of renewing its old obligations on new grounds, as a new title in property.[131] The concept of novation as used by the Constitutional Court is best understood in the context of the regulation with respect to the group affected by it, labeled as "previous owners."[132] The compensation act under review created a homogeneous group of the previous owners, on the basis of one common denominator. The common characteristic of previous owners as a class is that at a certain point a Hungarian government deprived all of them of their property. The Constitutional Court agreed that for the purposes of being cast as a "previous owner" in the context of compensation, the means of deprivation of property and the holder of the new title were irrelevant. This finding is all the more surprising in light of the fact that, while the property of some was confiscated, the property of others was nationalized or expropriated with some (although not necessarily adequate) compensation.[133] After all, the logic of legal continuity would dictate that those who did not receive compensation at the time do not cease to be entitled to be compensated by the state *as of right*. In spite of the diversity of titles and methods of deprivation the Constitutional Court found that creating a homogeneous group out of these previous owners did not give rise to equal protection concerns. According to the Court, novation extinguishes all claims, in-

cluding the right to restitution, and replaces all such claims by rules of partial compensation.[134]

It is not much of an exaggeration to suggest that the concept of novation is one of the central metaphors of the Hungarian Constitutional Court's transitional justice jurisprudence, a mighty competitor of constitutional continuity and the rule of law, and not only in a symbolic sense. Novation is a concept long familiar to Hungarian lawyers, yet not in the unique sense as used by the Constitutional Court in the compensation cases. Law students come across this term early in their education in Roman law, and meet it for a second time when encountering the law of obligations. As formulated by Ulpian: "Novation is the transformation or metamorphosis of an earlier debt into another obligation … It happens when, from the preceding cause, a new [obligation] is so constituted that the former one is destroyed. For novation derives its designation from novelty and new obligation."[135] Thus, in Roman law novation is about creating a new obligation based on an old ground. With novation, however, it is not the obligation that is preserved but the de facto performance (for example, the transfer of money is demanded not as payment for goods, but as a loan). The concept of novation as developed in Roman law was used as a model for the regulation of novation in Hungarian civil law.[136] However, the Hungarian Constitutional Court did not use the term in the sense familiar from Roman law. The concept of novation as used by the Constitutional Court gave a "new content" to the obligation, that is, it altered the extent of the de facto performance. Novation as used by the Constitutional Court was meant to assist in undoing the inheritance of a repressive past efficiently, without looking into the details of legal obligations. The Constitutional Court's departure from set definitions resulted in such confusion that, in order to avoid further misunderstandings, the Court stated at a certain point that it used the term "novation" as shorthand and not in the sense used in civil law.[137] One may then ask somewhat impatiently about the use served by this deficient term.

The justices' admission of the shortcomings of novation as a metaphor also makes it easier to crack the concept for the present analysis. The concept of novation as used by the Constitutional Court does not rest on demands of constitutional continuity and the rule of

law. Instead, the Constitutional Court saw compensation as a means of performing the unique and historic task of restructuring the system of ownership.[138] Novation as a means of handling past injustice is of a reconciliatory inclination, at least when read in its best light. It seeks to create a common ground for handling victims' claims efficiently. Paradoxically, this approach may be the result of a complete disregard for the past, or, also, of the complete awareness of past reality. It might result from a fear or reluctance to open the book of the past. Or, better, it might also result from knowing the past all too well, since the Constitutional Court even argued in the case that the right to civil-law compensation in the previous regime was not a real right, since it was impossible to assert a claim for compensation because of the lack of legal regulation.[139] This last remark, however, also suggests that existing though dormant (that is, previously unenforceable) claims for full compensation or restitution were transformed into claims for partial compensation by the very terms of Hungarian compensation legislation. If so, the book of the past was closed not *before* the novation of the obligations of the state, but precisely *with* the gesture of novation. Should that be the case, intentions towards reconciliation come into direct confrontation with the operation of constitutional continuity and the rule of law.

It is time to situate the concepts of *ex gratia* compensation and novation in the vocabulary of the present analysis. It appears that these concepts do not fit neatly within the Hungarian Constitutional Court's rhetoric of constitutional continuity, defended so fiercely in the *Retroactive criminal justice* cases.[140] As already mentioned, the Hungarian Constitutional Court's decisions, which fixed the premises of compensation legislation (*ex gratia* compensation and novation) and jurisprudence, preceded the first *Retroactive criminal justice* decision. In that case the Constitutional Court compared the punishment of perpetrators of past crimes with compensation decisions concerning harms done to property rights, saying that compensation is about the future: compensation legislation grants rights, and any limitation of rights is linked with free acquisition of title in the future.[141] This remark frames the concept of novation rather well, and also conveniently underscores the above-mentioned qualities of the logic of novation. At the same time, at this point the Constitutional Court clearly

contrasted novation, together with other means of reconstructing property relations, with the criminal justice cases: after all, in the Constitutional Court's reading the retroactive criminal justice decisions are past-oriented.

In a constitutional system, a compensation scheme which allows the government of the day to pay only as much as it believes it can afford to pay to those groups of victims that meet the government's policy criteria for victim-hood is only tolerable if additional principles are called to aid which allow for relaxing the standards of "everyday constitutionalism." The Constitutional Court's gesture of characterizing compensation as an *ex gratia* grant is best understood as such an aid, an attempt to loosen the grip of "everyday constitutionalism" in order to enable coming to terms with past injustice (that is, reconciliation). In a subsequent decision on compensation for moral harms, when repeating its stance on the *ex gratia* nature of compensation, the Constitutional Court stated that victims who suffered illegal moral harms as a result of state action do not have a claim for damages against the government, as before the entry into force of the democratic constitution the Hungarian government was under no legal obligation to rectify such harms. The justices added that, although during the Communist regime the government was in principle supposed to pay damages, in practice, however, government action resulting in such damages was made possible by the Communist legal order itself, and, as the Court added, moral (non-pecuniary) damages were practically non-enforceable under the Communist regime.[142]

This remark illustrates a tension that is not easy to relieve based on the high ground of legal continuity. The logic of legal continuity would dictate that there is no room for compensation or any rectification, as the Communist legal system validates government action resulting in harm in such cases.[143] These observations by the Constitutional Court at least suggest that the Hungarian constitutional justices did sense a discrepancy between the dictates of legal continuity and the principles approved as underlying compensation legislation. It is a matter of taste or intellectual vehemence whether one classifies these instances of reconciliation as creating an exception or a qualification to the logic of continuity and, thus, the ordinary standards of consti-

tutionality, as the Constitutional Court insisted on inserting a relaxed standard to be met by compensation schemes. It is nonetheless clear that, as intended by the Constitutional Court, the logic of reconciliation was meant to coexist with "everyday constitutionalism" within the reign of constitutional continuity. According to Teitel, "[i]n transition the rule of law is historically and politically contingent, elaborated in response to past political repression … while the rule of law ordinarily implies prospectivity in the law, transitional rule of law is both backward- and forward-looking."[144]

The concept of novation may also be reconstructed along the lines of this reconciliation rhetoric, since it allowed for joining a wide variety of claims, many of which might not have been enforceable earlier, in order to allow for at least partial compensation of victims who lost their property as a result of illegal government action. Nonetheless, an example of how realistic claims for full compensation, and even restitution, might become with the emerging democratic regime may be found in the criminal jurisprudence of the Hungarian Supreme Court. These cases are especially interesting as the Hungarian Supreme Court relied on a decision by the Constitutional Court in developing its jurisprudence. In the course of compensation for moral harms, the Hungarian parliament passed a series of rehabilitation acts to allow for the annulment of illegal criminal sentences rendered under previous regimes.[145] Victims of illegal convictions were to receive partial compensation under the 1992 Act on Compensation for Moral Harms and, in addition, their status in the old-age-pension scheme was corrected.[146] The 1992 Act on compensation came into force long after the first two rehabilitation acts became operative. This delay is not so much of a surprise, since the official reasons given in the first Rehabilitation Act argue that "it is not possible to pay compensation to the victims, as such compensation would constitute an inequitable burden on the present generation."[147]

In cases that did not fall under the scope of rehabilitation legislation, victims of illegal convictions could ask for the annulment of their convictions under the general rules of criminal procedure, either in a review for legality procedure or following a motion for retrial.[148] Thus, while a class of persons convicted illegally during the previous regime fell under special rehabilitation rules, other victims had re-

course to ordinary criminal procedures and to remedies available to all. For instance, in a case in which the claimant argued that he had been convicted in a show trial, the Supreme Court directed criminal courts to admit the application as a request for retrial based upon newly discovered facts. The Supreme Court reasoned that a request for retrial is appropriate in such cases, as before it was impossible to prove that the case had been framed.[149] Before the entry into force of the Act on Compensation for Moral Harms, victims of illegal convictions requested reparation for confiscations which took place pursuant to illegal criminal sentences. In 1991 the Hungarian Supreme Court ruled that these claims were unfounded, since the annulment of illegal sentences did not result in a valid claim for monetary relief.[150] Not long after this decision by the Supreme Court, the Constitutional Court invalidated the provisions of the Code of Criminal Procedure restricting the right to compensation for harms suffered in the course of criminal procedure.[151]

Shortly after the decision by the Constitutional Court, it was made clear by a series of decisions rendered by the Supreme Court in criminal cases that in cases in which illegal convictions were annulled in a procedure of review for legality or upon retrial, victims thus cleared are entitled to receive restitution of property confiscated in the course of criminal procedure.[152] Restitution for lost property in such cases does not cover moral loss, only the value of property acquired by the state as a result of confiscation.[153] If the property of the convict was not confiscated in the criminal procedure but was expropriated, there is no room for restitution in criminal procedure.[154] It is the duty of the trial court to ascertain the amount of property confiscated by the original judgment. Moreover, the Supreme Court held that in the event the state confiscated real property, courts must inquire whether it is possible to return it to its former owner (*in integrum restitutio*).[155] Thus, if an illegal conviction was annulled in the rehabilitation process designed for the sole purpose of undoing past injustice, victims were entitled to partial compensation. In contrast, the victims of those convictions not covered by the rehabilitation rules and compensations laws were entitled to full restitution of the harm suffered in the course of the illegal criminal procedure, under the ordinary rules of criminal procedure.

Thus, based upon the jurisprudence of the Hungarian Supreme Court, it seems that in some cases the state's obligation to repair past harms survived, or was resurrected, as a result of the operation of "everyday constitutionalism" and "the rule of law ordinary"—based on a decision by the Constitutional Court concerning general rules on remedies for harms incurred in the process of the conduct of criminal procedure. Certainly, this decision by the Constitutional Court was incidental to the Constitutional Court's transitional justice efforts. Nonetheless, the fact that claims for restitution on the basis of illegal convictions were enforceable at least suggests, by analogy, that the claims of some who were included in the group of "previous owners" in the course of the compensation process might not have been so impossible to assert after transition. This account duly illustrates how the concept of novation is not sensitive to the past itself, while running counter to rule-of-law and constitutional-continuity considerations in the name of reconciliation. Questioning the wisdom and utility of the concept of novation as used in Hungarian constitutional jurisprudence, Sajó submits that, from the perspective of constitutionalism and the rule of law, it would have been more tolerable to declare that past nationalizations constitute injustices without remedies and to offer partial compensation without title.[156] Such a strategy could have been applied to other forms of illegal, state-incurred loss of property in a manner that reinforces standards of the "rule of law ordinary" and legal continuity, while allowing for coming to terms with the past, and also permitting the Constitutional Court to enjoy the well-deserved luxury of agreeing to a spending scheme in which broad discretion is afforded to the political branches. Such an approach would have allowed for the rhetoric and means of reconciliation to coexist with constitutional continuity, without the former ultimately undermining the latter. Instead, as Teitel also found, the Constitutional Court confirmed a route otherwise typical in post-Communist transition, where "[a]s the state repairs the *ancien régime*'s takings, past entitlements are being used to justify contemporary property distributions. … Ex post facto property 'rights' are constructed and justified to the extent that they are otherwise compatible with the economic transformation."[157]

5.4. Indigenous peoples in the maze of reconciliation: the suppressed subject revisited[158]

The analysis in the present chapter investigates how constitutional review fora create and master reconciliation rhetoric in the course of juggling historical narratives in constitutional cases. Previous sections have explored how more or less disclosed reconciliation rhetoric interferes with continuity rhetoric in constitutional cases, and have analyzed the impact of this interaction on indeterminacy in constitutional interpretation. The present section turns to indigenous rights jurisprudence to learn about deep-seated obstacles that hinder court-intended reconciliation in settings where considerable efforts are made systematically to come to terms with past injustice that affects a considerable segment of the polity. The setting of indigenous rights was selected not for its quaint foreignness or obscurity. Rather, the decision was based on the realization that indigenous rights jurisprudence preserves centuries-old vestiges of outstanding intellectual achievements—including some remarkable contributions by the most eminent legal scholars[159]—blended with experiences of human brutality of the most regrettable kind, which in many cases have still not properly been accounted for. It is important to note at the outset that this section will not draw direct parallels between the process of decolonization on the one hand, and post-Communist democratic transition on the other.[160]

Very few domains of law are as entangled with the ghosts of the repressive past and the postmodern language of constitutionalism and rights as indigenous law.[161] The indigenous rights context provides ample illustrations of instances where unconsciously preserved intellectual routines, reflexes, or patterns of reasoning determining or prejudicing legal thinking prevent lawyers from achieving their best-intended aims, despite all the efforts invested. The setting of indigenous rights magnifies numerous factors, which silently define most scenes populated by lawyers or framed by legal rules. The following analysis will focus on hidden trails leading all the way back to colonialism in the vast body of jurisprudence which is premised on reconciliation rhetoric. It has been well established that indigenous rights

jurisprudence is not part of constitutional jurisprudence in a number of jurisdictions to be analyzed in the coming pages. However, it is my belief that the indigenous rights context serves as a magnifying glass, allowing a better look at those intellectual mechanisms and legal processes that hamper seeing and understanding the other in constitutional cases.[162] In this respect it is crucial to keep in mind, as a general warning, Ivison's observation that the very process of translating various aspects of indigenous cultures into "rights" means capturing the subject (or object) in such a manner that it fits a language understood by the dominant majority in the polity.[163]

There are many obvious reminders of the colonial past in indigenous jurisprudence all over the world. Often the very language of this field is revealing.[164] In U.S Indian law and jurisprudence, the key terms are enshrined in concepts such as "domestic dependant nations",[165] "plenary power", "federal trust responsibility",[166] and "federal recognition", language clearly reminiscent of the grammar and conveniences of colonialism.[167] Today, in jurisdictions also inhabited by indigenous peoples, for the most part legislators and—ultimately—courts get to determine who qualifies as "Indian", and which form of social organization merits being called a "tribe", "band", or "nation."[168] In the U.S., the stakes in the federal recognition procedure are high. "Federal recognition provides three main advantages to Native American tribes. The first is the federal government's acknowledgment of Indian sovereignty. The second is the receipt of federal services and protections by eligible tribes. The final advantage is the prestige and honor associated with federally recognized status."[169] While the federal registration process has barely ever been activated in Canada in the past few decades, a distinction between registered (band) and non-band aboriginal peoples[170] still remains relevant, and constitutionally tolerable.[171] In 2000, a unanimous Canadian Supreme Court in *Lovelace*—while acknowledging the "legacy of stereotyping and prejudice against aboriginal peoples"[172]—upheld, against a Charter-based equality challenge (section 15[1]), a provincial statute which distinguished between band and non-band aboriginal peoples in distributing the proceeds of an on-reserve commercial casino, the profits of which were meant to be used to further the well-being of Ontario's indigenous population.[173] Greschner

points out the sad irony of this decision, remarking that "*Lovelace* has effectively permitted a government to help a more advantaged group before it helps the less advantaged ones."[174]

While to some it might appear obvious that courts are entrusted with the task of applying such definitions as "Indian" or "tribe", from a slightly different perspective it is hard not to see these instances as the descendants of settlers passing judgment on the savages according to the settlers' own set of criteria.[175] The initial resistance and reluctance of lawyers to acknowledge indigenous claims is fading slowly, and legal criteria and standards often do not necessarily accord proper weight to facts of life. For instance, it is a well-documented fact that the Mashpee peoples living in Massachusetts have occupied an identifiable piece of land for over three hundred years. However, in a process that commenced in the late 1970s, they have so far failed to establish that their social organization amounts to a tribe under U.S. law.[176] The Mashpee Wampanoag Tribe's yearly report contains information about forthcoming oral arguments in their federal recognition process in early 2005, adding that, in a different case, a state court agreed "to order DNA testing to confirm tribal lineage of one of our eligible members. This decision holds great significance because it marks the first time a court has ever recognized the Mashpee tribe in a family law court hearing."[177] As Russell notes, for indigenous peoples even winning a case is a bittersweet victory, since it stands as "a reminder of the subordinate place of native societies within the larger settler societies in which they are embedded, and of their dependence on the courts that pronounce upon their rights in that larger society."[178]

The jurisprudence of the Canadian Supreme Court is by far the most progressive in protecting indigenous peoples' rights. In Canada, where aboriginal, Métis, and Inuit peoples' rights are entrenched in the constitution (section 35, Constitution Act, 1982), the recognition of a practice or tradition as an aboriginal right puts it in a position to trump conflicting legal norms.[179] In the common-law hemisphere, the Canadian Supreme Court's jurisprudence is unmatched in its emphasis on sensitivity to indigenous perspectives and its aspirations to accommodate claims for indigenous peoples' rights and title. However, processes of legal reconciliation are still hampered by lines of reasoning and considerations that can be traced back to doctrines in old im-

perial common law on extending sovereignty over the New World. The colonial perspective tends to blindfold those legislators and courts setting foot on reconciliatory grounds in most indirect and unexpected ways. Some of these factors are so deeply entrenched in legal approaches and processes towards indigenous issues that they are prone to go unnoticed before the settlers' eyes and minds.[180] The present analysis is unable to provide a systematic account of indigenous rights in Canada. A brief glance at Canadian aboriginal jurisprudence can, I believe, shed light on these factors, highlighting a few characteristic patterns in judicial reasoning that I consider tellingly illustrate the phenomenon under consideration.

Over the years the Canadian Supreme Court has made several attempts to devise a test to acknowledge existing aboriginal rights and aboriginal title under section 35. The first really comprehensive version of the test was developed in 1996 by the majority of the Supreme Court in relation to Musqueam fishing rights in *van der Peet*.[181] The so-called distinctive culture test requires the aboriginal right's claimant to show that the practice, custom, or tradition is integral to their culture, and that it is of central significance to the aboriginal community in question.[182] Courts must focus on those aspects that make a particular aboriginal society distinctive:[183] the custom need not be distinct (that is, unique), but it must be distinctive (that is, characteristic).[184] As the second prong, the right's claimant must show that the practice, custom, or tradition "made the society what it is."[185] The court must ask whether, without the practice, custom, or tradition in question, the aboriginal culture would be fundamentally different.[186] The practice must have independent significance in the aboriginal culture; merely incidental customs do not qualify.[187] The third prong of the test requires the showing of "continuity:" courts must examine if the claimed right stems from a practice, custom, or tradition prior to contact with Europeans (and not only to times preceding the Crown's assertion of sovereignty over land).[188]

The propriety of first contact as a prong of judicial inquiry came into question in *Delgamuukw*, the first case in which aboriginal title was to be established under section 35.[189] According to the majority, "[i]n order to make out a claim for aboriginal title, the aboriginal group asserting title must satisfy the following criteria: (i) the land

must have been occupied prior to sovereignty, (ii) if present occupation is relied on as proof of occupation pre-sovereignty, there must be a continuity between present and pre-sovereignty occupation, and (iii) at sovereignty, that occupation must have been exclusive."[190] From the perspective of the present analysis, the first obvious adjustment is that, while in the case of aboriginal rights (*van der Peet*) the Supreme Court pointed to first contact with Europeans as the moment relevant for the continuity analysis, with respect to aboriginal title the justices said that the relevant point in time was the Crown's assertion of sovereignty.[191] This shift in jurisprudence rests on a pragmatic consideration: the assertion of sovereignty is easier to establish than first contact.[192] This point would be hard to question, even if there is a difference in time between the de facto and de iure assertion of Crown sovereignty.[193] However, as Justice LaForest commented in his separate opinion, even the date of sovereignty should not be considered as the only relevant date for establishing prior occupancy, pointing out that lasting resettlements of aboriginal communities may have taken place following the assertion of Crown sovereignty, and sometimes even in response to interaction with European settlers.[194] This interjection is an important reminder of how even the assertion of sovereignty is an unstable date. A further adjustment was made to the *Van der Peet* test in respect of Métis rights, with the adjustment of the pre-contact requirement.[195] With respect to Métis aboriginal rights, the focus should be on the period *after* a particular Métis community arose and *before* it came under the effective control of European laws and customs.[196]

It is apparent even from this brief account of jurisprudence that in its section 35 analysis on recognizing aboriginal rights and aboriginal title the Canadian Supreme Court is set on conducting an empirical inquiry into the customs and practices of indigenous peoples. Indigenous common law, as a potential source of establishing continuity in aboriginal rights, has been almost completely sidelined by the justices.[197] The Supreme Court has also avoided consulting colonial legislatures or common law ("common-law continuity"). As explained in *Coté*, such an approach "risks undermining the very purpose of section 35(1) by perpetuating the historical injustice suffered by aboriginal peoples at the hands of colonizers who failed to respect the dis-

tinctive cultures of pre-existing aboriginal societies."[198] This finding is not undermined by the Supreme Court's more recent hint in *Blais* that the common law recognizes certain "time-honored practices" of indigenous peoples.[199] In order to overcome such potential backlashes, the test as established in *van der Peet* inquires into "plain" historic continuity.[200] The Canadian Supreme Court recently made this approach explicit in *Powley*, saying that section 35 "reflects a new promise: a constitutional commitment to protecting practices that were historically important features of particular aboriginal communities."[201] Note that this approach in principle allows for the constitutional recognition of indigenous rights that were previously neither recognized nor ignored by the Canadian legal system.[202]

Shifting the focus of judicial inquiry onto plain historical continuity and away from tainted legal rules facilitating the oppression of indigenous peoples is in line with the Canadian Supreme Court's prior jurisprudence, breaking with the doctrines of imperial common law which devised the colonial subjection of Canada's indigenous peoples, and seeking to facilitate the reconsideration of Canadian/indigenous relations. The Supreme Court took its first revolutionary step in 1973, which resulted in undoing the imperial common-law heritage which once enabled the imperial crown to extend its sovereignty over North America.[203] Among the components of what Slattery calls the "imperial model" of the Canadian Constitution, the doctrine of discovery is of central significance. As a consequence of the doctrine of discovery, under the imperial model "[a]ll land rights in Canada are deemed to stem from the Crown, either directly or indirectly. There is no such thing as 'aboriginal title' in Canadian law, in the sense of land rights that spring from longtime use and occupation under customary law. If any such rights had existed prior to European contact, they came to an end when the French and British Crowns gained sovereignty and imposed their own land systems."[204]

In 1973, in *Calder*,[205] the Canadian Supreme Court had to decide whether the Royal Proclamation of 1763 applied in British Columbia and how it affected N'isgha aboriginal title. While petitioners did not question the doctrine of discovery, the aboriginal right's claimants referred to their prior occupancy as the source of their aboriginal title. In a maverick move, Justices Judson and Hall, in dissent, accepted the

argument that aboriginal title did not depend on the Royal Proclamation, or legislative or executive enactment. The *Calder* dissenters' position was reaffirmed in *Guerin,*[206] a subsequent case in which the Supreme Court based its position on the premise that aboriginal title derived from the historic occupation of aboriginal peoples and that the Royal Proclamation was not the source of aboriginal rights. The Canadian Supreme Court thereby overturned the effects of the doctrine of discovery and re-established the sui generis nature and sources of aboriginal law. *Calder* was decided in a political environment that was opening up to indigenous peoples' claims. "Following *Calder*, the government adopted a policy of negotiation with aboriginal people where their rights had been neither superseded by law nor extinguished by treaty."[207] The Canadian Supreme Court's bold move to renounce the doctrine of discovery facilitated the insertion of section 35 into the Canadian Constitution in 1982. In *Sparrow*, when applying section 35, the Supreme Court announced that the "context of 1982 is surely enough to tell us that this is not just a codification of the case law on aboriginal rights that had accumulated by 1982. Section 35 calls for a just settlement for aboriginal peoples. It renounces the old rules of the game under which the Crown established courts of law and denied those courts the authority to question sovereign claims made by the Crown."[208] This is the clearest and boldest statement renouncing the doctrines of imperial common law and confirming an entirely different conceptual framework within which indigenous peoples' rights are to be perceived under the Canadian Constitution.

By way of comparison, note that the Australian High Court's much celebrated *Mabo* decision did not venture this far in renouncing the common-law foundations of the relations between indigenous and settler populations. It was truly unexpected of Justice Brennan to have written that the "common law of this country would perpetuate injustice if it were to continue to embrace the enlarged notion of *terra nullius* and to persist in characterizing the indigenous inhabitants of the Australian colonies as people too low in the scale of social organization to be acknowledged as possessing rights and interests in land."[209] Nonetheless, despite openly admitting to past mistreatment of Australia's indigenous peoples, the emphasis here is on preserving common law, with a face-lift for its future operation. For some, even

this much of a change, achieved through what has recently been labeled the declaratory theory of precedent, is stretching the limits too far.[210] This departure from old common-law rules in Australia does not match up to the departure made by the Canadian Supreme Court. Although not prompting a constitutional revolution in Australia, *Mabo* was a strong enough impetus for the federal parliament to pass, and later amend, the Native Title Act of (NTA) 1993 and, thus, to get on the rollercoaster of settling indigenous peoples' land-related claims.[211] The High Court's next real turn came when it was time to interpret the NTA and its section 223(1) defining native title rights and interests.

Judicial inquiries in search of indigenous rights and title are markedly phrased in terms of a quest for continuity. In *van der Peet* the Canadian Supreme Court established fairly stringent standards, saying that evidence of continuity between pre-contact and current practices may also relate to post-contact traditions, but must point to the pre-contact origins of those traditions.[212] Nor does continuity have to be completely uninterrupted.[213] European arrival cannot be used to deprive aboriginal peoples of an otherwise valid claim. Nonetheless, if a practice or custom was created solely as a response to European influences, it cannot be accepted as an aboriginal right.[214] In *Delgamuukw* the Supreme Court seems to have relaxed the standards applied when establishing continuity in the search for aboriginal title in land.[215] As an interesting aspect of the decision, when showing the continuity of aboriginal title the demonstration of continuity need not be limited to showing the continuity of de facto occupation.[216] According to the Supreme Court, "under the test for aboriginal title, the requirement that the land be integral to the distinctive culture of the claimants is subsumed by the requirement of occupancy:"[217] the claimants of aboriginal title may point to evidence from aboriginal common law and land-related practices, such as fishing or hunting.[218] The precise nature of occupation may change over time, as long as the use of the land is not irreconcilable with the nature of the attachment to the land.[219] In this way, the array of potentially acceptable evidence was considerably broadened by the Supreme Court.

Note that the Canadian approach towards establishing continuity is significantly more permissive than the continuity criterion formu-

lated in Australia for identifying native title under the NTA.[220] The test was disclosed in detail when the Yorta Yorta peoples claimed native title to lands that belonged to their ancestors at the time of the settlers' arrival.[221] When construing a concept of native title, the Australian High Court relied not so much on *Mabo* and progeny in common law; instead, the justices treated native title as a genuine "legislative concept."[222] According to the plurality judgment of Chief Justice Gleeson in *Yorta Yorta*, a tradition or practice, on the basis of which native title could be established, must date back to the rules of indigenous societies "that existed before the assertion of sovereignty by the British Crown."[223] Tradition must be transmitted from generation to generation,[224] thus it follows that an indigenous tradition cannot be revived.[225] The judgment emphasized that the reason for an interruption of continuity is irrelevant for judicial analysis under the NTA.[226] The plurality of the Australian High Court stressed the significance of establishing that the traditions and customs are preserved in an unaltered form by an indigenous community which directly descends from the ancestors exercising these practices at the time of the British Crown's assertion of sovereignty.

Judicial inquiry centering on the "plain" historic continuity of what is distinctive about an indigenous people's way of life and culture is not without problems. Insistence on continuity between pre-contact and contemporary aboriginal practices risks freezing an indigenous people's life at a particular moment chosen by the court.[227] While, for lawyers, a continuity rhetoric fits cozily with the confirming of indigenous rights for the purposes of legal recognition, such an approach does not seem to account for the lasting effects of the government-sponsored assimilation of indigenous peoples that has marked all settlers' regimes, nor does it assign proper weight to the interaction between indigenous and settler cultures. Indigenous cultures that survived European civilizatory projects and attempts at assimilation often adapted to a considerable extent to the narrative and regulatory framework established and enforced by the colonizing empires. Lack of attention to the consequences of assimilatory policies is hard not to regard as hypocrisy, while failure to accept that indigenous cultures do also develop results in freezing rights into an ideal,[228] or stereotype, that hinders understanding, communication, and, thus,

the processes of reconciliation framed by the law.[229] As Borrows explains: "[i]n limiting aboriginal rights to integral practices not developed solely as a result of European influences the court denies these cultures the right to survive by adapting to new situations."[230] Note that, while such representations are truly among the intellectual leftovers of colonial rule and are hardly specific to lawyers,[231] legal reasoning seems to provide a particularly fertile soil for their survival.

The djinns of colonialism residing in the legal mind are also insensitive to the fact that, following Europeans, the interaction between indigenous and settler cultures left its mark on European and indigenous cultures and perceptions of identity alike.[232] Judge-made tests do not seem to acknowledge that the survival of aboriginal communities was contingent upon their adaptation to the culture of the Europeans, nor do they honor contributions made by indigenous peoples to the success of the settlers' ventures. A judicial position which disregards these developments is not sensitive to history.[233] After all, at certain times and in certain places the sheer survival of Europeans depended on the cooperation of indigenous peoples, in the form of providing trade channels and vital translation services. Indigenous peoples' translation services were obtained by the settlers' successors even during World War II, when U.S. Marine corps relied on a code language based on Diné, the Navajo language, and enlisted Navajo "Code Talkers" to exchange highly sensitive military messages. However, the ultimate utility of the Navajo language did not figure that substantially in the legal or constitutional protection of indigenous languages.[234] An act of Congress was passed in 2000 to honor the Code Talkers with a Congressional medal for their efforts during World War II.[235] To the wider audience, the very existence of the unbroken military code and the Navajo Code Talkers was largely unfamiliar until they featured in the movie *Windtalkers* (2001), under the guardianship of Oscar-winning household hero Nicholas Cage.

On the face of it, Canadian indigenous rights jurisprudence seeks to decipher central features of indigenous peoples' culture.[236] This endeavor is a hard one since the concept of culture in itself is culture-dependent.[237] One's understanding of culture does determine factors one considers essential in recognizing a practice or rule as "culturally" relevant, not to mention as contributing to making someone else's

cultural universe into what it is. It does not help that indigenous claims sometimes contain fact scenarios that are obscure to the Western observer,[238] and that the language of indigenous jurisprudence revolves around concepts that often lack corresponding concepts in indigenous cultures. Furthermore, indigenous rights are often claimed as group rights, making them inherently suspect for a liberal theory of rights.[239] As if to further diminish the potential for understanding, Canadian scholar and judge Turpel-Lafond warned early on that the entire rights-centered approach of the Canadian Constitution and the Charter is completely alien from an aboriginal perspective.[240] This caveat is essential: however, it is not so much about stating a novel observation as about repeating lessons that should be long familiar. After all, as Viscount Haldane of the Judicial Committee of the Privy Council reminded long before, "in interpreting the native title to land, not only in Southern Nigeria but other parts of the British Empire, much caution is essential. There is a tendency, operating at times unconsciously, to render that title conceptually in terms which are appropriate only to systems which have grown up under English law. But this tendency has to be held in check closely. As a rule, in the various systems of native jurisprudence throughout the Empire, there is no such full division between property and possession as English lawyers are familiar with."[241] It is remarkable how Viscount Haldane admits that lawyers follow certain courses of reasoning without much critical consideration, and it is also puzzling how little a change has occurred in this respect since his remarks. Indigenous peoples' claims continue to puzzle judges with their very formulation.

Cultural barriers are difficult, if not impossible, to overcome without losing crucial aspects in translation. At the same time, translation may produce incidental consequences that could by accident serve to the advantage of indigenous peoples. In this regard a seemingly tiny aspect of the *Mabo* judgment is particularly interesting. In *Mabo*, Justice Brennan's decision starts with an account of how the indigenous peoples claiming native title in the case, the Torres Strait Islanders, have been engaged in gardening and the growing of a variety of plants for ceremonial and commercial purposes. According to Patapan, these references to gardening were meant to demonstrate that the claimants' use of property "fitted the European notions of proper use

of land."[242] Indeed, in a recent lecture Justice Brennan summarized the main claim in *Mabo* in the following terms: "Torres Strait Islanders were not traditionally hunters and gatherers. They cultivated vegetable gardens and lived in huts in settled villages, thereby having individual interests in discrete blocks of land rather than communal interests in vast tracts of country."[243] This comment supports Patapan's observation about cultural codes standing behind the most rigorous exercise of legal classification. The collective nature of indigenous peoples' claims about their relationship to land makes these claims suspect to a mind disciplined in legal reasoning, and it only makes the case worse that most often the forms of land use claimed by the indigenous peoples to constitute title in land is distantly reminiscent of property or possession of land.[244] In sharp contrast with a traditional hunter-gatherer lifestyle, gardening is the staple of civilization—at least in the eyes of colonizers, and as also demonstrated by the relentless efforts of protestant missionaries who were keen on creating gardens at all costs upon entering the land of the Tswana in Southern Africa.[245]

The difficulties presented by the cultural complexity of indigenous cases suggest that establishing "plain" historical facts about indigenous rights and practices is not a trivial matter across such a cultural divide. Rules of evidence safeguard procedural fairness, but at the same time they bear the imprint of the particular social context that designs and operates them. Rules of evidence are mightier tools of colonial subjection than one might expect. Difficulties of this kind in cases involving indigenous peoples' evidence are not unfamiliar in Australia, where for a long time indigenous peoples were prevented from giving evidence in court as they were believed not to comprehend the concept of oath. An 1876 legislative enactment in Queensland made it possible for indigenous peoples to testify on a promise and declaration.[246] A subsequent amendment in 1884 allowed indigenous evidence but attributed less weight to it than white evidence.[247] Such simple rules made crimes committed against indigenous victims rather difficult to prosecute.[248]

At a deeper level one might face further barriers that might be more difficult to overcome than by legislative amendment. Rules of evidence reflect epistemological assumptions and basic understand-

ings of human beings' access to the phenomena of the context they inhabit.[249] Before the arrival of the Europeans, the aboriginal people had no written history: "their history was recorded in their oral traditions."[250] Oral history is the depository of a wealth of information not available in the history books.[251] Courts of law, however, are not accustomed to dealing with such sources of information. Take the example of a piece of Gitksan oral-history evidence submitted in support of prior occupancy, showing their use of a lake as a seasonal fishing site during trial in *Delgamuukw*. The story concerns a bear one hundred feet tall coming down the hillside, tearing down trees, and throwing rocks into the lake, while making a horrific noise. The Gitksan peoples were scared by the bear; they ran away and were very respectful about the lake thereafter. Indeed, it is impossible to test such a legend in regular court-room conditions, as it makes little sense to ask about the factual accuracy of the story, such as how tall the bear was, whether the people could see the bear well, etc.[252] However, when such evidence is intended to establish an existing aboriginal right, a cultural gap of this sort may be fatal to the success of the claim.[253]

Written sources from the early days of the settlers' arrival are generally descriptions by missionaries and military personnel, the reliability of which is strongly questionable as the authors more often than not prepared these notes to show that they had been successful in their mission to accommodate the aboriginal peoples to European norms, and to religious practices or subordination.[254] Consider the words of George Copway, a chief of the Ojibwa nation, who was later ordained as a Methodist minister, written in 1850: "It can be proved that the introduction of Christianity into the Indian tribes has been productive of immense good. It has changed customs as old as any on the earth. It has dethroned error, and has enthroned truth. This fact is enough to convince any one of the unjustness and falsity of the saying, that, 'the Indian will be Indian still'."[255]

As stated in the Report of the Royal Commission, aboriginal oral histories have an approach to the past significantly different from the approach of Western tradition: aboriginal accounts of the past are not linear, not truth-oriented, and not human-centered.[256] As Drummond notes, "[i]n a cosmology where animals and humans have souls and

humans do not have dominion over animals but must be furtively watchful not to cause offence, history has distinctive contours."[257] Justices mask their uneasiness about evidence from history appearing in the form of tales, legends, and rituals instead of neat history books behind recognitions of the specific nature of evidence,[258] inserting reminders that evidence from aboriginal oral history has a function other than directly to reveal the truth about prior occupation.[259]

This problem with respect to evidence was already acknowledged by the Canadian Supreme Court in *Calder*,[260] and the turn in jurisprudence was hoped to bring about a turn in the judiciary's approach towards evidence in aboriginal cases.[261] In van *der Peet* the justices said that courts must apply the rules of evidence while keeping in mind the specific nature of the evidence: courts must not undervalue the evidence only because it does not conform to the usual evidentiary standards.[262] In *Delgamuukw*, the Supreme Court added that evidence from aboriginal oral history has a function other than directly revealing the truth about prior occupation.[263] Also, the Canadian Supreme Court created a special exception to the prohibition against hearsay in favor of the admissibility of aboriginal oral histories.[264] However, while the Canadian Supreme Court cleared the path for the bulk of evidence in aboriginal cases, it is still argued that the Supreme Court has "laid out no model for how to use history in construing aboriginal rights."[265] This is a real problem since, in complex cases involving indigenous rights, trial courts can easily be overwhelmed by the nature and volume of evidence. In the Australian *Yorta Yorta* case, during 114 trial days 201 witnesses were heard and 48 witness statements were admitted into evidence in a little less than two years.[266] However, this sounds almost short compared to Canada's *Delgamuukw*, where the trial lasted for 374 days in court over two and a half years.[267] The judge presiding at the trial remarked: "It is almost as if the parties are leading evidence in different kinds of lawsuits."[268]

Although often with serious reservations,[269] scholars and practitioners seem to agree that oral evidence is most efficient when corroborated by expert evidence. Alongside the legend of the 100-foot bear, on trial a geomorphologist expert testified that there had been a rockslide at that hillside 3,500 years ago. This dating was affirmed by an expert paleobotanist, who dated the pollen layers at the top and at the

bottom of the rock layers. In this way, the prior occupancy of the Gitksan people at the lake was established. The use of DNA evidence in tracking lineage, as mentioned in the Mashpee story above, also suggests that state-of-the-art, space-age expert evidence must be in the toolkit of indigenous claimants, should they wish to have their oral histories heard. Anthropologists, historians, and archeologists are most likely to be invited to take the witness stand.[270] While some argue that the task of assessing such evidence should be undertaken by an independent agency and not by the courts,[271] it has been also suggested that in general oral histories are "going to place a formidable weapon in the hands of First Nations people seeking to establish aboriginal title and aboriginal rights. The difficulties of contradicting oral histories may encourage those contesting aboriginal title and aboriginal rights to stick to the negotiating table and keep out of court."[272] Besides the apparent oddity of calling the latest technology to aid in the absence of the skills to listen carefully, one also has to see that meeting the burden of proof under tests which require establishing the past as a set of facts poses an immense financial burden on the indigenous rights claimants. Beyond the difficulties of overcoming cultural divides, another practical consideration is the fact that indigenous peoples are often unable to afford to make their case using experts of this kind to translate their claims in such a manner as to make them accessible to a court. Here, lack of financial means does impair indigenous peoples' access to justice in a most clear and cruel manner.[273]

Based upon the above, one might conclude that courts' insistence on seeing continuity in aboriginal rights and aboriginal title cases established as "plain history" is highly problematic, being out of touch both with history and with reality. It has been well established that legal argument gravitates towards continuity building, yet here the question is *why* courts insist on such a remorseless concept of continuity, linking pre-contact indigenous practices and traditions with contemporary ones. This riddle is not solved by pointing to the language of the Canadian Constitution's section 35, which expressly refers to "existing aboriginal and treaty rights",[274] saying that existing should mean preserved or conserved. It is a commonplace that common-law courts are familiar with handling legally relevant practices

that date from time immemorial.[275] Due to the nature of the evidence available with regard to indigenous peoples' rights, the continuity of current indigenous traditions and practices would be far easier to establish from time immemorial than starting from European contact or the assertion of sovereignty. For the purposes of an inquiry into "existing aboriginal rights" the selection of such a date might even appear random, if not downright arbitrary. A clue might be hidden in *van der Peet*, where the Canadian Supreme Court defined its mission under section 35(1) in the following terms: "the aboriginal rights recognized and affirmed by section 35(1) must be directed towards the reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown."[276]

Thus, despite the Canadian Supreme Court's rejection of the doctrine of discovery and the subsequent adoption of section 35(1), justices are still responding to indigenous rights claims within the conceptual framework created by lawyers in the early years of discovering the New World. As Drummond commented, the "shifting normality from the imperial to the post-colonial context indicates that some concepts stand still while discussions and disagreements spin around them and hold them in place."[277] In this model the rights held by indigenous communities have to be reconciled with the sovereignty of the Crown. As Borrows pointed out, this is a one-sided understanding of reconciliation in which the settlers' successors, while dressing indigenous peoples in the straightjacket of tests devised according to the terms of their (post-)colonial universe, are not required to relinquish their position.[278] It seems as if indigenous peoples' prior occupation, categorically acknowledged in *Calder* and *Guerin*, was not transferred from the plateau of hard facts to the club of normative preconditions underlying indigenous peoples' rights. Initially, the emphasis on de facto continuity with pre-contact or pre-sovereignty aboriginal practices in Canada was used to reject de iure continuity with those doctrines of the common law that brought about the state of affairs denounced by the Supreme Court in 1973. However, the terms of the test used to ascertain "plain historic continuity" follow the logic of the imperial doctrines of common law. The opportunity to treat section 35 as a normative ground for reconstituting aboriginal rights in Canada, as projected in *Sparrow*, seems to have melted in the path-dependence

of legal reasoning, thus incidentally preserving colonialism's hidden premises masked behind content- or value-neutral facades in judicial reasoning. This phenomenon is all the more disturbing as in Australia, following *Mabo*, the promise of reconciliation also encoded in the Native Title Act (NTA) seems to be slowly vanishing in judicial tests that insist on an unbroken chain of continuity between pre-sovereignty and contemporary indigenous practices and traditions.

The above cases involving indigenous peoples' rights teach important lessons about the involvement of courts in coming to terms with the past in historically charged contexts. It is indeed a sobering realization that the shadow of the colonial past is long, yet it is too familiar to be taken for what it is and what it entails. It is somewhat ironic that the legal rubrics of colonization go unaccounted for when they are unconsciously reinserted in the framework of approaches seeking to undo injustices flowing from the colonizers' legal regime, or in order to discover objects in their original shape which were altered upon the commands of the colonial legal regime. Imperial lawyers played a huge part in designing and administering the systemic assimilation of indigenous peoples. Today, (post-)modern democracies must prove that the colonizers' assimilation project failed. Despite honestly meant and well-intentioned adjustments, the terms of judicial inquiry into indigenous peoples' rights rest on concepts and hidden premises which easily blindfold their well-meaning operators. These efforts become all the more self-defeating when a lawyers' expedition sets its course towards a fictional or archaic indigenous artifact, while obliviously or carelessly avoiding the actual indigenous object or subject that survived in defiance of the colonizers' fiercest efforts. In the story surrounding indigenous peoples' rights, the historical narratives construed for the purposes of reconciliation by lawyers have acquired a prominent role in hampering reconciliation. Arguments put forward by Macklem and Ivison, positing forcefully that historical injustice is not the best ground for acknowledging indigenous difference, must be read in this light.[279] An approach focusing not on historical injustice but on the recognition of indigenous difference might be a route that offers alternatives, instead of reinforcing categories inherited from colonialism, in order to transcend the cleft of identity politics currently hampering the indigenous rights discourse.[280]

5.5. Conclusion: the unfulfilled promise of reconciliation

Chapter five set out to examine how the plotline of reconciliation operates in constitutional cases heavy with historical narratives. The chapter did not focus on reconciliation as a society-wide process or strategy aimed at coming to terms with a repressive past, as familiar from the South African truth and reconciliation process. Instead, the analysis centered on reconciliation as a rhetoric underlying the construction of historical narratives in constitutional cases. Almost inevitably, the analysis in this chapter stumbled upon the unruly relationship between continuity and reconciliation rhetorics, as reflected in three distinctly different settings.

While these case studies were taken from radically different contexts, there are a few lessons which apply across the borders of these settings. In some jurisdictions reconciliation was used as a plotline to patch up textual holes in the constitution, while in other instances it was used as an aid to construct the words of the law. The Canadian Constitution is silent on the issue of the secession of provinces, and the Hungarian Constitution is also silent regarding compensation for harms incurred during previous oppressive regimes. Furthermore, while reconciliation is at the core of judicial accounts of section 35, reconciliation itself follows not from the text of section 35, but from the justices' willingness to read section 35 in this particular manner. A shared trait in all contexts is that the reconciliation rhetoric which figures so prominently in the courts' reasoning is not mandated by the respective constitutions. Instead, it is a premise for constitutional analysis selected by the justices themselves which was then used as a legitimizing framework for the courts' discussion on the constitutional issue.

Another trait shared across contexts is that the reconciliation rhetoric superimposed by the courts on the armature of various constitutions triggered plurality within the constitution's normative galaxy. In the *Québec secession reference*, reconciliation facilitated a consolidated reading of Canadian constitutional history along a strong continuity narrative, bringing with it four unwritten constitutional princi-

ples and a novel constitutional obligation to negotiate secession. In the Hungarian transitional justice context the reconciliation rhetoric followed by the Constitutional Court was used to justify concepts which do not appear in the text of the constitution, and a standard of constitutionality which is below the ordinary standard of rights review. In the indigenous rights context, the recognition of indigenous rights by a court of law adds to the body of legally recognized rights and interests. In Canada, constitutionally entrenched aboriginal rights increase the plurality of the Canadian legal system as they alter the applicability of legal norms of general application to relatively small aboriginal communities. The plethora of constitutional norms and principles created under reconciliation rhetoric suggests that when a court talks about reconciliation or follows the plotline of reconciliation silently, the consolidation of the constitutional corpus in a most technical sense cannot be taken for granted.

Furthermore, one must also realize that in these cases, despite the wide variety of contexts explored, the emerging normative plurality did not result in acknowledging diversity in the polity, at least not beyond what the court exercising constitutional review could, or would, acknowledge or perceive. In the indigenous rights context the limits on the courts' exercise came from often unacknowledged inclinations of the legal mind and the path-dependence of legal reasoning. In the *Québec secession reference*, in the name of reconciliation the Supreme Court chose a consolidated account of Confederation history, which in effect silenced all other competing accounts, at least for the purposes of judicial inquiry and probably also for meaningful constitutional argument. In the Hungarian case the Constitutional Court consented to homogenizing claims concerning harms suffered during previous authoritarian regimes, thus in essence also eradicating the differences between the various classes of victims. When courts are equipped with such mighty tools of reclassification and homogenization, one may only wonder about the success of judicial reconciliation missions launched to foster coming to terms with the past in a more comprehensive sense.

NOTES

1 For the distinction between identity building and handling traumas in a narrower context see Eyal, "Identity and Trauma".
2 For a detailed inquiry see Chapter Three.
3 See, e.g., Boraine, *A Country Unmasked*; Hayner, *Unspeakable Truths*; *Truth v. Justice*, eds. Rotberg and Thompson; *Looking Back, Reaching Forward*, eds. Villa-Vicencio and Vorwed; Wilson, *The Politics of Truth and Reconciliation in South Africa*; Gibson, *Overcoming Apartheid*.
4 *Southwest State* case (1 BVerfGE 14).
5 Available in English in Kommers, *Constitutional Jurisprudence*, 63. The Constitutional Court made a passim reference to Article 79(3) of the Basic Law (the so-called Eternity Clause), providing that: "Amendments to this Basic Law affecting the division of the Federation into Länder, their participation on principle in the legislative process, or the principles laid down in Articles 1 and 20, shall be inadmissible."
6 See Currie, *The Constitution of the Federal Republic of Germany*, 218–219.
7 Article 368 of the Constitution of India. *Kesevananda Bharati v. State of Kerala* [1973], 4 SCC 225. For an assessment of the judgments in the case see Singh, *Shukla's Constitution of India*, 894–899.
8 Singh, *Shukla's Constitution of India*, 895.
9 Article 79(3), German Basic Law. See note 5 above.
10 Kommers, *Constitutional Jurisprudence*, 48.
11 Quint, *Imperfect Union*, 137.
12 *Klass* case (30 BVerfGE 1), reaffirming the Constitutional Court's jurisdiction to review unconstitutional constitutional amendments. Quoted in Katz, "On Amending Constitutions", 274.
13 BGHZ 75, 160 [162 f.], quoted in the affirmative in the German Constitutional Court's decision in the *Holocaust Denial* case (09 BVerfGE 241). Available in English in Kommers, *Constitutional Jurisprudence*, 382–387, 386.
14 Theodor Adorno, "What Does Coming to Terms with the Past Mean?" (1977). As another translation for *Aufarbeitung der Vergangheit*, "working through the past" was suggested in Olick, "What Does It Mean to Normalize the Past?" 260.
15 Olick, "What Does It Mean to Normalize the Past?" 260.
16 Gibson, *Overcoming Apartheid*, Chapter One.
17 See, e.g., Pankhust. "Issues of Justice and Reconciliation in Complex Emergencies".
18 Ricoeur, *History, Memory and Forgetting*.
19 Nora, "Between Memory and History."
20 Rousso, *The Haunting Past*, 4.
21 Brison, "Trauma Narratives and the Remaking of the Self", 43. See also Humphrey, "From Terror to Trauma", 10 et seq.

22 For a discussion on narrative and traumatic memory see van der Kolk and van der Hart, "The Intrusive Past, The Flexibility and the Engraving of Trauma". See also Leys, *Trauma*.
23 Cultural trauma research is of relatively recent vintage, giving rise to such works as *Trauma: Explorations in Memory*, ed. Caruth; *Unclaimed Experience: Trauma, Narrative, and History*, ed. Caruth; and Eyerman, *Cultural Trauma*.
24 For a most forceful critical account see Kansteiner, "Genealogy of a category mistake". This is not to dispute, however, that victims of trauma recall their experience in culturally determined manners (the so-called illness narratives). On this see Kleinman, *Writing at the Margin*.
25 Burke, "History as Social Memory", 99.
26 Schudson, "Dynamics of Distortion in Collective Memory."
27 Nietzsche, "On the Uses and Disadvantages of History for Life", 62.
28 On this see Chapter Four on the Hungarian and Czech experiences of dealing with the Communist past.
29 See Elster, "Coming to Terms with the Past."
30 See, e.g., Booth, "The Unforgotten. Memories of Justice", 778.
31 *Azanian Peoples' Organization (AZAPO) v The President of the Republic of South Africa*, Case CCT 17/96 [1996]. See Chapter Two for a detailed discussion.
32 *AZAPO*, para. 35. For a discussion of the relationship between recovering truth and seeking reconciliation in South Africa see Gibson, *Overcoming Apartheid*, Chapter One.
33 LeGoff, "Passé et présent de la mémoire", 39.
34 Todorov, "The Touvier Trial", 177 (emphasis added).
35 While clearly admitting that past events have a moral content for the present, to the extent that these past events shaped the past, Waldron problematizes the extent to which the present can and should reflect past injustice. See Waldron, "Superseding Historic Injustice."
36 Nino, *Radical Evil on Trial*, 147.
37 Minow, *Breaking the Cycles of Hatred*, 17–18. Also Minow, "The Role of Forgiveness in the Law."
38 Margalit, *Ethics of Memory*, 205. Margalit makes a distinction between ethics and morality (id. at 37), ethics informing humans in relation to their closest human relations ("thick relations"), while morality guides humans towards other humans in general ("thin relations").
39 Margalit, *Ethics of Memory*, 207.
40 Sajó, "Affordable Shame", 165 (original emphasis).
41 Fletcher, "The Relevance of Biblical Thought for Understanding Guilt and Shame."
42 Moeller, "What Has 'Coming to Terms with the Past' Meant in Post-World War II Germany?" 226.
43 Teitel, "Transitional Historical Justice", 217.

44 For a similar argument on the function of knowledge in the transitional justice context see Goldstone, "Exposing Human Rights Abuses", 615.
45 Cf. Humphrey arguing that the TRC hearings separated the past from the present: Humphrey, "From Terror to Trauma", 20–22.
46 Teitel, "Transitional Historical Justice", 218–220.
47 On the TRC's archive as a source for historians see historian Harris, "The Past, the TRC, and the Archive as Depository Memory".
48 See Shea, *The South African Truth Commission*, 10.
49 Nino, *Radical Evil on Trial*, 147.
50 On the acceptance of the TRC's record as the truth on apartheid in the South African polity see Gibson, *Overcoming Apartheid*, esp. Chapter Three, based on immense survey data.
51 Rousso, *The Haunting Past*, 15.
52 Minow, "The Uses of Memory."
53 See chapters three and four.
54 On the difficulties of delineation between injustice and misfortune see Shklar, *The Faces of Injustice*.
55 For a classic comment see Grey, "Do We Have an Unwritten Constitution?"
56 See Chapter Four on the French "block of constitutional norms".
57 See, e.g., *Reference re Resolution to Amend the Constitution* [1981], 1 S.C.R. 753 (the *Patriation reference*), and *Reference re Objection to a Resolution to Amend the Constitution* [1982], 2 S.C.R. 793 (the *Québec veto reference*). Also Hogg, *Constitutional Law of Canada*. On constitutional conventions outside the common-law hemisphere see Avril, *Les Conventions de la Constitution*.
58 *New Brunswick Broadcasting Co. v Nova Scotia (Speaker of the House of Assembly)* [1993], 1 S.C.R. 319.
59 *Babcock v Canada* [2002], 3 S.C.R. 3, para. 18. In this case the Supreme Court reaffirmed J.A. Strayer's position in *Singh v Canada* (Attorney General) [2000], 3 F.C. 185.
60 Hogg, *Constitutional Law of Canada*, 15–19.
61 See Hogg, *Constitutional Law of Canada*, 409–410, and Leclair, "Canada's Unfathomable Unwritten Constitutional Principles". The present analysis concentrates primarily on unwritten constitutional principles and refers to other non-written sources of the Canadian Constitution to the extent beneficial for the present analysis.
62 The argument is developed in Walters, "The Common Law Constitution in Canada", 93. This riddle has only been recognized but has not yet been solved, even if one recasts the most dubious unwritten constitutional principles within the larger bracket of case law-based sources of the Canadian Constitution.
63 Tierney, *Constitutional Law and National Pluralism*, 204.
64 *Reference re Secession of Québec* [1998], 2 S.C.R. 217, para. 44.
65 On this see chapter three.
66 *Reference re Manitoba Language Rights* [1985], 1 S.C.R. 721.

67 *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island* [1997], 3 S.C.R. 3 [hereinafter: *Provincial judges reference*]. Also see *Beauregard v Canada* [1986], 2 S.C.R. 56 (on independence of federal judges).

68 *Patriation reference* [1981], 1 S.C.R. 753, para. 110. Reaffirmed in *Provincial judges reference*, para. 94.

69 Sections 96 to 100 of the Constitution Act, 1867, apply to the federal court system.

70 *Provincial judges reference*, para. 107.

71 *Provincial judges reference*, para. 109.

72 Hogg, *Constitutional Law of Canada*, 409.

73 *Québec secession reference*, paras. 49–51.

74 See *Québec secession reference*, para. 53.

75 *Ell v Alberta* [2003], 1 S.C.R. 857, para. 19.

76 See, e.g., *Therrien (Re)* [2001], 2 S.C.R. 3 (security of provincial judicial tenure); *Moreau-Berube v. New Brunswick (Judicial Council)* [2002], 1 S.C.R. 249 (security of provincial judicial tenure); and *Ell v Alberta* [2003], 1 S.C.R. 857 (independence of justices of the peace). Contested measures were struck down in *Mackin v New Brunswick (Minister of Finance)* [2002], 1 S.C.R. 405 (independence of provincial judiciary, "supernumerary judges"). For another case in which a constitutional principle was used to invalidate legislation see *Lalonde v Ontario*, 56 O.R. (3d) 55 (Eng.) (Ontario Court of Appeal).

77 *Québec secession reference*, para. 54.

78 For an analysis see chapter three.

79 *Québec secession reference*, para. 43.

80 *Québec secession reference*, para. 59.

81 See, e.g., *Beauregard v Canada*, 70–71, noting the influence of the court system of the United Kingdom on the Canadian judiciary while carefully adding that Canadian substantive law has roots in *both* the legal system of the United Kingdom and France. *Valente v The Queen* [1985], 2 S.C.R. 673, para. 24.

82 *Provincial judges reference*, para. 106: "The historical origins of the protection of judicial independence in the United Kingdom, and thus in the Canadian Constitution, can be traced to the Act of Settlement of 1701. … Admittedly, the Act only extends protection to judges of the English superior courts. However, our Constitution has evolved over time. In the same way that our understanding of rights and freedoms has grown … so too has judicial independence grown into a principle that now extends to all courts, not just the superior courts of this country."

83 E.g. *Therrien (Re)*, para. 60: "Individual and institutional impartiality and independence … are inherent in the very definition of a judge and are an integral part of the constitutional structure of the parliamentary democracy of the United Kingdom, which we have inherited through the preamble to our Constitution."

84 E.g. *Babcock v Canada*, para. 18. Note the reference to the *Report of the Committee of Privy Counsellors on Ministerial Memoirs* (January 1976).

85 See, e.g., chapter three on *Sobeys Stores Ltd. v. Yeomans and Labour Standards Tribunal (NS)* [1989], 1 SRC 238. See also chapter two on various channels of interaction between courts in the common-law hemisphere.

86 Oliver, "The 1982 Patriation of the Canadian Constitution", 877.

87 *Provincial judges reference*, para. 92.

88 The argument is developed in Walters, "The Common Law Constitution in Canada".

89 As retained in force in the *Statute of Westminster*, 1931, section 2(2), and as listed in the schedule to the *Canadian Constitution Act*, 1982.

90 Dicey, *The Law of the Constitution*, 93–94.

91 For a discussion see Tremblay, "*Marbury v Madison* and Canadian Constitutionalism", 516.

92 Section 7 of the Charter provides that "Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice." The drafters of the clause were hoping to introduce such language to prevent judicial activism familiar from U.S. substantive due process jurisprudence.

93 *Reference re Section 94(2) of the Motor Vehicle Act* [1985], 2 S.C.R. 486.

94 *Québec secession reference*, para. 53. See also Justice Binnie in *Eurig Estate (Re)* [1998], 2 S.C.R. 565, para. 66, confirming that "principles can and should be used to expound the Constitution, but they cannot alter the thrust of its explicit text".

95 The ambiguity is not balanced by the fact that the Supreme Court repeatedly attaches the adjective "underlying" to the phrase "constitutional principles" in this segment of the judgment. See *Québec secession reference*, para. 53.

96 *Provincial judges reference*, paras. 315–16.

97 See *Patriation reference*, paras. 81 and 92. Also Hogg, *Constitutional Law of Canada*, 19–28.

98 Tremblay, "*Marbury v Madison* and Canadian Constitutionalism", 537.

99 Cousineau, "L'Affaire Montfort, Confirmation de la Valeur des Principes Foundamentaux de la Constitution."

100 Tremblay, "*Marbury v Madison* and Canadian Constitutionalism", 537.

101 Russell, *Constitutional Odyssey*, 33.

102 See Borrows, *Recovering Canada*.

103 See the Supreme Court stressing in the *Québec secession reference*, at para. 101, that the Court was to leave the project of polity-wide reconciliation to the political branches.

104 See also Chapter Three.

105 For a broader account see Teitel, *Transitional Justice*, 129 et seq.

106 In a provision which has never been enforced, the peace treaty concluded between the allied forces and the Hungarian government after World War II, the

Treaty of Paris, 1947, provided for restitution for those victims whose property had been confiscated by the Hungarian authorities because of their race or religion. Article 27, Treaty of Paris, 1947, clauses on "Jewish property".

107 While "in 1988 only 15% of assets were in private hands, the proportion had climbed to 75% by the end of 1995 and exceeded 80% by the end of 1997", as a result of privatization. Csaba, "A Decade of Transformation in Hungarian Economic Policy."

108 See the preamble of Act No. 25 of 1991 on compensation for damages caused by the unjust actions of the government. Also 1/1995 (II. 8.), AB decision, ABH 1995, 43. For an overview of Hungarian privatization and its broader context see Frydman, Rapaczynski, Earle, et al., *The Privatization Process in Central Europe*, 95–147; and Elster, Offe, Preuss, et al., *Institutional Design in Post-Communist Societies*, 158–160.

109 Sólyom, "Introduction", 26.

110 See Klingsberg, "Judicial Review and Hungary's Transition", 81–85 (1992), presenting the concepts of various political parties on property restitution. Also Schwartz, *The Struggle for Constitutional Justice*, 104–106.

111 Hungarian Constitution, Articles 70/A on equality, 9 on the right to property, and 13(1) on expropriation. The Hungarian Constitutional Court may provide abstract interpretation of constitutional provisions. Act No. 32 of 1989 on the Constitutional Court, Article 1(g).

112 21/1990 (X. 4.), AB decision. Schwartz, *The Struggle for Constitutional Justice*, 105.

113 21/1990 (X. 4.), AB decision, ABH 1990, 76. The Constitutional Court was consistent about one limit on the legislature's discretion: the returning of arable lands to their previous owners (reprivatization) while offering partial restitution for loss of property to all other owners violates equal treatment; reaffirmed in 28/1991 (VI. 3.), AB decision, ABH 1991, 91. Nonetheless, the restitution of church property closely resembles reprivatization, to the extent that the churches received immovable property and arable lands that were owned by churches before the state took them over. The respective rules were reaffirmed in 4/1993 (II. 12.), AB and 35/1994 (VI. 24.), AB decisions.

114 21/1990 (X. 4.), AB decision, ABH 1990, 77.

115 28/1991 (VI. 3.), AB decision, ABH 1991, 89.

116 16/1991 (IV. 30.), AB decision, ABH 1991, 59; 28/1991 (VI. 3.), AB decision, ABH 1991, 92.

117 28/1991 (VI. 3.), AB decision, ABH 1991, 87; also 1/1995 (II. 8.), AB decision, ABH 1995, 47.

118 Spitzer, "Experimental Constitutionalism", 48–49.

119 Prominently 1/1995 (II. 8.), AB decision, ABH 46-47. Also 46/2000 (XII. 14.), AB decision; 10/2003 (IV. 3.), AB decision; 11/2003 (IV. 9.), AB decision. This is what Teitel refers to as "political reparations" in Teitel, *Transitional Justice*, 133 et seq.

120 267/2000 (XII. 26.), cabinet decree on financial assistance to certain victims who suffered long-term deprivations of liberty: 10/2003 (IV. 3.), AB decision, and 11/2003 (IV. 9.), AB decision. The Constitutional Court emphasized that the cabinet decree introduced a welfare scheme and the benefits paid as a result did not qualify as compensation.
121 1/1995 (II. 8.), AB decision, ABH 1995, 42.
122 Act No. 32 of 1992 on compensation for illegal deprivation of life or liberty for political reasons.
123 1/1995 (II. 8.), AB decision, ABH 1995, 56–57. This shortcoming was remedied in a manner upheld in 22/1996 (VI. 25.), AB decision.
124 1/1995 (II. 8.), AB decision, ABH 1995, 58–59.
125 10/2003 (IV. 3.), AB decision. The decree singled out those convicted in relation to the 1956 revolt.
126 11/2003 (IV. 9.), AB decision. As an appendix to the decision indicates, the Constitutional Court's decision in the case affected over 800 cases.
127 22/1996 (VI. 25), AB decision.
128 46/2000 (XII. 14.), AB decision.
129 4/2002 (II. 15.), AB decision.
130 21/1990 (X. 4.), AB decision, ABH 1990, 76–77.
131 It was in 16/1991 (IV. 20.), AB decision, that the Constitutional Court introduced the concept of novation: 16/1991 (IV. 20.), AB decision, ABH 1991, 59. The concept was then applied in 27/1991 (V. 20.), AB decision; in 28/1991 (VI. 3.), AB decision; in 15/1993 (III. 12.), AB decision; in 16/1993 (III. 12.), AB decision; in 1/1995 (II. 8.), AB decision; and in 4/1996 (II. 23.), AB decision.
132 Art. 2(2) of Act No. 25 of 1991 on the compensation of damages caused by the unjust actions of the state.
133 On constitutional problems arising in connection with compensation and the privatization of agricultural property see Sajó, "A részleges kárpótlási törvény által felvetett alkotmányossági kérdések".
134 28/1991 (VI. 3.), AB decision, ABH 1991, 87–88; 15/1993 (III. 12.), AB decision, ABH 1993, 118.
135 *Digesta* 46.2.1.pr, Ulpian. In English in: *The Digest of Justinian*, vol. 2., ed. Alan Watson.
136 On novation (Article 1278) in the 1928 draft of the civil code, which never entered into force although it was widely used by courts of ordinary jurisdiction and became embedded in jurisprudence, see Szladits, *Magyar Magánjog*, vol. 3, 546–548. On novation under the Civil Code in force (Act No. 4 of 1959) see Eörsi, *Kötelmi Jog*.
137 15/1993 (III. 12.), AB decision, ABH 1993, 117–118.
138 15/1993 (III. 12.), AB decision, ABH 1993, 117.
139 28/1991 (VI. 3.), AB decision, ABH 1991, 88.
140 See Chapter Three.
141 11/1992 (III. 5.), AB decision, ABH 1992, 83.

142 1/1995 (II. 8.), AB decision, ABH 1995, 41.

143 This argument raises a dilemma similar to the one framing the conviction of GDR border guards who shot border violators at the Berlin Wall. See Quint, *Imperfect Union*, 196–205; Teitel, *Transitional Justice*, 16–17.

144 Teitel, "Transitional Historical Justice", 210.

145 In the early period of transition several acts were passed to bring rehabilitation for illegal criminal convictions. See Act No. 36 of 1989 annulling convictions for crimes committed in relation to the 1956 popular revolt between 23 October 1956 and 4 April 1963. Act No. 26 of 1990 provides for the annulment of illegal convictions between 1945 and 1963, while Act No. 40 of 1992 provides for the annulment of illegal convictions between 1963 and 1989. These acts list the offences the convictions for which are annulled. Note that compensation for moral harms was available to a large group of victims and not only to persons whose convictions were annulled under the rehabilitation acts.

146 16/1990 (VII. 11), AB decision.

147 Official reasons quoted in the decision of the Constitutional Court in 16/1990 (VII. 11), AB decision, ABH 1990, 66–67.

148 See, for example, Hungarian Supreme Court decisions BH 1993.348; BH 1993.417; BH 1993.418; and BH 1994.244.

149 BH 1997.434

150 BH 1991.195

151 66/1991 (XII. 21.), AB decision.

152 BH 1993.305; BH 1993.417. Restitution for confiscation may be requested by the convict in the original case, and successors have no standing. BH 1995.336. Note that on this point the jurisprudence of ordinary courts was previously contradictory. See FBK 1991.45, and FBK 1992.35.

153 BH 1993.417.

154 BH 1995.336.

155 BH 1993.418.

156 Sajó, "Preferred Generations", 348–349.

157 Teitel, *Transitional Justice*, 131.

158 The analysis in this section does not extend to indigenous peoples' treaty rights.

159 For an excellent, concise account see Seed, "Are These Not Also Men?" Also Williams, *The American Indian in Western Legal Thought,* and Howard, *Indigenous Peoples and the State.* On the combined impact of English and French law on indigenous peoples see Henderson, "First Nation's Legal Inheritances in Canada".

160 On this see, for example, Carey and Raciborski, "Postcolonialism".

161 Frickey, "Adjudication and its Discontents", 1765.

162 This section makes ample reference to the heritage of colonization without, however, attempting to provide an account of scholarship on colonialism. For an excellent account, which also informs the present analysis, see Ivison, *Postcolonial Liberalism.* See also Kirby and Coleborne, *Law, History and Colonialism*; and Krygier, "The Grammar of Colonial Legality".

163 Ivison, *Postcolonial Liberalism*, 3.

164 Note that Henry Summer Maine's *Ancient Law* (1861) contributed profoundly to the formulation, by the then emerging discipline of anthropology, of its subject (object) in terms of "primitive society". See Kuper, *The Invention of Primitive Society*. Also Fabian, *Time and the Other*.

165 *Cherokee Nation v Georgia*, 30 U.S. (5 Pet.), 1, 17 (1831).

166 See the *Indian Tribal Justice Support Act*, 25 USC § 3601(2): "The United States has a trust responsibility to each tribal government that includes the protection of the sovereignty of each tribal government." This language is found in a bill passed by the 103rd Congress, in 1993.

167 See, for example, Sager, "Rediscovering America"; also Velencia-Weber, "The Supreme Court's Indian Law Decisions", 420–428.

168 In the meantime, the quest to define "indigenous peoples proper" continues on the international plain. See Kingsbury, "'Indigenous Peoples' in International Law".

169 Mather, "Old Promises", 1832–1833.

170 For statutory definitions in Canada see section 2(1) of the *Indian Act*, R.S.C., 1985, c. I-5.

171 Cf. *Sandra Lovelace v Canada*, Communication no. R.6/24 (29 December 1977), U.N. Doc. Supp. No. 40 (A/36/40), 166 (1981), the U.N. Human Rights Committee finding that section 12(1)(b) of the Indian Act, pursuant to which an aboriginal woman marrying a non-aboriginal man loses her Indian status, violates Article 27 of the *International Covenant of Civil and Political Rights*. Note that the same rule did not apply to aboriginal men. On aborginal membership and discrimination under the Canadian Charter see Macklem, *Indigenous Difference*, 227–233.

172 *Lovelace v Ontario* [2000], 1 S.C.R. 950, para. 69, quoting *Corbiére v Canada (Minister of Indian and Northern Affairs)* [1999], 2 S.C.R. 203, para. 66, in the affirmative.

173 *Lovelace v Ontario*. The band/non-band line was chosen by the Court over more relevant comparators suggested by the applicants. See *Lovelace*, paras. 62–64. Morse, "Twenty Years of Charter Protection", 410.

174 Greschner, "Does Law Advance the Cause of Equality?", 311.

175 Note that bands themselves also define identity criteria. See Napoleon, "Extinction by Number".

176 For an excellent account of the Mashpee land claim suit in *Mashpee Tribe v Town of Mashpee*, 447 F. Supp. 940 (D. Mass. 1978), *aff'd* 592 F.2d 575, *cert. denied*, 444 U.S. 866 (1979), see Torres and Milun, "Translating Yonnondio by Precedent and Evidence".

177 *http://mashpeewampanoagtribe.com/year%20in%20review.htm*

178 Russell, "High Courts and the Rights of Aboriginal Peoples."

179 The effect of the Charter on aboriginal rights is more problematic. See Turpel, "Aboriginal Peoples and the Canadian Charter", and Morse, "Twenty Years of Charter Protection".

180 For a powerful reminder from a First Nation's standpoint see Metallic and Monture-Angus, "Domestic Laws versus Aboriginal Visions".
181 On the discussion of the facts and issues in *R. v. van der Peet* [1996], 2 S.C.R. 507, see also chapter three.
182 *R. v van der Peet*, para. 55. The present discussion does not extend to criteria of judicial inquiry into extinguishing indigenous rights.
183 *R. v van der Peet*, paras. 56–58.
184 *R. v van der Peet*, para. 71. Cf. para. 151 et al., L'Heureux-Dubé, J., dissenting, contesting the very term chosen by the chief justice.
185 *R. v van der Peet*, para. 55.
186 *R. v van der Peet*, para. 59.
187 *R. v van der Peet*, para. 70.
188 *R. v van der Peet*, para. 60.
189 *Delgamuukw v British Columbia* [1997], 3 S.C.R. 1010, the majority judgment was authored by Chief Justice Lamer.
190 *Delgamuukw v British Columbia*, para. 143. Note that the Supreme Court did not apply the above test in the case; the case was remanded for retrial due to the trial court's errors regarding evidence.
191 For a comparison see Elliott, "*Delgamuukw* (case comment)", 112–114.
192 *Delgamuukw v British Columbia*, para. 146.
193 Slattery, "Some Thoughts on Aboriginal Title", 27–28.
194 *Delgamuukw v British Columbia*, LaForest, J., para. 197.
195 As foreseen by both the majority in *R. v van der Peet*, para. 67, quoted in *R. v Powley* [2003], 2 S.C.R. 207, para. 36, and dissenting Justice L'Heureux-Dubé in *van der Peet*, para. 169.
196 *R. v Powley*, para. 37. The Métis peoples are descendants of indigenous peoples and settlers. So far the Canadian Supreme Court has not established a test for confirming Métis identity.
197 For an excellent treatment of indigenous common law in Canadian courts see Borrows, *Recovering Canada*.
198 *R. v Coté* [1996], 3 S.C.R. 139, para. 53. Also *R. v Sparrow* [1990], 1 S.C.R. 1075, 1091.
199 *R. v Blais* [2003], 2 S.C.R. 236, para. 13.
200 On competing constructions of continuity see Walters, "The Golden Thread of Continuity". See also Lambert, "*Van der Peet* and *Delgamuukw*, Ten Unresolved Issues", 32 U.B.C.L. Rev. 249, 261 et al. (1998); Barsh and Henderson, "*Native Imperialism*".
201 *R. v Powley*, para. 45.
202 See Justice Lambert in *Delgamuukw v British Columbia* [1993], 5 W.W.R. 97, 361–362 (B.C.C.A.).
203 On the passage of imperial common-law rules on aboriginal rights into modern Canadian law see Slattery, "Making Sense of Aboriginal and Treaty Rights", and Asch, "From Terra Nullius to Affirmation".

204 Slattery, "The Organic Constitution", 103–108.
205 *Calder v A.-G. of British Columbia* [1973], S.C.R. 313. With respect to the technical difficulty in this regard it is important to note that the doctrine of discovery—as well as the other doctrines concerning the assertion of sovereignty—are doctrines of international law, which were then adopted by imperial common law. While municipal courts of the Commonwealth were able to develop municipal common law, the norms of imperial common law were above and beyond them. This problem was dealt with expressly in *Mabo v Queensland [No. 2.]* (1992), 175 C.L.R. 1, paras. 32–42.
206 *Guerin v The Queen* [1984], 2 S.C.R. 335. In *Guerin* the applicability of the Royal Proclamation was not questioned; the central issue in the case was the extent and the nature of the Crown's fiduciary duty under the Royal Proclamation, 1763.
207 Schiveley, "Negotiation and Native Title", 449; see also Russell, "High Courts and the Rights of Aboriginal Peoples", para. 23.
208 *R. v Sparrow*, 178.
209 *Mabo v Queensland [No. 2.]*, para. 63.
210 For an excellent analysis see Patapan, *Judging Democracy*, 6–29.
211 See, for example, Meyers and Raine, "Australian Aboriginal Land Rights in Transition (Part II)", and Tehan, "A Hope Disillusioned".
212 *R. v. van der Peet*, para. 62.
213 *R. v. van der Peet*, para. 65.
214 *R. v. van der Peet*, para. 73.
215 *Delgamuukw v British Columbia*, para. 153.
216 *Delgamuukw v British Columbia*, para. 111; also paras. 117, 139.
217 *Delgamuukw v British Columbia*, para. 142.
218 *Delgamuukw v British Columbia*, paras. 148–149.
219 *Delgamuukw v British Columbia*, para. 154.
220 Section 223(1) of the Native Title Act defines native titles as "the communal, group or individual rights and interests of Aboriginal peoples or Torres Strait Islanders in relation to land or waters, where: (a) the rights and interests are possessed under the traditional laws acknowledged, and the traditional customs observed, by the Aboriginal peoples or Torres Strait Islanders; (b) the Aboriginal peoples or Torres Strait Islanders, by those laws and customs, have a connection with the land or waters; and (c) the rights and interests are recognised by the common law of Australia."
221 *Members of the Yorta Yorta Aboriginal Community v Victoria* [2002], H.C.A. 58.
222 Tehan, "A Hope Disillusioned."
223 *Yorta Yorta v Victoria*, para. 46.
224 *Yorta Yorta v Victoria*, para. 49–56.
225 *Yorta Yorta v Victoria*, para. 47.
226 *Yorta Yorta v Victoria*, para. 90.
227 A detailed analysis of the frozen rights approach was carried out by L'Heureux-Dubé, *R. v van der Peet*, paras. 164–170.

228 See Borrows, *Recovering Canada*, 70 et seq.
229 Nader and Ou, "Idealization and Power."
230 Borrows, *Recovering Canada*, 72.
231 See, for example, Rüsen, "How to Overcome Ethnocentrism".
232 Bayly, "The British and Indigenous Peoples, 1760–1860." For an argument on the significance of the capacity of a culture to adapt to even shocking encounters with a previously unknown culture see Todorov, *The Conquest of America*.
233 Walters, "Old Customs", 21–22.
234 See Dussias, "Waging War with Words".
235 Pub.L. 106–554, §1(a)(4) [Div. B, Title XI, § 1101], 21 Dec. 2000, 114 Stat. 2763, 2763A-311, recognizing the Navajo Code Talkers.
236 The space available here does not allow for a comprehensive discussion of the concept of culture and the accommodation of cultural differences. For an excellent treatment in the indigenous rights context see Macklem, *Indigenous Difference*, 45–75. For an essential classic see Geertz, *The Interpretation of Cultures*.
237 Barsh and Henderson, "Native Imperialism", 1002.
238 See, for example, the discussion on the Coast Salish nation's initiation ceremonies from the perspective of incompatibilities of cultural codes in Macklem, *Indigenous Difference*, 49–56.
239 For a recent philosophically informed account see Ivison, *Postcolonial Liberalism*, 4.
240 Turpel, "Aboriginal Peoples and the Canadian Charter."
241 *Amodu Tijani v. Secretary, Southern Nigeria* [1921], 2 A.C. 399 (Nigeria P.C.). For an informed discussion contrasting indigenous and settler understandings of property and ownership see Henderson, "First Nation's Legal Inheritances in Canada", 19–24.
242 Patapan, *Judging Democracy*, 113.
243 Brennan, "A Fair Go in An Age of Terror."
244 See, for example, Judge Blackburn in *Milirrpum v Nabalco Pty. Ltd.* [1971], 17 F.L.R. 141, finding that while Yirrkala peoples had a religious relationship to their lands, this did not translate into property rights under Australian law. See Grimshaw, et al. *Creating a Nation*, 297.
245 Comaroff and Comaroff, *Ethnography and the Historical Imagination*, 241. On the variability of the British imperial construction of the indigenous subject, shaped by the intellectual trends of the day and local military conflicts, see Bayly, "The British and Indigenous Peoples, 1760–1860", esp. 29–33.
246 *Oaths Amendment Act,* 1876, 40 Vic No. 10.
247 *Queensland Oaths Amendment Act*, 1884, 48 Vic No. 19.
248 Chesterman and Galligan, *Citizens without Rights*, 35–36.
249 See Boyle and MacCrimmon, "To Serve the Cause of Justice: Disciplining Fact Determination."
250 McLeod, "The Oral Histories of Canada's Northern People", 1279.
251 On the virtues of oral history see Borrows, "Listening for a Change".
252 Lambert, "Ten Unresolved Issues", 264–265.

253 See Stohr, "Repercussions of Orality", 687, on the same problem in the U.S.
254 Walters, "Old Customs", 6 and 23.
255 Copway, *The Traditional History and Characteristic Sketches of the Ojibway Nation*, vii.
256 *Report of the Royal Commission on Aboriginal Peoples* (1996), vol. 1 (*Looking Forward, Looking Back*), 33.
257 Drummond, *Incorporating the Familiar*, 40.
258 *R. v van der Peet*, para. 68.
259 *Delgamuukw v British Columbia*, para. 101. Also id., para. 86.
260 Justice Hall, dissenting, *Calder v A.-G. of British Columbia*, 346.
261 The foregoing is not to suggest that rigid rules of evidence inhibit a sensible judicial assessment exclusively in cases involving indigenous peoples' rights. For similar problems in equality cases see Peacock, "Judicial Rationalism and the Therapeutic Constitution".
262 *R. v van der Peet*, para. 68.
263 *Delgamuukw v British Columbia*, para. 101. Also id., para. 86.
264 *Delgamuukw v British Columbia*, para. 87. On the courts' approach to creating exceptions to the hearsay rule pre-*Delgamuukw* see Glover and Macauley, "Snow Houses Leave No Ruins", 60–78. On the relaxation of the hearsay rule in Australia see Lokan, "From Recognition to Reconciliation", 78, note 55.
265 Wallace, "Grave-Digging", 504.
266 *Yorta Yorta v Victoria*, para. 4.
267 *Delgamuukw v British Columbia*, Lamer, para. 5 et seq.
268 Quoted in Turpel, *Adapting the Criminal Justice System*, 169. The trial judge (McEachren) later became chief justice of British Columbia.
269 For example, on anthropologist expert witnesses in *Delgamuukw* see Culhane, *The Pleasure of the Crown*, 269–294; for the reflections of a prominent expert witness in the U.S. see Hornbeck Tanner, "History vs. The Law".
270 Farber, "Adjudication of Things Past", 1009–1038 (1998); Stohr, "The Repercussions of Orality", 687.
271 Elliott, "*Delgamuukw* (case comment)", 106–109.
272 Lambert, "Ten Unresolved Issues", 265.
273 Boyle and MacCrimmon, "To Serve the Cause of Justice", 67 et seq.
274 See chapter three and the quote from van der Peet.
275 On this, see chapter one.
276 *R. v van der Peet*, para. 31.
277 Drummond, *Incorporating the Familiar*, 35.
278 Borrows, *Recovering Canada*, 72.
279 Macklem, *Indigenous Difference*, and Ivison, *Postcolonial Liberalism*, 99 et seq.
280 On this see also Minow, *Not only for Myself*, 57.

CONCLUSION

The U.S. Constitution was drafted as a basic charter for a slaveholders' polity. Slavery as the status quo of the day does indeed figure in the U.S. Constitution's original language, such as in the Apportionment Clause calculating the basis of representation and taxation upon every free persons and three-fifths of all other persons.[1] The only framer who did not own slaves at all, and even refused to hire slaves, was future president John Adams. There were framers who disapproved of slavery while at the same time owning slaves (take Thomas Jefferson as a prominent example), and others (like Benjamin Franklin) who actively participated in anti-slavery causes. Until the Civil War, 49 years of the Constitution's total 72 years were spent under presidents from slaveholding states. In the U.S. following the Civil War, slavery was abolished in 1865 by the Thirteenth Amendment, which was followed by the Reconstruction Amendments and the Civil Rights Act.

Among the Reconstruction Amendments the Fourteenth figures prominently, providing that "No state shall … deny to any person within its jurisdiction the equal protection of the laws." It was under this provision that in 1896 the U.S. Supreme Court said, in *Plessy v Ferguson*,[2] that the "object of the amendment was undoubtedly to enforce the absolute equality of the two races before the law, but, in the nature of things, it could not have been intended to abolish distinctions based upon color",[3] so introducing the doctrine of "separate but equal." The Supreme Court announced the end of racial segregation thus vetted in 1954, in *Brown v Board of Education*.[4] In the aftermath of

the Civil War, a century passed before the next U.S. president (Lyndon B. Johnson) would arrive from a former slaveholding state. In 1989 Justice O'Connor found that the city of Richmond, Virginia, the former capital of the confederacy of slaveholding Southern states, did not show a record of sufficient past discrimination in the construction industry that would justify the affirmative action plan adopted to promote minority businesses under the Fourteenth Amendment's Equal Protection Clause.[5]

During these years, from the dome of the Capitol, the building that has stood as one of the symbols of U.S. government since 1865, the statue of Freedom has overlooked these events. In 1856 Jefferson Davis, secretary of War and a slave owner himself, vetoed the concept of the statue. The reason was that Freedom as envisioned was to wear a liberty cap, "'the badge of the freed slave'—an inappropriate symbol for a republic of white men who had never been slaves themselves. … Freedom got instead a helmet topped by an eagle's head crested with Indian feathers."[6]

Let us consider this record. Is this the story of abolitionism's ultimate success? Is it the story of the evolution of the slaveholders' charter into a decent constitution? Is it the story of the lasting marginalization of the South in federal politics? Is it the story of carefully crafted continuities fitted into the narrator's own storyline? Is it the story of reaching peace with the most regrettable instances of past injustice? Is it the story of neutral principles being applied evenly across contexts? Is it the story of lack of awareness about the polity's pasts? Even if one storyline is chosen as the right one, is it binding upon a court interpreting the Reconstruction Amendments? Or other provisions of the U.S. Constitution?

This riddle provides a useful summary of the problems that the interpretation of constitutions with troubled pasts might present for a student of constitutional adjudication. Lawyers feel comfortable about turning to history for guidance. This is so not only because of legal reasoning's much-famed path-dependence, but also due to a widely shared belief among lawyers about history being an objective and neutral aid to interpretation, and, therefore, appearing ultimately useful for reducing indeterminacy in constitutional reasoning. As a result, lessons drawn from history, when presented to other lawyers, are

most often beyond serious reflection and criticism. Misconceptions about the characteristics of historical narratives are easy to detect and trace. It is far more difficult to chase them away, since they often operate below consciously adopted strategies of reasoning. The aim of this work was to show how, in polities living under constitutions with troubled founding myths, historical narratives hold sway in constitutional reasoning, without their effects being understood, exposed, and accounted for.

It might well be time to revisit lawyers' confidence in historical narratives in constitutional adjudication, as historical narratives—due to their intepretiveness and normativeness—are incapable of delivering on the expectation of curbing indeterminacy in constitutional adjudication. The constitutional text does not command an inquiry into history, any more than a complete lack of text. Moreover, the premises underlying historical narratives and the rhetoric along which historical narratives are plotted are not prescribed by the constitution either. Rhetoric is invented by courts at their professional or intellectual convenience, and is disciplined or hampered not by the constitutional text, but by factors often indirectly or unconsciously affecting legal reasoning. Nevertheless, for a study of constitutional reasoning the real problem is not that historical narratives are unable to curb indeterminacy. Instead, it is far more discomforting that, due to the mismatch between their reputation and their actual characteristics, historical narratives may easily become the facade for courts' asserting undisclosed preferences in terms of values and policy.

Furthermore, despite the initial promise of serving as a powerful restraint in constitutional interpretation, historical narratives have been shown to increase indeterminacy and uncertainty. On the one hand, some cases indicate that this indeterminacy surrounding historical narratives may result in the denial of constitutional rights. In part this is due to the potential of historical narratives to freeze rights. This freezing effect can be remedied by calling other, subsidiary means of reasoning to aid. While such a move might prevent a hibernation of rights, it creates the impression that the court is not principled as it departs from its preferred historical narratives when convenience so dictates. Thus, from the perspective of consistency and principled judicial reasoning, it is scarcely acceptable that the court's

departure from a line of reasoning (which in the first place was mean to curb indeterminacy) should result in a better outcome. "Better", at least in the eyes of some.

As this latter observation suggests, historical narratives may easily drive judicial review fora towards the farthest edges of the legitimate exercise of review power, and what the flexibility of historical narratives makes possible may not always be within the limits of the constitutional review power. The commands of the past are not prescribed in the constitution—not even in a case where the history of the constitution is argued to give rise to certain obligations. History, indeed, may become a substitute replacing the undesired aspects of a written constitution. The cases analyzed clearly indicate that, in addition to new constitutional rights and obligations, courts have created new genres of constitutional norms on grounds of both continuity and reconciliation rhetoric. Such gestures, on the face of it, amount to problematic instances of judicial activism. In addition, new classes of court-made constitutional norms increase the plurality of the constitution, endangering the supremacy of the written text.

On a more pragmatic, yet equally problematic, note, one might also consider a number of consequences resulting from the willingness of courts to derive new constitutional rights and obligations, which also seem to evoke legitimacy considerations. While historical narratives share many traits with legal reasoning, they have the potential to become mighty competitors of certain kinds of legal argument, such as the doctrine of *stare decisis*. When, in a common-law jurisdiction, precedent is overruled or sidelined on the basis of references to history and traditions, courts (or majorities on the bench) are immediately suspected of pursuing partisan agendas. As another problematic phenomenon in this area, it is also important to point out that the proliferation of historical narratives prompts justices to argue about a proper reconstruction of the past for the purposes of resolving a given case. This trend clearly has the potential to deter attention from serious legal and constitutional issues, that is, matters that—unlike a proper reading of the past—are for courts to decide. Being mindful of the past in a constitutional case is not to be confused with using historical narratives to disguise value or policy preferences in constitutional reasoning.

The plurality and uncertainty thus emerging has side-effects that radiate beyond the confines of scholarly discourse on constitutional reasoning. When courts establish new rights or new obligations along such unpredictable lines of reasoning, they also—directly or indirectly—command the cooperation of the political branches. Despite the responses from the legislative and the executive branch, these reactions should not be taken, or mistaken, for a genuine public discourse on the issue of public concern decided by the court. Uncertainties in the language of court decisions heavy with historical narratives often provide little or insufficient guidance for a meaningful legislative response, thus legislatures might find it safe to copy the words of the judgment into law. While such a gesture on the legislature's part is truly a reaction to the court, it can hardly be taken for an example of genuine public discourse. Alternatively, more adventurous deputies might opt to untangle the web of principles and expectations woven by the court—a venture that is almost certainly destined to meet with disapproval in court. Without setting predictable criteria accessible to a rational participant of the discourse, courts padding their decisions with historical narratives can hardly be regarded as encouraging genuine public discourse on matters of public concern. Indeed, historical narratives, when deployed by courts in constitutional cases, are more likely to hinder than trigger such a discourse.

At this point it is important to remember that a court's construction of the past is hardly representative of any polity-wide consensus. This is so not only because courts do not take Gallup polls, or because courts are among the least representative agencies of any government, but also because it is a mistake to believe that courts might be capable of manufacturing a polity-wide agreement on any account of the past. Not to mention that consensus-seeking of this kind is definitely not a task for constitutional review fora. The judicial process and procedures before those courts and other bodies performing constitutional review are utterly unfit for such a consensus building exercise on matters of interpreting the past. In the highly regulated environment of truth-seeking inhabited by judges and fellow lawyers, issues, questions, tests, standards of proof, and rules of evidence are not tailored to befit an inquiry into the past. Also, the judgment of a court as a record of history is seriously deficient: in most cases it is

unclear where a particular peace of information came from and what methodology was followed in order to reach a particular narrative. Instead of providing a consensual account of the past, courts' decisions that are heavy with historical narratives frame the public discourse, often removing arguments and narratives lines from the discourse.

One important lesson from the present volume is that courts heavily relying on historical narratives are not to be cast as agents and depositories of a polity-wide consensus on the past, history, and traditions. At the same time, justices should be credited for, and watched for, construing the identity of the constitutional subject by their selected account of the shared past of the polity. In acknowledging or creating constitutional continuity or seeking reconciliation, constitutional review fora deeply engage in defining the polity for the purposes of constitutional adjudication. The past is most problematic when consequences are assigned to certain segments of it, in relation to the polity's identity. A selection of the *past proper* is based on (sometimes pronounced, sometimes implied) judgments about the *polity proper*. In cases where the reasoning of a constitutional court rests on continuity or reconciliation rhetoric, rights and principles informing the scope and limitations of those rights are distributed among the members of the polity according to sheer value judgments justified upon historical narratives.

The inquiry in the present volume adds important qualifications for grasping the consequences of this conclusion. Initially, it may have seemed that among a constitution's criteria of fitness it was proper to list "befitting the polity's past, history, and traditions." Courts invoking historical narratives in constitutional cases are particularly successful in perpetuating images that might appear to support this claim. Instead of proving this hypothesis, the present analysis seems to suggest that constitutions with troubled founding myths host a wide range of historical narratives at any given moment, many of which are competing or internally incoherent. The capacity of constitutions to serve a diverse polity over time depends on lawyers' skills in presenting, perceiving, and accepting varying historical narratives in constitutional cases for what they are: no more and no less than interpretive commitments which determine "what law means and what law shall

be"—to recall the words of Robert Cover from the introduction. In the event that a constitution is allowed to stand and serve as such a container, it might be operated with the aid of courts and lawyers in preserving the polity. May courts and lawyers fail at this challenge, and any member of the polity may at any time see her constitutional status vanish only to become an accident of constitutional reasoning.

The high reputation of historical narratives in constitutional adjudication is, for the most part, a matter of intellectual and professional convention, on which many participants of a professional discourse rely on a daily basis. This somewhat a-rational reliance of historical narratives is efficient in managing lawyers' time and intellectual resources, and also works well in the absence of a better argument. The analysis was aimed at directing attention to the soft points of reliance on historical narratives in constitutional reasoning. Despite the problems which have been unearthed on the pages of this volume, it would be more than unrealistic to demand that historical narratives be discarded from the intellectual toolkit of the constitutional interpreter. The most serious peril of historical narratives is not that they perpetuate indeterminacy in constitutional reasoning, but that this potential of theirs is not accounted for. Caveats presented in this work apply not only to specific theories or techniques of constitutional interpretation, or to the originalist manner of constitutional construction in particular, but on a larger scale, independent of the theoretical framework in which historical narratives are invoked in constitutional cases.

NOTES

1 U.S. Constitution, Article I, Section 3, Clause 3. Non-taxed Indians were excluded from the formula. See also Article 1, Section 9, Clause 1, limiting the powers of Congress to impose taxes on the importation of persons.

2 *Plessy v Ferguson*, 163 U.S. 537 (1896).

3 *Plessy v Ferguson*, 163 U.S. 537, 544 (1896).

4 *Brown v Board of Education of Topeka I*, 347 U.S. 483 (1954).

5 *City of Richmond v J.A. Croson Co.*, 488 U.S. 649.

6 McPherson, "Specimen Days." Illustrations from presidential history are also drawn from McPherson.

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