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Slaying the misshapen monster: The case for constitutional heuristics[*]

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I   Introduction

On 9 February 1784 Adriaan Kluit, *rector magnificus* at the University of Leiden, ascended the podium to deliver his valedictory address: 'On the abuse of constitutional law'.[1] Kluit was speaking at a time of fierce contestation in Dutch politics between the Orangists (with whom Kluit identified) and the anti-Orangist 'Patriots'. The language of constitutional theory had become a key weapon in their battle, and it was to that language that Kluit's address was directed. Its contents were sharp and uncompromising. The Patriots, Kluit said, had created 'a misshapen monster in constitutional law.'[2] The excellent provisions of the Dutch state's settled constitutional institutions had established civil liberty on the firmest foundations, but these accomplishments were threatened by those who, posing as the commonwealth's physicians, were taking it down a path of ruin.[3] The Patriots' constitutional doctrines, Kluit warned, were a destructive plague bringing catastrophes upon commonwealths.[4]

This chapter is motivated by our sense that little has changed since Kluit's day in the methodology of constitutional theory and how it deals with disagreement. The debate between Kluit and the Patriots was at one level a theoretical debate as to the meaning of liberty, and whether civil liberty mattered more than political liberty. Yet the argument about these concepts was suffused with claims about facts: about the Netherlands' Batavian

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[1] A Kluit, *Academische Redevoering over het Misbruik van 't Algemeen Staatsrecht* (Leiden, 1787).

[2] ibid 25.

[3] ibid, 2–3.

[4] ibid, 97.

past and commercial present, about the regicides, oppressions, and tumults that afflicted polities at different points of time, about which political treatises were useful guides and which should be disregarded, and so on. And, crucially, the parties' disagreement was marked by an inability to agree on which of these facts were of significance in understanding the true nature of the eighteenth-century Dutch constitution.[5]

And so it remains in the present day. Constitutional theorists, unlike political theorists, are concerned with the specifics of a particular constitutional system or set of systems. The goal of constitutional theory is to identify the institutions and principles that underpin the public life of a specific state, rather than consider how all states ought to be organised. Of their nature, they therefore necessarily (if implicitly) claim to be not merely *dialectically* effective (likely to be persuasive), but also *epistemically* effective (likely to produce a true understanding of the constitution).[6] Notwithstanding their claim to merely be advancing arguments about how a particular constitution ought to be understood, they are beneath their surface concerned with facts precisely as the theories of Kluit's day were.

Where, then, does theories' epistemic confidence come from? This question is rarely discussed explicitly. Theorists rarely discuss the process through which their theories were formed, and their writing usually seeks only to persuade the reader of its correctness rather than (as, for example, in science) to explain why the process by which the theory was constructed or tested meets criteria for justified belief. The rightness or wrongness of a theory is treated as a matter to be uncovered through argumentation and persuasion, rather than through an assessment of the processes that underpinned its construction and the biases if any that they bequeathed to the theory.[7] Kluit's language in terming opposing theories of the eighteenth century Dutch constitution a misshapen monster and a destructive plague may well be more extreme than the terms a modern-day theorist would use, but this is a matter of degree rather than kind. The underpinning assumptions remain the same: each theory presents itself as a correct understanding of the principled and institutional underpinnings of a constitution's excellence that safeguards its accomplishments, unlike its rivals.

The impact of this on constitutional theory has not been a happy one. The reliance on persuasion means that constitutional theory lacks any method

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[5] WRE Velema, 'The concept of liberty in the Dutch Republic, 1780-1787' in WRE Velema (ed), *Republicans: Essays on Eighteenth-Century Dutch Political Thought* (Brill 2007) provides a concise and accessible overview of the broader debate and Kluit's position within it.

[6] On the role of epistemic and dialectical effectiveness in disagreement, see E Sosa, 'The epistemology of disagreement' in A Haddock, A Millar, and D Pritchard (eds), *Social Epistemology* (Oxford University Press 2010) 293-297.

[7] A similar point was made by Herbert Simon about public administration theory in the mid-twentieth century. See HA Simon, 'The proverbs of Administration' (1946) 6(1) Public Administraiton Review 53.

beyond argumentation for judging the truth or falsity of a given theory of the constitution, reducing it to a cycle of disputation between different 'styles of public law thought'.[8] But even more fundamentally, rhetorical or philosophical attractiveness is by itself an inadequate basis for evaluating whether a particular constitutional theory ought to be accepted by a polity. Constitutional theories have non-trivial real world consequences because they influence the conduct of public affairs, and the history of constitutional thought is littered with constitutional theories whose rhetorical power made them appear normatively attractive in their day but whose practical consequences were deeply troubling. Examples range from Mill's theory of benevolent colonial despotism which exercised a shaping influence over the imperial constitution in the late nineteenth century,[9] to John Calhoun's anti-majoritarian theory of the US constitution which, despite being designed to justify the continuance of slavery, was built on a moral rhetoric so alluring that it influenced thinkers as liberal as Lord Acton.[10]

Overcoming these problems requires a fuller understanding of the strengths and limitations of the processes and techniques constitutional theorists use to derive theories and the manner in which they justify their belief in the reliability of those processes. In Part II, we draw on the literature on social epistemology to show that the process of constructing any theory of a specific constitution involves two distinct forms of engagement with facts: firstly, identifying facts that have constitutional salience and, secondly, assigning significance to those selected facts. There are strong parallels between these processes and those implicated in the construction and transmission of traditions, an analysis of which sheds new and useful light on how constitutional theories construct the constitutional world they describe.

In Part III we build on the argument of Part II to show that there are four broad families of approaches to selecting and assigning normative significance to facts into which most constitutional theories can be classified. Each of these families is united by its propensity for highlighting certain types of features, and its predilection to read certain types of normative significance into constitutional facts. As we show, a closer focus on these predilections not only helps us achieve a better understanding of how constitutional theories are made, but also of the limitations those methodologies impose on constitutional theory.

In Part IV, we argue that while these families have value, the failure to

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[8] M Loughlin, *Public law and Political Theory* (Clarendon Press 1992) 62.

[9] On Mill's theory and its impact, see J Pitts, *A Turn to Empire: The Rise of Imperial Liberalism in Britain and France* (Princeton University Press 2005) 133-162.

[10] On Calhoun's theories and slavery, see LK Ford Jr, 'Inventing the Concurrent Majority: Madison, Calhoun, and the Problem of Majoritarianism in American Political Thought' (1994) 60(1) Journal of Southern History 19. On the influence it exercised over Lord Acton, see e.g. L Acton, *Essays on Freedom and Power* (The Free Press 1948) 225-231.

understand their aetiology and limitations has led to positions in constitutional debates becoming entrenched, polarised, and unyielding. Our purpose in making this point is methodological rather than merely critical. The methodology of constitutional theory suffers from the failure to recognise the extent to which constitutional theories are shaped by the predilections and predispositions that underlie them. We propose a new approach to constitutional theorisation and constitutional method which takes a heuristic approach, relating constitutional facts to the shifting needs of the polity, and opening up a more pragmatic space for theoretical debate and doctrine-making in constitutional scholarship.

II Facts, Theories, and Traditions: Making the constitutional world

A The social epistemology of constitutional theory

Constitutional theorists who state that a particular theory is superior to another are making a claim qualitatively different from—say—the claim that Beethoven is a better composer than Mozart. The latter statement deals with a matter of subjective opinion. However strongly one may hold a belief as to the relative superiority of one, few will argue that there is a theorist-external standard by which that belief can be judged. Constitutional theorists, in contrast, do make such claims. A theorist who claims that political constitutionalism provides a better account of the UK's constitution than legal constitutionalism,[11] or that current US constitutional jurisprudence remains flawed by the inherent contradiction between the Constitution's promise of liberty and its compromises and contradictions on the position of African Americans,[12] is claiming that there is something about the institutional features of the relevant constitutional order that means that their theory describes the constitution with greater accuracy than others.

It is, of course, possible to take a critical standpoint and treat these claims as mere rhetoric. Examination of debates in constitutional theory, however, suggests that the claims are seriously meant—that theorists believe, and hold themselves justified in believing, that the facts their theories assert about a constitutional order are true in a way that others are not. On what basis, then, do theorists form this belief? What gives them the confidence that their approach to theory-formation is epistemically effective and not just dialectically effective? Our case in favour of heuristics is founded on the understanding that there are inherent flaws in the answers which constitutional theories implicitly give to this question. Our focus in this section

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[11] See e.g. A Tomkins, 'In Defence of the Political Constitution' (2002) 22(1) Oxford Journal of Legal Studies 157.

[12] See e.g. D Hall, 'The constitution and race: A critical perspective' (1988) 5(2) New York Law School Journal of Human Rights 229.

is, accordingly, on setting out our analysis of what those answers are.

Our starting point lies in two observations about how constitutional theories work. Firstly, all constitutional theories draw on a shared pool of facts about a polity. Disagreements between constitutional theorists do not relate to whether King John really signed a document in 1215 which included a statement that freemen would not be imprisoned save by the law of the land, or whether the Constitution of India really includes an Article that states that no person shall be denied equality before the law or the equal protection of the laws. They relate, rather to the institutional status of facts and to whether they have deontic power.[13] Simply put, disagreements in constitutional theory relate to whether a specific fact in the shared pool carries any significance at all for our understanding of how the broader constitutional order operates today, and if so what.

Secondly, in forming and justifying positions on these points, constitutional theorists are concerned not just with codified or uncodified constitutional texts as they stand in the present, but also with the accreted sum of practices, actions, and ideas inherited from the past that they hold to be constitutionally significant; and their purpose in so engaging is to derive a body of precepts that can be entrenched and transmitted to the future as determinative of *the* proper conduct of constitutional affairs.

The remainder of this section discusses these processes, and how they purport to give theorists confidence in their epistemic effectiveness.

B   Taking facts seriously

Let us begin with the first of these, namely, the processes underpinning a theorist's treatment of a fact as having institutional significance and deontic power. This entails, firstly, selecting a subset of facts by attaching constitutional *salience* to specific facts taken from the common stock of facts bequeathed by the past. Secondly, it entails deriving lessons for the present from those facts in terms of actions or institutional configurations that they recommend, rule out, or warn against—in other words, deriving *significance* from those facts.

The debate in the UK between political and legal constitutionalists presents illustrates the role the attribution of salience plays in constitutional theory. In his influential treatise *Law, Liberty, and Justice*, one of the foundational works of modern legal constitutionalism, TRS Allan begins by linking Dicey's relevance to the role factual considerations played in Dicey's theory. 'Contrary to orthodox opinion', Allan declares, Dicey 'was wise to seek an interpretation of the rule of law *which reflected the traditions and peculiarities of English common law.*' (Emphasis added)[14] Allan

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[13] The language of institutional facts and deontic power is taken from the work of John Searle. See especially JR Searle, *The construction of social reality* (The Free Press 1995).

[14] TRS Allan, *Law, Liberty, and Justice: The Legal Foundations of British Constitution-*

then proceeds to build his own theory of the rule of law. In doing so, he is informed and influenced by his reading of contemporary legal and political philosophers, in particular Raz and Dworkin.[15] But his account of that philosophy is interwoven with a detailed analysis of how judges in twentieth century UK, working with the material of earlier eras, developed, applied, and extended the rule of law.[16] Like Dicey, in other words, Allan's theory is built on a deep engagement with the 'traditions and peculiarities' of the UK's constitutional order and the process by which it emerged (an analysis that, in later work, is extended to also encompass the US and Australia).[17] It is built on and underpinned by facts.

This is also true of political constitutionalists. Crucially, however, they differ in which facts they emphasise. Adam Tomkins, for example, in *Our Republican Constitution*, engages not just with the political philosophy of civic republicanism, but with English constitutional history.[18] But where Allan's focus is on the contribution made by courts to constitutional government and constitutional development, Tomkins' focus is on episodes in which the courts failed to protect private persons against oppressive institutions.[19] In the episodes he discusses, it was Parliamentary institutions that took the lead.[20] As in Allan's work, this engagement with the traditions and peculiarities of the UK's constitutional order exercises a shaping influence.

Constitutional theories, in other words, are underpinned by disagreements about which facts are significance for understanding the constitutional arrangements of a polity. But, in addition to disagreements about which facts are significant, theorists may also disagree about what that significance is. They may agree on the facts that shed light on the present constitutional order, but disagree on the light they shed.

The debate about the right to keep and bear arms in the US Constitution provides a good example. For much of the constitutional history of the US, African-Americans were denied the right to keep and bear arms notwithstanding the Second Amendment and its counterparts in state constitutions, and militias soldiered by arms-bearing white men were regularly deployed to suppress dissent by African Americans. In a recent treatise, Carol Anderson draws on the interweaving of the past history of arms-bearing and the systematic suppression of African Americans to argue that the Second Amendment is at its heart lethal and 'steeped in anti-Blackness', a 'loaded weapon...just waiting for the hand of some authority to put it to use.'[21]

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alism (Oxford University Press 1994) 21.

[15] Allan, *Law, Liberty, and Justice* (n 14) 23-29, 45-48.

[16] ibid, 32-44.

[17] TRS Allan, *Constitutional Justice: A Liberal Theory of the Rule of Law* (Oxford University Press 2003).

[18] A Tomkins, *Our Republican Constitution* (Hart Publishing 2005).

[19] ibid 69-87.

[20] ibid, 87-109.

[21] C Anderson, *The Second: Race and Guns in a Fatally Unequal America* (Bloomsbury

A strikingly different reading of the same history is presented in the concurring opinion of Justice Clarence Thomas in *McDonald v City of Chicago*,[22] In contrast to Anderson's view, Thomas argued for an extension of the Amendment by holding that the Fourteenth Amendment made the right it created valid against state governments. Thomas does not differ from Anderson's reading of the past. Like her, he discusses the racialised history of arms-bearing and arms laws in the US. But Thomas attaches a very different significance to these aspects of the past. Where Anderson sees evidence of a right fatally tainted by racism, Thomas sees a warning against permitting state power to be deployed to disarm individuals. The significance of its history and the lesson it holds for the present is, for Thomas, that individual rights conferred by the Second Amendment need to be better secured against governmental interference.

C Continuity and the ascription of deontic power

The differences discussed in the previous section are not random. As we show in this section, they are the result of processes which strongly resemble the processes by which traditions are developed, reworked, and adapted.

A tradition is at its heart an attempt to create a pattern to guide future action. Traditions differ from evanescent action in that they outlive the specific circumstances against whose background they were originally enacted.[23] Constitutional theory likewise differs from an individual application of legal doctrine in that a theory is intended to identify general patterns which can guide future action in different circumstances. Equally, both constitutional theory and traditions are principally concerned with the normative prescriptions, precedents, and conditions for action established by the material that constitutes the theory or tradition. Like constitutional theory, a tradition seeks to use its material to identify and establish exemplars of action. Finally constitutional theory, like a tradition, seeks to assemble not a disparate set of records of past action but a received image of patterns, practices, beliefs, and institutions which require, regulate, permit, or prohibit the enactment of particular patterns of future action.[24]

The idea that the law resembles a tradition is, of course, not novel.[25] Nevertheless, a closer exploration of the analogy sheds useful light on the methodology of constitutional theory, as well as why that methodology has a propensity to produce disagreements that are sharp, long-lasting, and seemingly intractable. As theorists of traditions have pointed out, the material

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[22] (2010) 561 US 742.

[23] E Shills, *Tradition* (University of Chicago Press 1981) 31-32.

[24] ibid, 12-13.

[25] See e.g. G Postema, *Bentham and the Common Law Tradition* (Clarendon Press 1986); N Duxbury, *Frederick Pollock and the English Juristic Tradition* (Oxford University Press 2004).

that constitutes a tradition can be classified into three elements: the aspects of the tradition that constitute its continuity, a canon of written texts that cumulatively embody the distinctive features of that tradition, and a core of teachings or precepts that are foundational to the tradition and cannot be rejected without rejecting the tradition.[26] A tradition's core is placed beyond criticism, whereas a canon is subject to refinement, evolution, and scrutiny.[27]

Continuities, canons, and cores are fundamental to constitutional theory. Theorists seek to uncover what they believe to be the best understanding of a constitution by examining textual evidence (treatises, cases, statutes, etc.), as well as broader evidence of constitutional practices, beliefs, and outcomes over time. They decide not just how much weight to attach to a particular item of evidence and what that evidence tells us, but also what constitutes evidence of constitutional practice in the first place.[28] And the starting point for that process is fundamentally determined by their views as to where constitutional continuity lies.

Consider, for example, the respective positions occupied by the pre-Union Parliaments of England, Scotland, and Ireland in the UK's constitutional imagination. The post-Union Parliament is, in principle, a successor to all three Parliaments; yet in practice constitutional theorists tend to draw exclusively on the precedents established by the English Parliament, even where those of other parliaments speak squarely to issues of theoretical relevance. Take, for example, the question of whether Parliament can be prorogued against its will—a question that was of considerable interest to constitutional theorists in the UK in 2019. In December 1639 the Scottish Parliament, faced with an attempt by the King to prorogue it, declared that it could not be prorogued without its consent, and in June 1640 it abolished one of the main instruments of executive control over it.[29] That this episode hardly figured in discussions of the purported prorogation of August 2019 is not because the Scottish Parliament is ignored or not studied. Rather, it is because modern constitutional theorists largely share Tomkins's perception that the modern British constitution 'for good or ill... was made in England.'[30] To inform a constitutional theory, and action must, be seen as forming part of an intellectual continuity with the present, and the Scottish Parliament's pasts are not so regarded notwithstanding the *legal* continuity.

The process involved in identifying continuity between the practices and

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[26] J Alexander, 'A systematic theory of tradition' (2016) 10(1) Journal of the Philosophy of History 1.

[27] ibid, 23-24.

[28] See e.g Loughlin (n 8) 59.

[29] For the political context, see IM Smart, 'The political ideas of the Scottish Covenanters, 1638-1688' (1980) 1(2) History of Political Thought 167, 173.

[30] Tomkins, *Our Republican Constitution* (n 18) 114. It is pertinent to note that while Tomkins discusses the history of the Covenanting Parliament, he does not mention the actions discussed here.
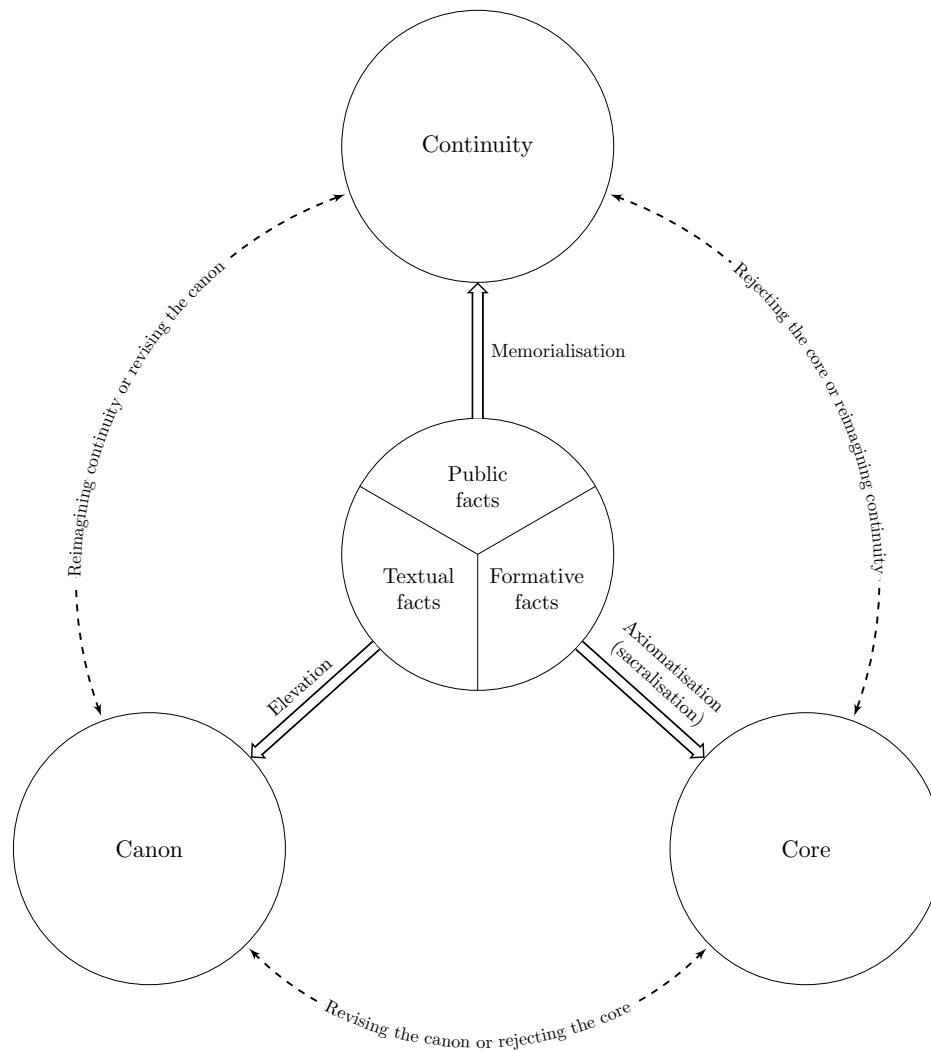
Fig. 1: The interaction between core, canon, and continuity

beliefs of the past and those of the present day might be termed 'memorialisation'. The facts implicated in memorialisation are public or social facts: the images of public actions, practices, and beliefs from the past that are seen by a theorist as having enduring relevance when it comes to determining how a polity's constitutional affairs should be conducted.[31] Disagreement in constitutional theory is frequently a consequence of different views about where continuity lies. The disagreement between Anderson and Thomas over the Second Amendment in the US, for example, reflects how each of them sees constitutional continuity. To Anderson, the continuity implicated

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[31] Alexander (n 26) 12.

in the right to keep and bear arms is the phenomenon of the consistent and systematic oppression of African Americans, and the Second Amendment's full enforcement therefore necessarily entails the continuance of that oppression. To Thomas, in contrast, the continuity in question is the assurance to every individual of the right to acquire and possess the means to defend oneself against oppression, and the Second Amendment's full enforcement therefore has the potential to operate as a powerful tool for African American rights.

Similar differences exist elsewhere. The debate between political and legal constitutionalism in the UK is driven by whether one sees greater constitutional continuity with the present day in the actions of the mid seventeenth-century legislature or the early seventeenth-century and late eighteenth-century courts. Likewise, theoretical debates around post-colonial constitutions such as India's have involved whether their independent constitutions marked the creation of an order radically different from any they had previously had, or whether there are continuities between the modern constitutional order and the constitutional ideas on which the independence movement was built, or even with the older ideas and theories underpinning the pre-colonial constitutional order.

Differences as to where continuity lies, in other words, underpin disagreements about which of the shared store of facts deserve to be given deontic power. As the next section shows, these differences are in turn shaped by a theorist's understanding of the other two components of tradition: cores and canons.

D   Core and canon in constitutional theory

Two other processes operate alongside memorialisation: 'elevation', by which certain texts acquire canonical status, and 'sacralisation' or, less provocatively, 'axiomatisation' by which certain precepts acquire the status of an unchallengeable core. The three processes are closely intertwined in the making of constitutional theories, which are defined both by the processes themselves and by how they interact, as Figure 1 illustrates.

A canon includes not just the written text of a constitution (in jurisdictions that have one), but also other texts. It may include cases seen as being of high constitutional significance: for example, Chief Justice Marshall's decision establishing the principle of judicial review in the US in *Marbury v Madison*,[32] or the decision of the Supreme Court of India in *Kesavananda Bharati v State of Kerala*[33] establishing the basic structure doctrine under which a constitution may not be amended in a way that cuts against its fundamental elements or values.[34] It may also include texts that do not have

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[32] (1803) 5 US 137.
[33] AIR 1973 SC 1461
[34] The doctrine in turn was influenced by the work of the German jurist Dietrich Conrad.

the force of law but nevertheless are seen by a theorist as carrying weight. These could be historical documents, such as the Federalist Papers in the US, or they could be particularly influential commentaries, such as the commentaries of Ito Hirobumi on the Meiji Constitution in pre-War Japan,[35] or even works of legal or political philosophy: for example, the status occupied by the works of Joseph Raz or John Rawls in many present-day constitutional theories in the common law world. As with continuity, theorists can and do differ on which texts belong in the canon: for example, the debate among constitutional theorists in the UK about whether the decision in *Anisminic*[36] should be seen as an important part of the canon or as a case that borders on the heretical.

In contrast to continuities and canons, theories of constitutional law do not need to affirm a core, although in practice most do. A core consists of central precepts whose importance to a constitution is seen as being so foundational that they are sacralised and placed beyond question or beyond criticism. The idea of Parliamentary sovereignty constitutes precisely such a core in many modern theories of the UK's constitution, and jurisdictions such as India[37] and Kenya[38] which have a 'basic structure' doctrine holding certain aspects of their constitutions to be unamendable have arguably turned those aspects into a non-challengeable core.

A core may be the subject of broad consensus. The idea of the 'balanced constitution' that dominated constitutional thought in the UK from the sixteenth century to the 1830s is an example: it was accepted as underpinning the UK's constitution by thinkers as diverse as Blackstone, Henry St. John Bolingbroke, Edmund Burke, Walter Moyle, and even Charles I.[39] But what constitutes the core, too, is capable of being contested, as the strident debates over the place of doctrines such as human rights, or even devolution, within the UK's constitutional order indicate. Equally, it is wholly possible for a constitutional theory to lack a core if no doctrines are seen as unquestionable. Lord Steyn's controversial statement in *Jackson*[40] that the supremacy of Parliament was a judicial creation which, like all judicial cre-

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For a discussion, see M Polzin, 'The basic-structure doctrine and its German and French origins: A tale of migration, integration, invention and forgetting' (2021) 5(1) Indian Law Review 45.

[35] For an accessible overview, see T Masuda, 'The Meiji Constitution: Theory and Practice, 1890-1913' (1991) 1 East Asian History 125.

[36] *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147 (HL)

[37] *Kesavananda Bharati v State of Kerala* AIR 1973 SC 1461

[38] *David Ndii v Attorney General*, High Court of Kenya, decision of 13 May 2021, available at https://www.afronomicslaw.org/sites/default/files/pdf/BBI%20Consolidated%20Judgment%20-%20Final%20Version%20-%20As%20Delivered.pdf

[39] On the Royalist contribution to the received understanding of the doctrine, see CC Weston, 'English Constitutional Doctrines from the Fifteenth Century to the Seventeenth: II. The Theory of Mixed Monarchy under Charles I and after' (1960) 75 The English Historical Review 426.

[40] *R (Jackson) v Attorney General* [2005] UKHL 56, [2006] 1 AC 262.

ations, could be judicially qualified or limited[41] is an example of precisely such a position. To Lord Steyn, whilst the UK's constitution has a canon, none of its precepts in that canon are beyond questioning, with the result that there is nothing in the constitution that can be said to constitute a core.

As Figure 1 illustrates, the process of theorisation places core, canon, and continuity in constant dialogue—and, occasionally, conflict—with each other. Not every case or other text that might have a claim to canonical status will fit with a given theorist's understanding of continuity, nor will it necessarily fit with that theorist's view of the core. The same is true of the facts that might have a claim to form part of a polity's constitutional continuity, and the precepts that might have a claim to form part of its constitutional core. In such a situation, the theorist faces the task of either resolving the seeming conflict, or altering their picture of the core, canon, or continuity by rejecting or reworking portions of them.

The history of constitutional theory and constitutional conflict provides several examples of this process of rejection, harmonisation, and resolution. The eighteenth-century Dutch debate between the Orangists and Patriots, for example, saw the Orangists reject the idea that political liberty formed part of the core of the Dutch constitution, because they saw it conflicting with the prosperous commercial society underpinned by civil (rather than political) liberty, which they saw as being at the heart of constitutional continuity in the Netherlands.[42] Similarly, the difference between the constitutional theories of Hozumi Yatsuka and Minobe Tatsukichi in pre-War Japan revolved at a fundamental level around the clash between core and continuity—and, in particular, whether the adoption of a new, Western-influenced constitution had created a new, and more liberal, core which limited the Emperor's powers (as Minobe argued), or whether (as Hozumi argued) even the most liberal provisions in the Constitution must be read subject to the deeper constitutional continuity represented by the traditional idea of the state as a family with the Emperor at its head.[43] An even starker example is provided by the support which many leading constitutional scholars in Turkey gave the military coup of 27 May 1960. The ousted government, they argued, had repeatedly violated the secular republican principles on which Ataturk's Turkey was founded. Given the constitution's inadequacy when it came to defending that core, the only solution was to sweep away both the government and the constitution, and put in their place a new set of arrangements. The 'canon' of the constitutional text could be rejected in defence of the deeper core represented by Ataturk's secular

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[41] ibid [102].

[42] Kluit (n 1) 104-108.

[43] Masuda (n 35) 135-138. For a somewhat unsympathetic but factually accurate discussion of Hozumi's position, see R Minear, *Japanese Tradition and Western Law: Emperor, State, and Law in The thought of Hozumi Yatsuka* (Harvard University Press 1970).

republican vision.[44]

These examples are historical, but the pattern also holds in relation to present day constitutional theory. Consider, for example, Lord Steyn's controversial statements on Parliamentary sovereignty in *Jackson*. Lord Steyn was, arguably, rejecting the idea that Parliamentary sovereignty constituted the core of the constitution precisely because he was unable to reconcile it with what he believed to be an important element that emerged from the canon, namely, the historical commitment of the judiciary to protecting the polity from arbitrary and despotic government. In effect, when faced with a clash between canon and core, his position led him to reject the orthodox account of the core rather than revise the canon.

To sum up: our purpose in this section has been to shed light on how constitutional theorists reach, and have epistemic confidence in, the position that their constitutional theories contain a more accurate description of constitutional facts than other competing theories. As we have shown, the process involves ascribing salience and significance to specific facts, and is shaped by the theorist's views on the constitution's continuities, canons, and core precepts. In the next section, we show that this process in turn is shaped by underlying predispositions stemming from how a theorist sees the polity in question, which cumulatively have a largely negative effect on constitutional theory.

III   A Methodology for Constitutional Theory

A   A Taxonomy of Constitutional World-Views

The argument in section II has demonstrated that the claim that one constitutional theory is superior to another cannot be defended with reference to which theory is the better fit with salient and significant facts: questions of salience and significance of constitutional facts are themselves a product of processes of constitutional world-making that are highly contingent. In a companion piece to the present chapter, co-written with Simon Halliday,[45] we proposed a taxonomy, derived from Mary Douglas's grid-group cultural theory, for exploring and classifying the different constitutional understandings of the task of judicial review in relation to administrative justice. In order to understand the divergent epistemologies underpinning constitutional world-views, we propose a similar scheme, based on the same two-dimensional classification.

Douglas terms her dimensions 'grid' and 'group'. The grid dimensions

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[44] 'The Principles identified by the Constitutional Commission', *Resmi Gazete*, 1 July 1960, 1636 (Part I); 2 July 1960, 1644 (Part II); translation on file with the authors.

[45] TT Arvind, S Halliday, and L Stirton, 'Judicial Review and Administrative Justice' in J Tomlinson and others (eds), *The Oxford Handbook of Administrative Justice* (Oxford University Press 2021)

represents the spectrum between transactions mediated by rigid institutional classification and those where structure is minimal.[46] This presents an obvious analogy with the formal/substantive distinction familiar to constitutional theory. Formalist understandings of the constitution emphasise the authority and legal competence of constitutional actors to exercise particular powers on particular grounds, even where that comes 'at the expense of justice or wise policy or efficiency in the individual case.'[47] A substantivist approach in contrast accords less priority to structure, and more to the achievement of fundamental social values, or desirable outcomes.[48]

The group dimension, which represents the extent to which an individual is incorporated into a group, can similarly be interpreted in terms of the extent to which the constitution defines and embraces—and indeed imposes— broadly accepted social goals. This dimension is captured in Banakar and Travers' distinction between 'conflict' and 'consensus' prespectives on society[49]—though we prefer to use the terms 'discord' and concord', to capture the distinction between a polity characterised by 'conflict, bargaining and agreement'[50] and one united by a conception of the common good sustained and realised through the constitutional order. Combining the two dimensions, we can identify four distinct ways of seeing constitutions, illustrated in Figure 2. These are discussed in subsections (B)–(E) below.

B   The constitution as a shield

The lower left taxon sees the constitution as a shield to protect individuals against aggression by others and against intrusions by the state. This image of the constitution is exemplified by the seventeenth century English constitutional theorist, John Locke, who understood Government as being brought into being by the constitution, '. . . for the Preservation of every Mans Right and Property, by preserving him from the Violence or Injury of others. . . '.[51] Locke's account of Government as emerging from the consent of the people to form a commonwealth for the better protection of their rights has influenced libertarian readings of the US Constitution. Randy Barnett, for

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[46] M Douglas, *Risk and Blame: Essays in Cultural Theory* (Routledge 1992) 106.

[47] F Schauer, *Thinking Like a Lawyer: A New Introduction to Legal Reasoning* (Harvard University Press 2009) 35

[48] *cf* the contrast between Allan's account of the principle of the rule of law at TRS Allan, *The sovereignty of law: freedom, constitution, and common law* (Oxford University Press 2013) 12 and Dicey's emphasis on the limits on the powers of government.

[49] R Banakar and M Travers, 'Introduction' in *Law and social theory* (Hart Publishing 2014).

[50] R Dahl, 'Decision-making in a democracy: the Supreme Court as a national policy-maker' (1957) 6 Journal of Public Law 279, 294.

[51] J Locke, 'First Treatise' in P Laslett (ed), *Two Treatises on Government* (first published 1689, Cambridge Texts in the History of Political Thought, Cambridge University Press 1960), §92.
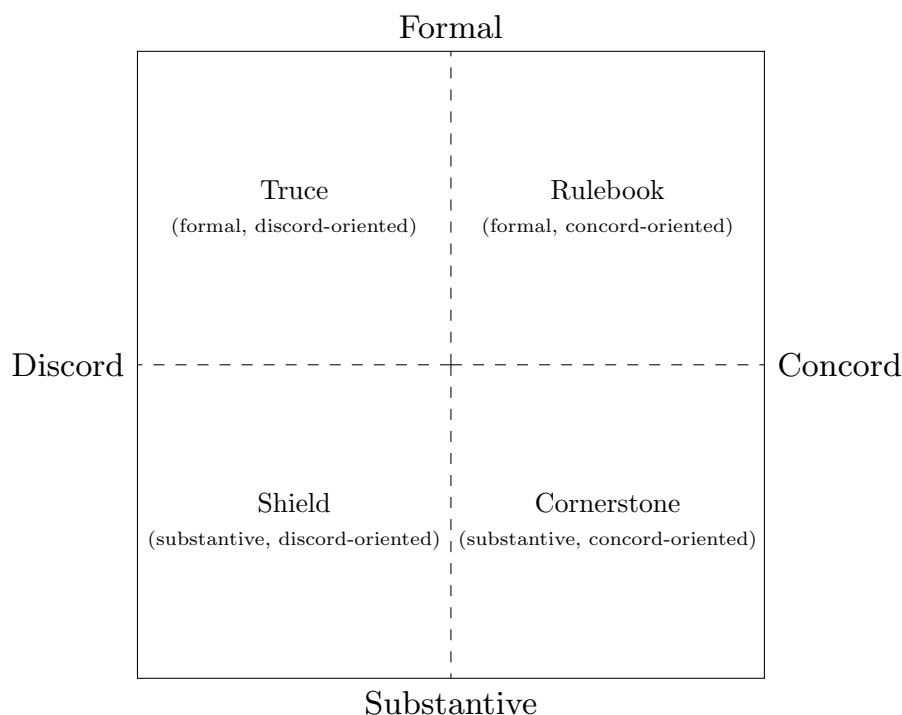
Formal

Truce
(formal, discord-oriented)

Rulebook
(formal, concord-oriented)

Discord

Concord

Shield
(substantive, discord-oriented)

Cornerstone
(substantive, concord-oriented)

Substantive

Fig. 2: Four ways of seeing constitutions

example, has offered a modern, Lockean reading of the US constitution.[52]

The conception of the constitution as a shield influences both the manner in which continuity with the past is read, and the manner in which the implications of the canon are selected. Janet Ajzenstat, for example, has argued that the fathers of Canada's Confederation set about to create a civic government based on the actual consent of the people—people who unsurprisingly held different views on such issues as the extent of collective provision of welfare, civil liberties versus national security, and many other issues.[53] She reads the debates on Confederation in the colonial assemblies as demonstrating that a real concern at the time was how such consent could meaningfully given—whether the assent of the assemblies was sufficient, or whether it required the assent of the people directly, through a plebiscite for example. TRS Allan, for his part, draws on the image of the constitution as a shield to frame the central problem of public law as that of '...devising means for the protection and enhancement of individual human rights in a

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[52] RE Barnett, *Restoring the Lost Constitution: The Presumption of Liberty - Updated Edition* (Princeton University Press 2013)

[53] J Ajzenstat, *Canadian Founding: John Locke and Parliament* (McGill-Queen's Studies in the History of Ideas, McGill-Queen's University Press 2007).

manner consistent with the democratic basis of our institutions.'[54]

Here, the constitution's ability to provide an assurance that natural rights are not violated takes the place of consent as providing the constitutional order's core, thus combining a substantive conception of the law with a propensity to assign significance to facts depicting society as a field of discord. The link between rights-based approaches and a discord perspective on society is well captured by the claim of Sir John Laws that 'the language of rights is not the language of morality but of conflict.'[55] Because this tradition sees conflicts inevitably arise between the respective goals, plans, visions and values held by different persons, as well as between these and the collective interests of the polity, its measure of the worth of the constitution is its ability to secure an appropriately defined autonomous sphere in which individuals can pursue their goals, plans, visions and values. The proper role of the constitution is preventing governments from pursuing an expansive conception of the common good where doing so would intrude into this protected sphere. Questions of institutional form are not ignored, but they take second place to questions of substance. The constitutional rulebook's significance is only as a means to the end of upholding the principles that constitute the tradition's core. Locke's argument that the legislative power should be vested at least in part in an elected assembly, for example, was not based on a belief that the endorsement of the peoples' representatives was sufficient to imbue any positive enactment with the requisite authority. Rather, Locke believed that if the approval of such a body were required for passing legislation or levying taxes, these would be no more oppressive nor restrictive of liberty than that which was necessary to the proper, limited purpose of government. The process of deliberation and assent, in other words, mattered because it made it more likely that the resulting laws would respect the rights of persons.

C   The constitution as the cornerstone of social and political life

Remaining at the substantive end of the vertical axis, but moving towards concord brings us to the image of the constitution as a cornerstone of social and political life. This image differs from the understanding of the constitution as a shield in that it allows for a fuller conception of the public good, and hence of a sense of purpose for the polity—a sense of purpose which it is the function of the constitution to nourish and sustain. The image of the constitution as a cornerstone comes from the subtitle of Granville Austin's account of the founding of India's constitution: 'the cornerstone of a nation.' The combination in this perspective of a substantive interpretation of constitutional law with a concordant, even purposive view of the polity, is

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[54] TRS Allan, 'Legislative supremacy and the rule of law: democracy and constitutionalism' (1986) 44(1) Cambridge Law Journal 111.

[55] J Laws, 'The Constitution: Morals and Rights' [1996] (Winter) Public Law 622, 626.

seen in Austin's account of the purposes of the constitution as understood by members of the constituent assembly:

> The Constitution was to foster the achievement of many goals. Transcendent among them was that of social revolution. Through this revolution would be fulfilled the basic needs of the common man, and, it was hoped, this revolution would bring about fundamental changes in the structure of Indian society—a society with a long and glorious cultural tradition, but greatly in need, Assembly members believed, of a powerful infusion of energy and rationalism.[56]

This illustrates a number of paradigmatic features of the lower left taxon. First, what is being constituted (or more accurately, re-constituted) is not just India's government, but India's society and polity, which was to be infused with a sense of purpose. The founders were effecting a social revolution with a number of objectives: national unity and domestic stability, which Austin tells us, were 'considered necessary prerequisites for a social renascence'[57], the protection of minority interests, an efficient government and administration, the protection of national security, together with institutions to achieve them.[58]

If Locke is the exemplar of a seventeenth century theorist of the constitution as a shield, then Thomas Paine writing a century later illustrates the image of the constitution as a cornerstone. For Paine, the purposes of government extended beyond the preservation of order. In *Agrarian Justice* Paine emerges as an advocate of a rudimentary basic income provided by the commonwealth. In his introduction to Paine's *Political Writings*, Kuklick attributes the ease with which Paine combined the defence of liberty with the good of the polity to his Quaker roots: 'in Quaker doctrine there was a concern not only for individual conscience also for the commuity of Friends.'[59]

A number of consequences follow from the expanded space for the public interest that this bottom right understanding allows, compared with the lower-left taxon. Instead of thinking wholly in terms of protection against rights violation, attention turns towards ensuring that the proper identification of the common interest. Much of *the Rights of Man, Part I* is taken up with a favourable contrast between the French Revolutionary Constitution of 1791 and the English constitution—which Paine thought was no constitution at all, 'a thing in name only.' Crucially the points of comparison

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[56] G Austin, *The Indian constitution: Cornerstone of a Nation* (Clarendon Press 1966) xi.

[57] ibid, xi.

[58] ibid, xi.

[59] B Kuklick, 'Introduction' in *Thomas Paine, Political Writings* (Revised edition, Cambridge University Press 2000) xviii.

are overwhelmingly concerned with political rather than civil rights, that is, with creating the means by which the governed community established its its common purposes: the franchise, the allocation of seats to the Assembly, frequency of elections, and measures to limit corruption of elected representatives. The exceptions are prohibitions on game laws and monopolies, but even these can be seen as establishing a claim by members of the community on the common resources of the community. The emphasis on corruption and the degeneracy of putting private gain ahead of common wealth is significant. Just as despotism—the subjugation of individual rights to the will of the rules—is the primary pathology of government from the point of view of the 'shield' tradition, from the perspective of the cornerstone tradition it is the tendency of government and members of the society to degenerate into the advancement of narrow self-interest rather than the pursuit of the interests of the polity.

D   The constitution as a rulebook

The last two conceptions of the constitution move from the substantive to the formal. In the context of constitutional theory, this leads their accounts of the constitution to emphasise traditional, formal conceptions of institutions, and place in the foreground institutionally oriented ideas such as sovereignty rather than the more free-standing principles that are the primary focus of the two substantively-oriented conceptions. If theories at the substantive end of the scale outlined in Figure 2 can be described as engaged in a search for principle, then theories at the formal end of that scale can be described as engaged in a search for the loci of sovereign authority.

In the upper right quadrant, the focus on institutions combines with a concord-oriented view of the polity to produce a conception of the constitution as a rulebook for the institutions of state. Although such a conception does not deny the existence of the principles that are the focus of the 'shield' and 'cornerstone' conceptions, it tends to subordinate principle to institutions and to read core, canon, and continuity in a manner that emphasises the institutions themselves rather than the principles they embodied at any point of time. Constitutional theory, accordingly, does not simply ask what principles might best resolve a given issue, but which institution is constitutionally tasked with identifying, formulating, and applying the principles that should be used to resolve that issue.

The practical consequences of viewing a constitution in these terms are illustrated by the recent jurisprudence of the US Supreme Court on voting rights. In *Rucho v Common Cause*,[60] which concerned partisan gerrymandering, the court did not deny that the redistricting plan at issue was 'highly

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[60] *Rucho v Common Cause* (2019) 139 SCt 2484 (US Supreme Court).

partisan',[61] or that it was 'incompatible with democratic principles.'[62] The focus of its analysis, however, was on whether responsibility for dealing with the constitutional challenge posed by partisan gerrymandering lay with the courts, and it held that it did not. In institutional terms, it was to the state legislatures, checked and balanced by the federal legislature, that the issue was assigned.[63] Notwithstanding the importance of the principle at stake, in terms of actual constitutionalism the question was who was tasked with upholding it.

The idea of the constitution as a rulebook underpins a significant portion of modern constitutional theory, including virtually all of what is termed 'political constitutionalism'. As the example of *Rucho* shows, its focus on the loci of institutional authority gives it a propensity to leave important social issues unaddressed if the relevant institution is unwilling or unable to act, and it is this propensity that has formed the basis of the most strident criticisms of it by 'shield' and 'cornerstone' theorists.[64] From a conception-internal perspective, however, this subordination reflects the fact that 'concord' is not an organic phenomenon in an institutionally oriented conception. The inherent state of a polity is one of disagreement, not agreement.[65] It is only through institutions—and particularly more open-ended political institutions—that we can carve out islands of concord in the polity, making the 'painful compromises' that are essential a stable and successful polity.[66] 'Politics is the medium of concilliation',[67] and institutions are necessary to make an attained concord workable. As the Jamaican leader Norman Manley put it, the best-written constitution in the world would be of little avail without institutions animated by a democratic spirit, of the type which he held Jamaica to have 'built up and preserved over the years.'[68]

The political philosophy underpinning this constitutional worldview is instantiated by Hobbes' famous image of Leviathan as the body composite of all members of the polity, and similar ideas are seen in constitutional theories around the world. The Indian constitution, for example, is typically seen as a cornerstone, as section III(C) has discussed. But at the time of its framing, leading jurists such as B.R. Ambedkar, who chaired the committee

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[61] ibid 2491.

[62] ibid 2512.

[63] ibid 2496.

[64] See e.g. the dismissive comments on 'the slightly absurd game of "hunt ultimate sovereign"' in N Barry, 'Soveeignty, the Rule of Recognition, and Constitutional Stability in Britain' (1994) 2(1) Hume Papers on Public Policy 10, 15.

[65] J Waldron, *Law and Disagreement* (Oxford University Press 1999) 1.

[66] C Forsyth, 'Showing the fly the way out of the flybottle: The value of formalism and conceptual reasoning in Administrative Law' (2007) 66(2) Cambridge Law Journal 325, 336.

[67] Tomkins, 'In Defence of the Political Constitution' (n 11) 174.

[68] NW Manley, 'The Independence Constitution' in R Nettleford (ed), *Norman Washington Manley and the new Jamaica: Selected speeches and writings, 1938–68* (Africana Publishing Corp 1971) 310

that drafted it, saw it far more as an institutional rulebook. To Ambedkar, the constitution's core lay in its creation of strong centralised governmental institutions that could develop a consensus around the post-independence social revolution's intervention in long-established social structures and practices.[69] The constitution's social provisions, seen by many modern theorists as clearevidence of its place as a cornerstone,[70] was to Ambedkar simply part of the rulebook, akin to the Instruments of Instructions that were an important part of colonial administrative practice.[71]

This does not mean these theories have no role for courts. The courts, too, have the capacity to provide a field on which individuals can articulate 'the democratic demand of the citizen to be heard'.[72] Constitutional rights can also have a place in a rulebook theory, as the debate on drafting Jamaica's constitution indicates. In his speech to Jamaica's Legislative Council on the proposed constitution, Manley endorsed the incorporation of a Charter of Fundamental Rights and Liberties, but not for the reasons that would be offered in a shield-based theory. The Charter, Manley said, would guide a well-meaning government as a framework within which it could work and outside which it must not stray. Equally, however, it was essential that such rules should not limit government discretion inappropriately. 'If you are not careful,' Manley added, 'you may write yourself out of the right to do many things that are good and useful to the community.'[73]

In consequence, the role of courts and rights is also circumscribed by the constitutional rulebook, and a court that exceeds those bounds acts unconstitutionally, no matter how pressing the issue. The nature of the positions to which this leads becomes clear if we compare the positions on *Miller (No. 2)* taken by Paul Craig and John Finnis. Craig was writing from a perspective emphasising principles over institutions and discord over concord. Discord can affect institutions just as it can affect individuals; and if the constitution is a shield then sometimes that shield will need to also protect Parliament against an intransigent executive in times of discord. Indeed, to fail to so extend the shield calls into questions the principles that are the core of the constitutional order.[74] To Finnis, in contrast, the constitution is a rulebook, and to read down a distinction between 'law' and 'convention' that the rulebook formerly accepted is to severely disrupt the

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[69] BR Ambedkar, *Federation versus Freedom* (Gokhale Institute 1939).

[70] See e.g. T Khaitan, 'Directive principles and the expressive accommodation of ideological dissenters' (2018) 16(2) International Journal of Constitutional Law 389.

[71] See his speech to the Constituent Assembly introducing the draft constitution, *Constituent Assembly Debates*, Vol VII, 4th November 1948, 7.48.241–244.

[72] DAO Edward, 'The Role of Law in the Rule of Law' (1994) 2(1) Hume Papers on Public Policy 10.

[73] Manley (n 68) 304-5.

[74] PP Craig, 'The Supreme Court, Prorogation and Constitutional Principle' [2020] Public Law 248.

institutional configuration that is the core of the constitutional order.[75]

E   The constitution as a truce

The last category sees the constitution as a social and political truce between factions with significantly different levels of economic and/or political power. It shares with rulebook theories an emphasis on institutions but, unlike that view, is pessimistic about the ability of institutions to produce concord; and unlike theories that treat constitutions as akin to shields, it is also sceptical about the existence of principles capable of commanding sufficient assent to protect zones of personal autonomy. It is the state's task to stop tensions building up 'potential towards explosion',[76] and there are few effective constraints on it when it acts.

Carl Schmitt's theory instantiates this understanding. Schmitt used the repeated constitutional crises of the Weimar state to argue that it was the power of the sovereign—made manifest in the ability to invoke a state of exception and quell internal enemies—that constitutes the bulwark against discord threatening the political community.[77] Other constitutional theories seeking to justify autocratic government similarly build on this conception. Tsuzuki Keiroku's controversial writings on the Meiji constitution, for example, took the view that the national interest must take precedence over public opinion. It was the right and the duty of the Imperial bureaucracy, in discharge of their responsibility to the Emperor, to reject the legislature's views if they conflicted with the national interest. If the legislature persisted in its view, the appropriate course of action was 'as many successive dissolutions of the Diet as necessary' until it accepted the bureaucracy's position.[78] Likewise, in his critical study of West African constitutional systems after decolonisation, W. Arthur Lewis argued that political leaders such as Sekou Touré and Nkrumah, who believed their societies to be afflicted by tribal and ethnic antagonisms which menaced the unity of the state, had embraced totalitarian single-party rule as the only route to containing and overcoming these antagonisms and preventing the polity's disintegration.[79]

Quite apart from the insight it gives us into the constitutional underpinnings of autocratic states—an issue rarely discussed in mainstream con-

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[75] J Finnis, 'The Unconstitutionality of the Supreme Court's Prorogation Judgment' (*University of Oxford Research Paper 6/2020*, 2020) ⟨http://ssrn.com/abstract=3548657⟩ accessed 1 July 2021.

[76] K Llewellyn, 'The normative, the legal, and the law-jobs: The problem of juristic method' (1940) 49(8) Yale Law Journal 1355, 1375-1376.

[77] AJ Jacobson and B Schlink (eds), *Weimar: A Jurisprudence of Crisis* (University of California Press 2000) provides an excellent overview of the broader intellectual context of Weimar constitutional theory and of Schmitt's place within it.

[78] J Banno, *The establishment of the Japanese constitutional system* (JAA Stockwin tr, Routledge 1992) 31-38.

[79] WA Lewis, *Politics in West Africa* (Oxford Univeristy Press 1965) 50–2.

stitutional theory—this conception also sheds light on a neglected dimension of constitutional theory. The idea that the stability of a polity hinges on 'painful compromises' is never far from the surface even in mainstream constitutional theories; and while constitutional theorists rarely endorse this conception's institutional prescriptions, they do nevertheless draw on the diagnostic resources it provides while looking elsewhere for solutions.[80] Lewis himself instantiates this. Although he accepted that West African societies were characterised by mutual antagonism, strongman rule only created a 'fascist state'[81] without resolving the antagonism—unlike well-designed pluralist institutions. As he put it, '. . . in the inflamed atmosphere of the plural society, the unspectacular Prime Minister, who shuffles along, but somehow manages to keep things going on an even keel, may build a permanent community, where the strong man may leave only fragments behind.'[82]

The imagery of confrontation and barely stable compromise also underpins the recent critical literature on the South African constitution, arguing that the constitution represents an unsatisfactory attempt to paper over significant and growing differences between the different sides who negotiated the post-Apartheid settlement,[83] but cannot meet the aspirations of the black majority without adopting an expressly anti-colonial perspective.[84] Perhaps more strikingly, it was precisely this imagery that underpinned the justification of the Turkish military coup of 27 May 1960 by constitutional scholars: the ousted government had turned the state from 'a social power dependant on the law' to 'an autocratic power that represents the interests of a group.' The discord it had sowed placed an obligation on the army to 'reestablish the organizations of the state... and legitimate government.'[85] In a truce conception, a group that holds itself unjustly marginalised by a constitutional order will also hold itself justified in rejecting that order 'in the name of an alternative and deeper legal and moral foundation.'[86] That the real world bears this out suggests there is reason to take the truce conception's claims seriously.

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[80] *cf* Murray's argument that the social rights in the Irish, German, and Mexican constitutions were motivated by the elites' fear of social revolution: T Murray, 'Socio-Economic Rights Versus Social Revolution? Constitution Making in Germany, Mexico and Ireland, 1917-1923' (2015) 24(4) Social and Legal Studies 487.

[81] Lewis to Keenleyside, quoted in RL Tignor, *W. Arthur Lewis and the Birth of Development Economics* (Princeton University Press 2006) 172.

[82] Lewis (n 79) 80.

[83] P du Toit, C Swart, and S Teuteberg, *South Africa and the Case for Renegotiating the Peace* (SUN Press 2016).

[84] T Madlingozi, 'Social justice in a time of neo-apartheid constitutionalism: Critiquing the anti-black economy of recognition, incorporation and distribution' [2017] Stellenbosch Law Review 123.

[85] 'Principles identified by the Constitutional Commission' (n 44).

[86] S Halliday and B Morgan, 'I Fought the Law and the Law Won? Legal Consciousness and the Critical Imagination' (2013) 66 Current Legal Problems 1, 18-19.

IV   Heuristics and the limits of rhetoric

The discussion thus far has sought to outline the implicit methodology of constitutional theory and critically examine its strengths and weaknesses. We have shown that constitutional theory has an ingrained tendency to lapse into what Hirschman evocatively termed 'rhetorics of intransigence', whose orientation towards formulating and honing arguments exacerbates rather than ameliorates the challenges and divides that characterise modern constitutional law.[87]   In this final section, we offer a deeper diagnosis of why constitutional theory has a propensity to so lapse and suggest how the analysis set out in this chapter points to a possible path out of this intransigence.

A   Understanding the impasse

As section II discussed, constitutional theory differs from many other forms of theory in that it seeks not just to understand the past or present, but also to shape the future. In most areas of theory, it is possible to draw a clear distinction between descriptive or analytical theory, on the one hand, and normative theory on the other. An astrophysicist describing the nature of black holes, for example, is not thereby seeking to influence black holes to behave in the manner the theory describes. Similarly, an anthropologist describing the nature of a society is not doing so to persuade that society to reshape itself so it better fits with the description.

Constitutional theory is different.[88]   Constitutional theorists seek not just to describe facts, but also to create facts. In formulating a theory of a constitution, a theorist is not just describing the existing constitutional order, but also seeking to provide a framework that can integrate new developments into the constitutional order and chart a path for that constitutional order in a still-unfolding future. This is not, and cannot be, a simple matter of describing and analysing facts. It is inherently concerned with making new facts, and it inherently straddles the boundary between analytical and normative theory. A constitutional theorist outlining a theory of the relationship between different governing institutions is—in sharp contrast to an astrophysicist or anthropologist—seeking precisely to persuade the institutions to behave in the manner the theory suggests.

This means that in law, unlike in most other disciplines, the continued existence and future states of an institutional fact cannot be separated from belief in their continued existence and expectations of their future state.[89]

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[87] See AO Hirschman, *The Rhetoric of Reaction: Perversity, Futility, Jeopardy* (Belknap Press 1991) 168.

[88] Although we focus on constitutional theory in this section, the points we make here also apply to legal theory more generally.

[89] *cf* the discussion in A Ross, *On Law and Justice* (U Bindreiter tr, Oxford University Press 2019) 58-63. Note that the repeated references to 'legal politics' in the English

Legal theories deal not just with *present* facts but also with *future* facts, and they do so in a context in which whether or not a particular future fact eventuates depends in significant part on a theory's success in influencing institutional behaviour. It is this that gives the predilections discussed in section III so much bite. The epistemic confidence that constitutional theories place in the validity of the factual underpinnings of their theories is not justifiable because that confidence is inextricably linked to the future facts the theory seeks to produce, and the types of future facts to which constitutional theory relates are necessarily of a type whose eventuation is so tenuous that one cannot achieve a justifiable belief that they will come to pass.[90]

Constitutional theorists have not, of course, been inattentive to this point, but the solutions they have suggested have only served to exacerbate the problem. TRS Allan, for example, has sought to avoid the epistemic trap we have outlined above by suggesting that constitutional theorists are doing no more than:

> reporting our own opinion, based on a view of constitutional practice that we find defensible—an account of our practice that shows how legal doctrine furthers the moral and political values that a good constitution ought to serve.[91]

There is an obvious allure to this way of framing the difficulty, but it is equally precisely the acceptance of this approach that has led to debates within constitutional theory assuming the form of mere rhetorical clashes between different styles of public law thought.[92] If the starting point is that *this* account furthers the moral and political values that any good constitution would, then it follows that other accounts do not and, for that reason, must be rejected. Constitutional debate, thus, becomes an effort to slay the 'misshapen monsters', as Kluit termed them, created by competing theories.

There is a strong parallel between the current state of constitutional theory and the problem of rhetorics of intransigence which was the focus of Hirschman's work. Hirschman was motivated, as we are, by a concern

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edition are the result of a mistranslation. Danish does not distinguish between 'policy' and 'politics' (both are '*politik*'), and in the overwhelming majority of cases Ross meant the former rather than the latter.

[90] This is why, as we see it, one cannot judge between constitutional theories on the basis of which provides the best fit, or for that matter the best moral justification for a constitutional practice. Judgements about the relevant practices themselves are baked into the selection of facts and practices that demand explanation, and which don't. For a sophisticated argument to the contrary see S. Lakin, 'Why Common Law Constitutionalism is Correct (If It Is)', chapter XX in this volume.

[91] Allan, *Sovereignty of law* (n 48) 19.

[92] Loughlin (n 8) 62.

that public discourse had come to be ever more characterised by an impasse in which opposing schools repeatedly deployed the same rhetorical tools against each other.[93] Positions were advanced on the basis that they were necessary to avoid adverse consequences,[94] and they were opposed on the basis that they would bring adverse consequences[95] or jeopardise well-functioning institutions that had stood the test of time.[96] Alternatively, they were advanced on the basis that they 'fit' with the existing political order[97] and with the general trend of historical development,[98] but were opposed on the basis that they sought to change characteristics that were so deeply entrenched in the social order that any attempt to change them was bound to fail.[99] Hirschman argued that unless public discourse moved beyond these positions, it would descend into a 'dialogue of the deaf' that was far from friendly to the type of open-minded opinion-forming processes on which liberal democracy depends.[100]

B   From rhetoric to heuristics: towards a resolution

How, then, can we overcome this impasse? The answer lies in acknowledging that the epistemic confidence we can place in any single account of the constitution is necessarily limited. Rather than approaching constitutional theory from a starting point which holds that there is always one account of constitutional practices that is superior to its competitors, one should approach the area with the appreciation that no theoretical position in constitutional law does justice to the variety and diversity of the body of social facts from which constitutional theories are drawn.[101] The construction of a theory is a process not just of expanding our constitutional world by reading deeper significance into constitutional practices, but also of shrinking and reducing our constitutional world by winnowing out social facts to which one refuses to attach constitutional significance—a process that as discussed in section III is fundamentally shaped by the theorist's pre-existing worldview in relation to where the balance of significance lies as

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[93] Hirschman (n 87) 167–170.

[94] ibid, 152–153.

[95] ibid, 11–42.

[96] ibid, 81–132.

[97] ibid, 149–151.

[98] ibid, 154–159.

[99] ibid, 43–80.

[100] ibid, 168–170.

[101] In this regard, we are in partial agreement and partial disagreement with Sarah Nason's contribution, S Nason, 'Methodological Pluralism and Modern Administrative Law', chapter XX in this volume. As should be apparent from Arvind, Halliday, and Stirton (n 45), we agree that administrative law must be understood in pluralist and empirically grounded terms if it is to successfully solve the problems to which it is addressed, but as outlined in this chapter, we believe that a heuristic constitutional theory will show precisely such a problem-solving orientation.

between the institutional and the principled, and the civil and the solidary.

A constitutional theorist, in consequence, is operating not nearly so much like a theorist of the natural or social world as like an editor preparing a recension of a text attested in multiple fragments or in competing versions. Recensions are versions of a work produced by a process of critical revision,[102] and represent an attempt to reconstruct an archetype, or best recoverable form, of a text from the available evidence of the contents of that text.[103] An editor preparing a recension of a text works on the basis of a wide body of evidence as to its content: manuscripts and early printed evidence, but also translations and quotes in other text. Crucially, and precisely like constitutional theorists, an editor preparing a recension must not just use sources providing evidence of the best recoverable form, but also reject the evidence of sources that contradict the reconstructed reading; and will typically do so based on a pre-existing view as to the nature of the text and its contents.

This process is strikingly similar to the manner in which Allan, in the work quoted above, describes constitutional theorists exercising judgement and forming opinions to construct and advance the reading of the constitution they hold to be the most defensible.[104] The difficulty with relying on a recension-like methodology in constitutional theory, however, lies in the wider implications of constitutional theory. As we have argued above, constitutional theories—unlike recensions of texts—are produced not simply for their own sake, but to exercise influence over how a given polity conducts public affairs. Shrinking a constitutional world by rejecting a particular social fact from it is, therefore, not simply a matter of judgement. It seeks to eliminate or close off the possibility of particular forms of institutional action, or of priority being accorded to particular types of principles. Theories typically justify this with reference to the risks and downsides which those types of institutional action or principles carry, but a shrinking of the constitutional world also inevitably entails tradeoffs carrying their own risks and dangers, the likelihood of whose eventuation will never be known with certitude.[105]

The solution to the difficulty this poses, we suggest, lies in moving towards a more heuristic conception of constitutional theory. The terminology of 'heuristics' requires a word of explanation. There is a significant strand of literature in legal theory that views heuristics with suspicion, seeing it as having a propensity to lead to systematic error in factual and normative

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[102] C Baldick, *The Oxford Dictionary of Literary Terms* (3rd, Oxford University Press 2015) 304.

[103] P Beal, *A dictionary of English manuscript terminology, 1450-2000* (Oxford University Press 2008) 333.

[104] Allan, *Sovereignty of law* (n 48) 19.

[105] *cf* the very similar points made in Hirschman (n 87) 168–170.

judgements.[106] Heuristics, however, has two distinct aspects.[107] The focus of legal scholarship has largely been on only one of these aspects, namely, the use of mental shortcuts as a rapid way of answering challenging questions. Heuristics in this sense is closely associated with biases, and it is unsurprising that legal theory has been critical of it. The other aspect of heuristics is different. Here, heuristics are used because reflects the problem itself is intractable or poorly defined, and not merely to find a simple shortcut to make decisions that could also have been made in more optimal ways. A classic example is an environment characterised by multiple needs, drives, and goals that must be balanced, the relationship between which, and the content of each of which, is far from certain.[108] In a situation like this, characterised not just by incommensurability of goals but also by uncertainty as to the extent and loci of the incommensurability, there is no non-heuristic way of resolving the problem.[109]

In his work on styles of public administration, Christopher Hood provides an elaboration of the difference between heuristic and non-heuristic conceptions of theoretical work, which also applies to constitutional theory.[110] Non-heuristic approaches to constitutional theory take their starting point in the social pre-commitments they believe to be embedded in a particular constitutional order. The theorist's task is to elaborate on those pre-commitments, analyse their implications for the type of outcomes that should be promoted in the conduct of public affairs, identify situations where those outcomes are not in fact being promoted, and put forward suggestions for how the conduct of public affairs might be altered to promote those outcomes. It is this pattern that constitutional theory as conventionally done follows. A heuristic approach, in contrast, takes a very different starting point. Even if there is agreement that the constitution does in fact embed certain pre-commitments, there is uncertainty about what those commitments are, what their practical implications are in a given situation, and how one resolves a situation in which multiple competing commitments pull the conduct of public affairs in different directions. This, it should be stressed, is not because the heuristic conception sees polities as necessary

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[106] See e.g. CR Sunstein, 'Hazardous heuristics' (2003) 70(2) University of Chicago Law Review 751; CR Sunstein, 'Moral heuristics' (2005) 28(4) Behavioral and Brain Sciences 531.

[107] For a fuller discussion, see C Engel and G Gigerenzer, 'Law and heuristics: An interdisciplinary venture' in C Engel and G Gigerenzer (eds), *Heuristics and the law* (MIT Press 2006).

[108] HA Simon, 'Rational choice and the structure of the environment' (1956) 63(2) Psychological Review 129.

[109] There are obvious parallels between our discussion of heuristics and the concept of improvised order in D Howarth, 'The British Constitution as Improvised Order', chapter XX this volume.

[110] C Hood, 'When extremes meet: "Sprat" versus "Shark" in Public Risk Management' in C Hood and DKC Jones (eds), *Accident and Design: Contemporary Debates on Risk Management* (Routledge 1996).

located on the discord end of the spectrum. Rather, it is because of the epistemic limitations of non-heuristic approaches to constitutional theory discussed in sections II and III: the reductionism that is necessarily and always embedded in them, the impossibility of having epistemic confidence in the judgements on which that reductionism is based, and the shaping role played by theoretical predispositions in producing them. Constitutional heuristics, in consequence, is willing to modify initially held opinions in light of new evidence, and tends away from the all-or-nothing outcomes to which the current structure of constitutional debate leads.[111]

A heuristic approach to constitutional theory will differ methodologically from current constitutional theory in two ways. Firstly, heuristics require theorists to be conscious of the predispositions that underpin their engagement with social facts—of where, in other words, they situate themselves on the spectrum between focusing on principles and focusing on institutions, and assuming civil existence or assuming solidary existence. They need, equally, to be conscious of the resulting predispositions in relation to what they expect to see in the material, and the risks and tradeoffs inherent in the form of constitutional reductionism they favour. A heuristic approach is, accordingly, willing to countenance messiness, and to explore and accept forms of constitutional action that sit uneasily with its theoretical predispositions but nevertheless provide workable solutions to constitutional problems. Its focus is on the type of facts the theorist seeks to create, and the present and future social needs to which those facts seek to respond, rather than on cohering strictly to a tightly defined set of philosophical positions. In engaging with doctrine and practice its focus is not simply on how we might justify those doctrines or practices but, rather, on the work they do or can be made to do to meet present and future social needs.

Secondly, and flowing from the first, a more heuristic constitutional theory also approaches sources differently. Where a non-heuristic approach uses and relies on Kuhnian exemplars—ideal-typical scenarios that showcase the normative power of the theory—a heuristic approach focuses on examples—empirically-grounded scenarios that instantiate and illustrate challenging questions facing constitutional theory, and which frequently sit uneasily with the more simplistic scenarios that exemplars represent. In consequence, its primary task is neither a search for a sovereign nor a search for principle, but a search for experience. As Arun Thiruvengadam has persuasively shown in his study of South Asian constitutionalism, constitutional courts regularly draw on and constructively use sources from other jurisdictions in a manner that sustains and furthers their constitutional tradition, and better equips it to meet emerging social needs.[112]

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[111] Hirschman (n 87) 168–170.

[112] AK Thiruvengadam, 'In Pursuit of "the Common Illumination of Our House": Trans-Judicial Influence and the Origins of PIL Jurisprudence in South Asia' (2008) 2 Indian Journal of Constitutional Law 67. There is a strong parallel between the phenomena

This type of socially responsive and epistemically open engagement with, and willing to draw on, a diverse range of sources is characteristic of a heuristic approach. Legal and political philosophy still has a role in this process, but as a source of solutions we can borrow, or of problem-definitions we can use to gain greater insight into the competing policy considerations in an area, rather than the normative touchstones and sources of legitimacy they tend to be in non-heuristic approaches. It is this that perhaps constitutes the bigger break with the manner in which constitutional theory is done today but, as we have sought to show in this chapter, it as a break that is necessary if constitutional theory is to be able to move beyond the impasse to which it has been led.

V   Conclusions

In this chapter, we have argued for a shift in the way we think about and do constitutional theory. Theories, as we have sought to show, are built on an implicit methodology of selecting and ascribing constitutional significance to facts, and memorialising, sacralising, and elevating them to a continuity, core, and canon. These are in turn shaped by predispositions which depend, firstly, on whether a theorist sees the essence of a polity's constitutional arrangements as lying in a set of principles or in a configuration of institutions; and secondly, on whether they see the primary thrust of those arrangements as lying in working to shape concord or general agreement within the polity, or to manage the discord that will necessarily characterise any polity where interests and expectations conflict. We have also proposed an analytical scheme, drawing on the institutional theories of Mary Douglas, to better study and model the way in which these predispositions influence constitutional theory. While other analytical schemes exist, such as Loughlin's contrast of normativism and functionalism, we believe that the scheme we propose has a number of advantages over existing approaches. Douglas describes her approach to culture as one of 'social-accounting', which, 'selects out of the total cultural field those beliefs and values which are derivable as justifications for action' and which constitute an 'implicit cosmology.'[113] Analysing these 'thought styles', as she terms them, enables us not just to classify theories within a scheme, but also to identify the relationship between justificatory accounts and their implied world-views. Such a focus is one that is particularly necessary in the context of constitutional theory, where little if any consideration has been given to the complex relationship between account-giving, reasons, and beliefs that underpins disagreements

Thiruvegadam discusses and those that underpinned Alan Watson's theory of legal transplants. See A Watson, *Legal Transplants: An Approach to Comparative Law* (2nd, University of Georgia Press 1993).

[113] M Douglas, 'Cultural Bias' in *In The Active Voice* (Routledge revivals, Routledge 2011) 190.

about how to read a particular constitution.

These points do not, of course, negate the value of constitutional theory as currently done. There is much insight that constitutional theorisation has shed, and will continue to shed on the functioning of constitutional orders. Nevertheless, as the discussion in sections II and III has shown, there has also been a failure to recognise the ways in which the predilections built into constitutional theories act to shape and direct the positions they take. We have sought to argue that a greater focus on these processes, and the limitations they impose on constitutional theory, will help move constitutional theory beyond its tendency to lapse into unyielding positions whose allure obscures their limitations. Rather than merely seeking to overcome other theories through persuasion, the greater use of heuristics will open the door to a less polarised constitutional world in which entrenched positions can be the subject of open-minded debate. But even for those who are not persuaded by the case we have sought to make in favour of heuristics, doing constitutional theory with a greater awareness of the biases built into it, and considering more deeply why the form of reductionism that theory takes is justifiable and why belief in the theory is justifiable notwithstanding the predilections that form of reductionism inevitably generates, will lead to a richer and more productive engagement than we currently see.