

## Resolution and Accommodation in the Good Constitution

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### 2.1 INTRODUCTION

Those who ask what counts as a good constitution normally mean to ask a different question; that is, they mean to ask what counts as a good state. Most people do not care whether the wording of the constitution is elegant or crude, whether its structure is clear or complex, or whether it was produced by an elected convention or is an accident of history, and, generally, they are right not to care: what matters is the state that the constitution has produced. When the state is succeeding in its primary task of advancing its people's well-being, the constitution is, by derivation, successful too.<sup>1</sup> But whilst the constitution is defined by its relationship to the state – the assemblage of rules which creates that institution – it remains an instrument in its own right, distinct from the state which it creates. This chapter asks whether there are features of the constitution that can render it, in itself, good, separately from the state it constitutes. An answer to this question would need to show that the constitution, as a bare set of rules, can play a part in helping the state achieve its primary task, distinct from the construction and operation of the constitutional institutions it instantiates. Though a range of answers to this question could be given, this chapter will examine two contenders. Each of these provides ways in which the constitution might, in itself, serve to moderate disagreement within the community and help unite people behind the state. First, the rules of the constitution may stand as *resolutions* of disagreement in society, articulating a conclusion reached by the state about a contested issue. Second, the rules may *accommodate* this disagreement, allowing those on each side of the argument to see their position contained within the constitution, thus enabling the state to span these positions. These are two contrasting constitutional techniques to deal with disagreement in society, and each makes use of the expressive function of constitutions: the constitution rule stands as an articulation of the state's position on an issue, and this articulation may,

<sup>\*</sup> I am grateful to Tarunabh Khaitan, Julius Yam, and the editors for comments on an earlier draft.

<sup>1</sup> For an argument, this is the defining point of the state, see N.W. BARBER, *THE CONSTITUTIONAL STATE* (2010).

in itself, shape the way the state's people interact, both with each other and with the state.

Constitutional scholars tend to be drawn to one or other of these two approaches, depending, perhaps, on their temperament. Some see clarity and consistency as virtues, as qualities that we should expect a constitution to embody, whilst others see clarity and consistency as luxuries, potentially cutting against the inherently political nature of the state. However, although these two approaches to constitutions are contrasting, they are not contradictory. Each is seeking to advance what Dieter Grimm has called the 'integrative' function of the constitution, containing and regulating disagreement within the state.<sup>2</sup> As Grimm puts it, the constitution 'is expected to unify the society that it has constituted as a polity, regardless of the difference of opinions and conflicting interests that exist in all societies'.<sup>3</sup> To an extent, this is a necessary precondition of a state. If the state is radically unable to keep disagreement within the boundaries of the constitution, it will collapse into civil war, as people cease to accept its dispute-resolving processes and try to achieve their political ends outside of state institutions. The rules of the constitution, in themselves, can play a role in this integrative function, by standing as resolutions of disagreements or by seeking to accommodate them. Which of these two approaches is the right one to adopt will depend on the situation: sometimes constitutions should provide answers; sometimes they should leave questions open. This chapter will examine these two responses to the question of what makes a 'good' constitution, and close with some suggestions about how, in particular situations, we should choose between them.

## 2.2 CONSTITUTIONAL RULES AS RESOLUTIONS

Most arguments for the resolution of disputed issues in constitutions turn on the merits of the application of that resolution by institutions. Our primary concern is, for example, that the judiciary upholds a right or the executive provides a benefit. But there are at least three groups of arguments which contend that, sometimes, there are inherent benefits in constitutions taking a position on these issues, benefits which are distinct from the value of the subsequent application of those rules. First, there are those arguments grounded in the value of the process by which these rules have been produced, with the constitution rule providing a memorialisation of the process of its production. Second, there are arguments grounded in the capacity of the constitution to resolve disputes just by deciding; once a decision is contained within the constitution, people may come to accept it for this reason. Finally, there are arguments grounded in the inherent value of some constitutional rules; there are, perhaps, some rules that all constitutions should

<sup>2</sup> DIETER GRIMM, *CONSTITUTIONALISM: PAST, PRESENT AND FUTURE* (2016) (ch. 6, 'Integration by Constitution').

<sup>3</sup> *Id.* at 144.

contain simply because they are declarations that all states should make, given a state's relationship with its people.

The first set of arguments, grounded in the value of the mode of production of constitutional rules, forms the basis of a recent case for a written constitution for the United Kingdom, advanced by Jeff King. King contends that constitutions should be seen, in part, as 'mission statements' which express the core values of a community, and contain commitments intended to guide the state towards the achievement of these goals.<sup>4</sup> For these 'mission statements' to be of value, they must be produced democratically, with communities acting as authors of their own constitutional order, making decisions about the structuring and ends of the state.<sup>5</sup> Over time, of course, the community changes, and for the mission statement to remain the mission statement of this group, the constitution must be rewritten, with each generation crafting its own constitution. Resting content with the constitution given by past generations or, worse still, with a constitution handed down from another state amounts to a failure to exercise democratic control over the rules that govern a people. For this reason, King's constitutions have a built-in obsolescence, expiring after a twenty-year period, forcing their communities to rewrite a constitution, presumably from scratch.<sup>6</sup> The very act of writing a constitution is, for King, of value; by so doing we ensure that the constitution is a democratic document, the expression of the will of the people.

The second set of arguments uses the expressive aspect of constitutions as a tool with which constitutions can shape behaviour outside of the normal operation of the law. Distinct from their role in directly guiding action, constitutional norms also serve as articulations of the values of the community and, by that act of articulation, can shift social norms within that group.<sup>7</sup> As Cass Sunstein has argued, these rules can amount to a statement of what is or is not acceptable within the community. So, for example, legislation in discrimination law often turns on the superficial aspects of discrimination – unequal pay, unfair exclusion from promotion, and so forth – but, whilst the focus of the legislation may be on the manifestation of discrimination, the aspirations of the law often go deeper. The law stands as a statement by the community that it is committed to equality, that people should not be treated differently because of their race or gender, and such a statement may, itself, help shift attitudes, conditioning what people say and think.<sup>8</sup> The shifting of attitudes serves to reduce disagreement within society, uniting people behind the constitution. Sunstein argues that, on occasion,

<sup>4</sup> Jeff King, *Constitutions as Mission Statements*, in SOCIAL AND POLITICAL FOUNDATIONS OF CONSTITUTIONS 73 (Denis J. Galligan & Mila Versteeg eds., 2013). See also Kim Lane Scheppele, *Aspirational and Aversive Constitutionalism*, 1 INT'L J. CONST. L. 296 (2003); Michael Dorf, *The Aspirational Constitution*, 77 GEO. WASH. L. REV. 1631 (2009).

<sup>5</sup> Jeff King, *The Democratic Case for a Written Constitution*, 72 CURRENT LEGAL PROBS. 1 (2019).

<sup>6</sup> Here, King is echoing a claim by Thomas Jefferson: see Dorf, *supra* note 4, at 1631.

<sup>7</sup> Cass Sunstein, *On the Expressive Function of Law*, 144 U. PA. L. REV. 2021 2031 (1996); see also RICHARD H. McADAMS, *THE EXPRESSIVE POWERS OF LAW: THEORIES AND LIMITS* (2015), ch. 5.

<sup>8</sup> McADAMS, *supra* note 7, at 139–43.

putting an answer to a socially disputed question in the constitution can remove that issue from political debate, focussing attention on other, less divisive areas of political dispute. Controversially, Sunstein offers the legality of abortion as an example of how a constitutional rule can defuse political debate.<sup>9</sup> Making access to abortion a constitutionally protected right, taking the question of the legality of abortion out of the normal dispute-resolving processes of the constitution will result, claims Sunstein, in people turning their attention to areas in which it is more likely that progress towards agreement can be made. Through its inclusion of a resolution of the issue in the constitution, the state discourages disagreement over the issue by making it harder to change the law, and so reduces people's interest in the issue.

As regards the third set of arguments, inclusion of certain rules in the constitution may be of inherent value. In an important book, Alon Harel takes the expressive function of law a stage further, contending that there are certain rights which should be included in constitutional texts as an expression of the state's recognition of the duties it owes to its people.<sup>10</sup> Harel argues that these rights should be judicially enforceable, and emphasises the significance of judicial review, but also contends that the explicit recognition of these rights is, itself, important. Even if enshrining the right in the constitution does not render it better protected, Harel contends that the act of public recognition by the state is essential to the protection of freedom, embodying an acceptance by the state of its duties towards its people. Drawing on the work of republican political theory, Harel writes that it is only citizens whose rights are constitutionally entrenched who do not live 'at the mercy' of their legislatures; without such legal recognition, their freedom depends on the inclinations of legislators, who may, or may not, be inclined to honour their rights.<sup>11</sup> Here, the constitution acts as a sort of self-denying ordinance, heading off some disputes before they arise; the constitution embodies a repudiation by the state of its capacity to exercise its power in certain ways, and the repudiation is, in itself, valuable.

These three arguments identify value in having a rule within a constitution that embodies a decision on some dispute or other, whether that value comes from the constitution memorialising the process through which the decision was reached, from the bare fact of the constitution expressing a decision on a contested topic, or from the public repudiation of a potential capacity. In each case, inclusion of a rule in the constitution expresses a resolution to a dispute and, in so doing, may reduce disagreement within the state.

### 2.3 CONSTITUTIONAL RULES AS ACCOMMODATIONS

The second set of techniques for responding to disagreement is radically different: rather than seeking to provide resolution, these techniques seek to accommodate the

<sup>9</sup> Cass Sunstein, *Constitutionalism and Secession*, 58 U. CHI. L. REV. 633 (1991).

<sup>10</sup> ALON HAREL, *WHY LAW MATTERS* ch. 5 (2014).

<sup>11</sup> *Id.* at 150–52.

disagreement. The use of accommodation as a constitutional strategy cuts against the normal approach of lawyers to constitutions. In their reasoning, most lawyers, including most academic lawyers, present constitutions as coherent: as grounded in a set of complementary values and, as a result, speaking in a single voice. This methodological commitment to coherence underpins and constrains most interpretations of constitutions and is particularly marked in judicial reasoning. Judges strive to show that their decisions square with constitutional values, claiming that these are decisions grounded in the constitution and not the judge's personal preferences. After all, admitting that there are multiple values within the constitution which are, sometimes, in tension would be to admit that the judge had a choice, that a range of decisions were available to him or her. But whilst the presumption of coherence is one that judges should normally adopt when deciding disputes, when we examine the constitution outside of the courts it is sometimes useful to put this presumption to one side and approach the constitution as a sociological entity, as an instrument that has been shaped by different groups of people over a long period of time. Gary Jacobsohn has developed an account of what he calls the 'disharmonic constitution' that nicely captures this aspect of constitutions.<sup>12</sup> The disharmonic constitution contains multiple constitutional identities within itself, different visions of what the constitution is and should become. Rather than a single mission statement, to use King's term, the constitution embodies multiple, competing statements. These different visions can provide different perspectives on particular constitutional rules, which are explicable in terms of these different constitutional identities, and thus support competing understandings of these rules within the constitution. For Jacobsohn, the principal merit of a disharmonic constitution is that it provides material for the development of the constitution, allowing for the creative interaction of various strands of identity.<sup>13</sup> But a further merit is that it allows people with radically different views about the content of the constitution to identify with that instrument; by meaning different things to different people, the disharmonic constitution advances the integrative aim of the constitution. Sometimes the disharmonies within the constitution are unstable, and quickly collapse, but sometimes they can persist, and embody long-lasting accommodations of rival constitutional ideologies. There are four constitutional features that can facilitate stable disharmony: the breadth of the constitution, its size permitting different constitutional ideologies to operate in different areas; the capacity of particular constitutional rules to bear different interpretations; the ability of constitutions to leave questions open; and, finally, the potential for inconsistent rules within constitutions.

First, the sheer size and complexity of constitutions allow those instruments to accommodate differing constitutional visions. The United Kingdom, with its unusually long constitutional history, provides many examples of this. For

<sup>12</sup> GARY JEFFREY JACOBSON, *CONSTITUTIONAL IDENTITY* 4 (2010).

<sup>13</sup> *Id.* at 102.

traditionalists, the United Kingdom is a monarchy, with a queen, an established church, bishops and hereditary peers in the legislature, and plenty of historical dressings – gothic buildings, robes, and crowns. For staunch democrats, the United Kingdom is the paradigmatic political constitution, with Parliament enjoying wide legislative power and the courts lacking the capacity to challenge its decisions, whilst for those who regard rights as the basis of the constitution there are the Human Rights Act 1998, the Equality Act 2010, alongside other statutes which can be invoked in courts against the state. The list could go on; there are multiple different ways of looking at the United Kingdom constitution, all of which can claim some support from different parts of that system. A recurrent trope of United Kingdom constitutional scholarship is that the UK constitution is one thing in the guise of another – a republic in the guise of a monarchy, a federation in the guise of a unitary state – but, perhaps, it would be better to say that it manages to be all of these things at once, with the element that predominates depending on the observer's ideological perspective.

These different constitutional identities can operate in distinct parts of the constitution, but they can also overlap, with a single rule forming part of both strands. Cass Sunstein has written of the value of incompletely theorised agreements within constitutions.<sup>14</sup> Where these are present, people agree with the inclusion of a rule, but disagree over the reasons underpinning it. Sometimes this disagreement will relate to competing visions of the constitution; a given rule could be grounded in either ideology. So, for example, in the United Kingdom courts cannot strike down statutes that run contrary to the Human Rights Act; they can only issue a 'declaration of incompatibility' that may then trigger a legislative reappraisal of the statute. For those who emphasise rights as at the core of the constitution, this is tantamount to striking down the statute – Parliament has never, to date, refused to alter a statute after such a declaration. Under this interpretation of the constitution, the purpose of the rule is to enable Parliament, an institution with differing strengths and capacities from those of the court, to make the changes needed to protect rights. For those who emphasise democracy, though, the rule exists to give Parliament the final decision about the significance and implications of individual rights; the purpose of the rule is to preserve the position of the legislature in the constitution. The same rule can form part of two different pictures of the UK constitution, and is capable of being accommodated within rival ideological accounts of the state. Whilst problems might arise further down the line, when disputes over the implications of the rule require resolution and the lack of an agreed purpose makes interpretation of the rule controversial, such disputes may be rare, and, most of the time, the two understandings of the rule can comfortably coexist.

<sup>14</sup> Cass Sunstein, *Incompletely Theorized Agreements*, 108 HARV. L. REV. 1733 (1995); HANNA LERNER, MAKING CONSTITUTIONS IN DEEPLY DIVIDED SOCIETIES 39–41 (2011).

Rules that rest upon incompletely theorised agreements appear to resolve disputes as their language seems clear and certain but their underlying purpose remains ambiguous. A more direct way of accommodating rival constitutional ideologies is to explicitly leave the question open, postponing its resolution to a later date.<sup>15</sup> The most notorious example of this is, of course, found in the American Constitution which included a twenty-year moratorium on the legality of the slave trade. The effect of this provision was to reassure those opposed to slavery that the issue could be addressed through constitutional institutions in the future, whilst also promising those who supported the practice that this would not occur in the short term. It is important to note that this provision did not leave open the question of slavery's legality – the Constitution accepted that it was lawful; it simply made clear that the issue would need to be reconsidered in the future, postponing the debate rather than resolving it. Tarun Khaitan has shown how the postponement of issues was skilfully used to help gain support for the Indian Constitution, through the device of directive principles.<sup>16</sup> Directive principles are constitutional statements that are not directly enforceable by the courts; they are aspirations, rather than justiciable rules. As Khaitan notes, this feature allows the setting of goals that can draw groups which support them into the constitution, whilst reassuring others that the implementation of these objectives can be debated at a later point: directive principles combine a commitment to a goal with a promise not to implement the goal without further deliberation within the constitutional institutions.

A final method by which disagreement may be accommodated rather than resolved is through the inclusion of inconsistent rules within the constitution. In particular, within a single constitutional order there may be multiple, inconsistent rules giving priority to rival sources of law, or identifying rival institutions as having the final say about the content of the legal order. I have written at length about inconsistencies of this type elsewhere.<sup>17</sup> Whilst they might seem pathological, embodying contradictions that would appear antithetical to the very idea of a legal order, they are far from uncommon, and frequently arise during constitutional ruptures, periods when new states emerge from the constitutional structures of an older constitutional order. So, for example, the Australian legal order started life as an offshoot of the imperial legal order, with the Imperial Parliament – Westminster – the highest law-making body in the system, and the Privy Council standing as the final court of appeal. As Australia's constitutional identity emerged during the twentieth century, this legal position became anachronistic, and, well before the Australia Acts, passed by the Australian and United Kingdom Parliaments, settled the issue, Australian judges had started to

<sup>15</sup> Rosalind Dixon & Tom Ginsburg, *Deciding Not to Decide: Deferral in Constitutional Design*, 9 INT'L J. CONST. L. 636 (2011).

<sup>16</sup> Tarunabh Khaitan, *Directive Principles and the Expressive Accommodation of Ideological Dissenters*, 16 INT'L J. CONST. L. 389 (2018); see also Tarunabh Khaitan, *Constitutional Directives: Morally-Committed Political Constitutionalism*, 82 MOD. L. REV. 603 (2019).

<sup>17</sup> BARBER, *supra* note 1, ch. 9; Nicholas W. Barber, *Legal Inconsistency and the Emergence of States*, in LAW AND THE NEW LOGICS (H. Patrick Glenn & Lionel D. Smith eds., 2016).

create constitutional space between Australia and the old imperial institutions.<sup>18</sup> Some Australian judges identified the constitutional basis of the Australian system as grounded in the Australian people, rather than in a statute passed by Westminster, and argued that Westminster's law-making power over Australia had expired.<sup>19</sup> However, others held to the view that Australia remained a subset of the British Empire, reliant on a UK statute for its constitution and subject to legislative decisions made in Westminster.<sup>20</sup> This inconsistency allowed two constitutional ideologies to coexist within the Australian order, one in which Australia was a sovereign state, the other in which Australia formed part of a larger imperial constitutional unit. This allowed Australian traditionalists to regard Australia as remaining part of the British Empire, and the more progressively minded to see Australia as an independent state. Similar inconsistencies can be found in other polities where there is disagreement over fundamental features of the constitution. Whilst such inconsistencies might seem to bring with them the risk of confusion or constitutional fragmentation, provided that the disagreement does not affect lower-level rules, they can prove long-lasting, with judges taking different views of the constitutional basis of the laws they apply.

#### 2.4 CONCLUSION: RESOLUTION OR ACCOMMODATION?

These two groups of strategies for using the rules of constitutions to regulate and contain disagreement show that the rules of the constitution, in themselves, can help the state to achieve its objectives, distinct from the operation of the institutions instantiated by that instrument; the expressive function of constitutions can be, in itself, valuable. Sensible policymakers will consider strategies of resolution and accommodation when faced with disagreement, and will make use of both approaches, resolving some disputes whilst seeking to accommodate others. Perhaps the most important lesson to take from the preceding sections is that both strategies have roles to play in making constitutions work successfully. Though constitutional lawyers tend, by virtue of their training, to be attracted to the certainty offered by strategies of resolution, even when it is possible to write an answer to a dispute into the constitution accommodation may still be the better option. King's proposal for a regular and comprehensive rewrite of the constitution should be rejected for this reason, amongst others: it assumes that resolution is invariably better than accommodation, that people should be pushed towards resolving issues. As Hanna Lerner warns, debates during constitutional drafting can inflame foundational disagreements within society.<sup>21</sup> Recognising the value of accommodation

<sup>18</sup> Australia Act 1986 (Cth); Australia Act 1986 (UK).

<sup>19</sup> *Bisticic v. Rokov* (1976) 135 CLR 552, 565–67; *Robinson v. Western Australia Museum* (1978) 138 CLR 283; *Kirmani v. Captain Cook Cruises Pty Ltd (No. 1)* (1985) 159 CLR 351, 442.

<sup>20</sup> *China Ocean Shipping Co. v. South Australia* (1979) 145 CLR 172.

<sup>21</sup> LERNER, *supra* note 14, at 35–38.



requires us to acknowledge that, on occasion, it is better to avoid answering some questions than to resolve them.

The overarching question of which strategy should be used, resolution or accommodation, turns on questions relating to the political capital of the state, that is, the support that people have for the constitutional order, and the moral permissibility of compromise, that is, whether these are issues that it is permissible to avoid answering. These will largely turn on the particular issues raised by the area of dispute.

In terms of the costs of making a decision, both the need to make it and the timeliness of the decision must be evaluated. Sometimes, there are issues that have to be resolved there and then, and only one acceptable decision is open to the state. There are some options that states should never permit to remain open, issues which have to be resolved in a particular way because the state is a state; that is, its resolution is implied by its identity as a state. For example, the initial tolerance of slavery by the American Constitution was a mistaken accommodation. Given the evils of slavery, the fact that the practice cuts against the very purpose of the state, its legality is not a question that should ever have been allowed to remain open. Harel's comments about the importance of the state recognising limits on what it can legitimately authorise are significant here. Whilst we might be sceptical of Harel's claim that states need to memorialise these constraints in law, he is right to argue that there are certain moral limits on a state's authority that any decent state must recognise, and, moreover, that the recognition of these limits is an essential feature of a successful state. Permitting slavery to continue was a concession that the Founders should have realised was not open to the state to make, and being willing to consider compromising on this was, in itself, an assumption of a capacity that a state should renounce.

Conversely, there may be some questions that it is simply not necessary to answer. Where an issue does not make a difference to people's lives, it may be better to leave it open than to answer it; the costs of resolving it cannot be justified. For example, whether or not a constitution has a religious base, whether it is grounded in the will of God or the dictates of reason, is a question that people might have strong views over but which may not need resolution. Difficult questions about the place of religion within the state may arise lower down the constitutional order, and will need to be answered there, but the fundamental question about the basis of the constitution need not be addressed. For the constitution to pick a side on this debate risks alienating one group or other, reducing the capacity of that group, or those groups, to identify with the constitutional order; accommodation expends far less political capital than resolution.

Connectedly, the timeliness of the decision should be considered.<sup>22</sup> There are some issues which are likely to become easier to answer over time, where postponing their resolution is likely to reduce the eventual costs of addressing and answering

<sup>22</sup> Dixon & Ginsburg, *supra* note 15, at 641–43.

them. For example, the grand question of whether the European Union is, or should be, a federal state, a confederation of states, or a mixture of these two constitutional forms has remained open for most of the EU's existence.<sup>23</sup> To resolve this question now would be costly, both in terms of the time spent debating the issue and, of course, in terms of the price paid by creating a losing side, a group whose vision of Europe has been excluded. It is likely that, over time, it will become clearer which constitutional model of Europe is preferred by those within the polity; the question will become less controversial and thus easier to answer. On the other hand, there are questions that are likely to become more controversial over time, making a push for early resolution favourable. For example, the question of the regularity of secession referendums in Scotland is unanswered. During the last independence referendum, there seemed to be broad agreement that the vote could be held once in a generation – but there was little clarity about how long a generation lasted or what, if any, exceptional circumstances might mean that an earlier vote could be held. Had the issue been addressed immediately after the 2014 referendum, when the political tensions over the question were at their lowest, it might have been possible to reach a decision that many, if not all, of the participants could accept. Now, in 2022, the question of whether Scotland is constitutionally entitled to hold a second referendum is a deeply controversial one, a question which presses for resolution but which is hard to resolve. The decision to allow different understandings of the required length of time between referendums to persist, to accommodate rather than resolve, was a mistake. Frustratingly, the timeliness of a constitution decision is often inversely related to the political will to resolve it: the pressure to make a decision is likely to be at its most intense when the issue is a focus of controversy, and thus hardest to resolve, whereas when passions cool, few outside a small group of constitutional lawyers are interested in the issue.

Finally, and most generally, as well as considering the costs of making a decision, the subsequent costs of it having been made should also be considered. As we have seen, both resolving and accommodating disagreement may, in some situations, benefit effective government in the state. Sometimes the inclusion of a rule resolving a dispute will act as a focus for identification with the state, a statement of a value around which people can unite. As King's depiction of constitutions as 'mission statements' reminds us, constitutional rules can express ideologies that people can rally behind, uniting people rather than dividing them. Sometimes, as Sunstein argues, resolving an issue can end or mitigate debate around it. But one example Sunstein gives, of abortion law in America, shows the hazards of confusing legal resolution with political resolution. By constitutionalising the right to abortion, the issue has been made legally more stable, with the law strongly resistant to change, but this may have made the politics around the issue more heated as the normal

<sup>23</sup> N.W. Barber, *The Two Europes*, in *THE RISE AND FALL OF THE EUROPEAN CONSTITUTION* (N.W. Barber et al. eds., 2019).

avenues for legal change have been closed. Recalling Khaitan's work on the Indian Constitution, making it clear to opponents of a rule that there is a plausible path to legal change, even if the rule they object to remains in effect, may encourage them to support constitutional structures rather than subvert them.

Constitutions are intertwined with states but have an existence distinct from them. Whilst the primary purpose of constitutional rules is to establish and regulate state institutions, these rules can possess a significance beyond their constitutive effect, standing as public statements of the state's approach to issues of controversy, seeking either to resolve these disputes or to accommodate them. Thus, the constitution, itself, can facilitate the integrative function of the state, helping to bolster the community's support for, and acceptance of, state institutions.