THE PURPOSE AND PERILS OF ENTRENCHMENT



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ABSTRACT

To endure over many generations, a state must be able to accommodate change, which may be the result of internal or external forces and is inevitable, but also potentially destabilising. A healthy state accommodates change in ways that conduce to order and stability over time and avoid social and political disruption. Because change is something that happens not just once but constantly and diachronically, it must be handled in ways that promote continuity and avoid discontinuity.

One way that states manage the process of change is by entrenching important rules, principles, institutions, and arrangements. By adding friction to the process of change, formal legal entrenchment requires those responsible for the governance of a state to consider what (or whether) change is necessary to accommodate change and to mitigate threats to social stability that come from unpredictable or unwise change. Other kinds of entrenchment, including political and social entrenchment, can entrench arrangements and institutions informally at a more flexible level, obviating the need to legalise too much of the way of life in the state.

While entrenchment is necessary to manage change, different forms of entrenchment can fail in different ways. These perils of entrenchment, such as when the form or depth of entrenchment makes the process of change too easy or too difficult, mean that entrenchment, done badly, can itself be a source of disorder and destabilisation in the state. In a healthy state, this is more likely to be a problem of formal over-entrenchment than of formal under-entrenchment. By understanding why entrenchment matters, the forms it may take, and how it can go wrong, we can better understand how states may successfully use various forms of entrenchment to make it more likely that the state will endure over time.

I would like to thank my parents
for their constant love and support,
for introducing me to Oxford, and
for inspiring a love of learning and language,
and Sir William Blackstone,
for his assuasive marmoreal company
through long days in the All Souls library.

I have said before
That the past experience revived in the meaning
Is not the experience of one life only
But of many generations – not forgetting
Something that is probably quite ineffable:
The backward look behind the assurance
Of recorded history, the backward half-look
Over the shoulder, towards the primitive terror.[1]

* * *

[1] TS Eliot, *The Dry Salvages* (Faber & Faber 1941).

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INTRODUCTION

All states undergo change, but only those that manage the process of change successfully survive. And because change is not something that happens once but continuously, for a state to endure through successive generations it must manage the process of change in ways that are more likely to promote continuity and stability and less likely to result in disruption and disorder over time.[1] This is the idea captured in Edmund Burke's twin observations that a society is an intergenerational project—'a partnership not only between those who are living, but between those who are living, those who are dead, and those who are to be born'[2]—and that '[a] state without the means of some change is without the means of its conservation'.[3] In this thesis, I propose to show how different forms of entrenchment can work together in a state to provide these successful means of change. This requires examining the variety and complexity of entrenchment—constitutional, legal, political, and social—as well as the risks of entrenchment. I will do this by looking at entrenchment in three related but distinct constitutional systems: the codified American constitution, the uncodified British constitution, and the partially codified Canadian constitution.

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[1] Michael Oakeshott, 'Political Education' in Michael Oakeshott, *Rationalism in Politics and Other Essays* (first published 1962, Liberty Fund 1991) 61. Like Oakeshott, I assume the virtues of stability and order in a state. We who live in the freest and safest countries in history should not forget either the rarity of our condition or the horror of the alternative. In the epigraph to a recent book, Robert Kaplan quotes Abu Hamid al-Ghazali's saying that '[o]ne year of anarchy is worse than a hundred years of tyranny'. Robert D Kaplan, *The Tragic Mind: Fear, Fate, and the Burden of Power* (Yale UP 2023) xii. This is a laconic paraphrase of Ghazali's original saying that 'the tyranny of a sultan for a hundred years causes less damage than one year's tyranny exercised by the subjects against one another'. Albert Hourani, A History of the Arab Peoples (Harvard UP 2002) 144. See also St John Henry Newman, 'States and Constitutions' in St John Henry Newman, *Discussions and Arguments on Various Subjects* (Longmans, Green, and Co 1885) 313 ('When the great Assyrian Empire broke up, a time of anarchy succeeded and, little as its late subjects liked its sway, they liked its absence less.'). This does not mean that rupture or rebellion are never politically and morally desirable, such as to remove a brutal regime. Their relative virtue then depends on what is likely to replace the regime. The exchange of brutality for brutality at the cost of disorder is not a reasonable trade. See Eric Voegelin, '*The Nature of the Law* and Related Legal Writings' in Robert Anthony Pascal, James Lee Babin, and John William Corrington (eds) *The Collected Works of Eric Voegelin, vol 27* (Louisiana State UP 1989) 61 ('The undisturbed order of the society enters as a good in its own right into the normativity of the legal rules. ... Although there are limits to the proportions that the error may assume, existence in an imperfectly ordered society, with numerous and even gross injustices in single cases, is preferable to disorder and violence'.)

[2] Edmund Burke, *Reflections on the Revolution in France* (first published 1790, OUP 1993) 96.

[3] ibid 21-22.

Because the term is used in different ways and because it so is central to this thesis, it is worth explaining up front what I mean by 'entrenchment' and why I believe it is useful to consider the concept broadly. In his treatment of entrenchment, Nick Barber wrote that '[a]t its most general, entrenchment has been used to describe any rule that is difficult to alter',[4] before opting for what he called a 'middle course' that defined entrenchment as 'a legal rule that makes it more difficult for a body to change the law in an area that, but for the entrenching rule, would fall within its jurisdiction, and be alterable under the default rules of legal change.'[5] In this thesis, I take the 'general' view. While Barber's approach conforms to the standard account of constitutional entrenchment, an exclusive focus on that form of entrenchment will fail to capture the full range of reasons why some rules are more difficult to change than others. For example, it cannot account for how rules of all kinds, including legal rules, may become effectively entrenched in ways other than by deliberate acts. More importantly, it will miss that legal rules are embedded in a matrix of legally and non-legally entrenched rules, principle, arrangements, and institutions, which affects how each rule functions in practice and determines whether it is necessary in the first place.

Entrenchment in this broader sense is not one thing but a family of forms of entrenchment—constitutional, legal, political, and social—that in combination can inhibit the processes of change in a state and help to stabilise the civic order. As noted above, the most familiar form of entrenchment is codified constitutional entrenchment, which Margit Cohn has described as 'the insulation of the constitution from so-called "normal politics" by requiring special, onerous amendment processes',[6] but both ordinary legislation and the common law are also legally entrenched in their own ways and establish rules that require specified formal processes to change. Political entrenchment consists predominantly of rules made by and for state officials

[4] NW Barber, 'Why Entrench' (2016) 14 ICON 325, 327.

[5] ibid.

[6] Margit Cohn, 'Tension and Legality: Towards a Theory of the Executive Branch' (2016) 29 Can J L & Juris 321, 321.

and includes conventions and rules of recognition, which are entrenched not by law but by political practice and social expectation. Finally, social entrenchment, as I use the term, includes those habits, mores, and ways of living that regulate social behaviour without the need for legal or political rules.

These forms of entrenchment may be categorised as formal or informal and deliberately enacted or organically evolved. Constitutional and legal entrenchment are usually formal and deliberate. Both enacting and changing these rules requires intentional action following formalised processes. Political entrenchment is usually informal and organic (although it can be deliberate[7]). Social entrenchment is almost entirely informal and organic. Within each of these forms, there are also different degrees of entrenchment. Formally entrenched rules may be intentionally entrenched in different ways and to different depths (eg, some provisions of a codified Constitution may require a higher super-majority or more unanimity among institutions to amend) or they may be made harder to change in unintended ways by non-legal factors. Political entrenchment contains a hierarchy of conventions, practices, customs, and norms that restrict action in different ways and to different degrees. And socially entrenched behaviour and expectations may be more or less changeable in ways that are often knowable only from experience over time, and most clearly in retrospect. One of the purposes of this thesis is to show that these forms of entrenchment work side-by-side and together in a state, forming an interoperative matrix of entrenchments of different kinds and depths that is unique to that state's social, political, and legal development—and, in a healthy constitutional order, uniquely fitted to its needs.

My analysis of entrenchment will consider four questions: (1) why entrenchment is a feature of every constitutional system; (2) how entrenchment differs in different states; (3) what are the risks of entrenchment; (4) and what general lessons we might learn about how to avoid the risks that come with entrenchment. With respect to the first question—*why?*—I provide theoretical

[7] Eg, the Addison-Salisbury Convention. House of Lords Library, *The Salisbury-Addison Convention* (19 June 2015) <https://lordslibrary.parliament.uk/ research-briefings/lif-2015-0011/> accessed 23 October 2024.

background for the question in chapter 1 and, in chapter 2, I consider various answers. I propose that entrenchment is a necessary and universal feature of successful states because, by adding friction to the process of change, entrenchment requires those responsible for the governance of a state to consider what (and whether) change is necessary and to seek some degree of political consensus, which reduces the risk of unpredictable or unwise change.[8] This answer applies especially to entrenchment that is deliberate, such as codified constitutional provisions, ordinary laws and, to a lesser degree, to political conventions and social habits, which are evolved rather than enacted. I then answer the second question—*how?*—in chapters 3 to 6, where I show that understanding entrenchment requires thinking of it in terms of both form and degree, as described above.

In chapters 3 and 4, I consider the varieties of constitutional entrenchment using examples from specific constitutions. I consider the possibility and risks of attempting permanent constitutional entrenchment and show how constitutional entrenchment is not an all or nothing proposition: that is, some constitutional provisions may be more difficult to amend than others (intentionally or not), and some provisions may even be unamendable (again, intentionally or not). In chapter 5, I look beyond constitutional entrenchment at other forms of legal entrenchment, including ordinary legislation, the common law, and so-called 'constitutional statutes'. In chapter 6, I examine the non-legal forms of political and social entrenchment. These forms of entrenchment are often overlooked, but the endurance of a state is impossible without them, so it is important to understand how they function individually and in interaction with the other forms of entrenchment. I show that within each of these forms there are, again, degrees of entrenchment, and that the form of entrenchment is not necessarily indicative of the degree of entrenchment. That is, some legally, politically, or socially entrenched provisions may, in practice, be more deeply entrenched than constitutionally codified provisions.

[8] This is a generalisation for the purposes of an introduction. As I show in chapter 7, some forms of entrenchment fit this description and fulfil these functions more clearly than others.

In chapter 7, I look at what happens when entrenchment fails, and how this failure may be due to under-entrenchment—ie, when an important institution or arrangement is left vulnerable to too easy change—or over-entrenchment—ie, when an institution or arrangement becomes so deeply embedded that change is impossible even when it is necessary or desired. In chapter 8, I show why it follows from my analysis that a rule, principle, institution, or arrangement that is constitutionally entrenched in one state may be 'only' legally, politically, or socially entrenched in another, with the different mixes of different kinds of entrenchment nevertheless playing a similarly effective change-regulating function in each. Finally, I offer some general lessons for a state that wants to minimise the risks of entrenchment and suggest that a healthy state should be particularly alert to the risks of over-entrenchment.

Chapter 1 THE STATE IN TIME

1.1 Of the Ends and the Endurance of States

1.1.1 To Succeed, a State Must Endure

Endurance is a basic requirement of a successful state. This does not mean that longevity is the best measure of a state's success any more than superannuation is the best evidence of a good life. A state has an end or purpose, a good that it should aim to fulfil separate from mere survival.[1] Two recent accounts of this end have been offered by Nick Barber and Timothy Endicott. Barber proposed that the 'defining purpose' of the state is the well-being of its members,[2] to which Endicott demurred that because '[a] state can only be a good one if it is virtuous', the state exists not only to promote the well-being of its members but also to act for the good in ways that may not directly or even directly maximise its members' well-being.[3] While I agree with Endicott that a people should will their state to act virtuously,[4] this thesis is not specifically concerned with the questions of what virtuous statehood consists of or how a state is best organised towards it.[5] I take the purpose of the state to be for a people to continue associating, in so far as it is possible, according to principles and under conditions that they believe will promote the highest human good as they understand it. What that good is, is beyond the scope of this thesis.[6] I am concerned not with states' ends, but with their endurance.

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[1] Aristotle, *The Politics* (Stephen Everson ed, CUP 1996) I.1.1252a1-7, IV.1.1289a17-18.

[2] NW Barber, *Principles of Constitutionalism* (OUP 2018) 35.

[3] Timothy Endicott, 'The Purpose of a State' (2021) 66 AmJJuris 69, 72-77.

[4] See also Richard Ekins, 'Between Authority and Usurpation? Common Good and Constitutional Government' (2024) 69 AmJJuris 45, 46.

[5] cf Lars Vinx, 'Constitutional Indifferentism and Republican Freedom' (2010) 38 Political Theory 809.

[6] Whether a good society is more likely to endure is another question. My tentative, hopeful answer is 'yes', while acknowledging that many wicked societies have endured a very long time. I would say that so long as they avoid collapse, countries like the Democratic People's Republic of Korea are not, strictly speaking, failed states, but failures *as* states (in moral terms). For another perspective, see Joseph Raz, 'On the Authority and Interpretation of Constitutions: Some Preliminaries' in Joseph Raz, *Between Authority and Interpretation: On the Theory of Law and Practical Reason* (OUP 2009) 351-2.

One can imagine more narrowly ideological state purposes. Marco Goldoni and Michael Wilkinson, for example, have described the goal of state constitutions in post-Second World War Western Europe as promoting the liberal values of 'democracy, federalism, human rights, or social welfare',[7] and Wilkinson has elsewhere described the 'overriding goal' of the European Union's superstate project as a 'liberal market teleology'.[8] In states where the founding moment is accompanied by an identifiable statement of intent, the *telos* may be stated explicitly (how successfully the state aligns its actions with that intent over time is another question). So, for example, if you were to ask what is the *telos* of the United States of America, someone could point to the Declaration of Independence's stated intention to protect 'certain unalienable Rights' through the institution of a government whose powers flow 'from the consent of the governed'.[9] Or they might cite Abraham Lincoln's restatement of that promise during the American Civil War as 'government of the people, by the people, for the people' that is 'dedicated to the proposition that all men are created equal'.[10]

Constitutional preambles or state mottos may also express a state's understanding of its ends. This can be as simple as the British North America Act's intent to unite the loyal North American territories into a single state with 'a Constitution similar in Principle to that of the United Kingdom',[11] or as lofty as the preamble to the Irish Constitution of 1937's commitment 'to promote the common good, with due observance of Prudence, Justice and Charity, so that the dignity and freedom of the individual may be assured, true social order attained, the unity of our

[7] Marco Goldoni and Michael A Wilkinson, 'The Material Constitution' (2018) 81 MLR 567, 592.

[8] Michael A Wilkinson, 'The Reconstitution of Postwar Europe: Liberal Excesses, Democratic Deficiencies' in Michael W Dowdle and Michael A Wilkinson (eds), *Constitutionalism Beyond Liberalism* (CUP 2017) 38, 66.

[9] 'Declaration of Independence: A Transcription' America's Founding Documents, U.S. National Archives and Records Administration <www.archives.gov/founding-docs/declaration-transcript> accessed August 17 2023.

[10] See Garry Wills, *Lincoln at Gettysburg: The Words That Remade America* (Simon & Schuster 1992) 191; Eric Foner, *The Second Founding : How the Civil War and Reconstruction Remade the Constitution* (WW Norton & Company 2020).

[11] Preamble to the *Constitution Act, 1867*, 30 & 31 Vict, c 3 (UK).

country restored, and concord established with other nations'.[12] No matter how a state understands its purpose, the underlying fact remains: howsoever lofty its ends, a state that ceases to exist is quite literally purposeless. To endure may be a minimal bar for success, but it establishes the only condition by which a state can succeed maximally.[13]

The imperative of endurance distinguishes the state from other social enterprises. Unlike most social organisations, a state cannot conceive of itself as a time-limited project. No one would found a state to last only a year or even a single generation. Like the species itself, a state and the motives of its members are underwritten by a principle of perpetuation. For the same reason that a healthy man is not suicidal, a healthy state cannot desire its demise. This is an important way in which the state differs from that other social organisation characterised by notional perpetuity, the corporation.[14] Under the right (or, perhaps, from their perspective, the wrong) circumstances, the shareholders of a corporation may act rationally to wind it up and end its existence. Even a 'real entity' theory of company law, which views the corporation as an autonomous social phenomenon that is 'real in a social sense'[15] recognises that a corporation is subject both to external legal regulation by the state and internal control by its shareholders, who may terminate it for good reason.[16] Indeed, winding up may sometimes the rational course of action. That is not the case with states. There could not have been a 'winding up' of the Roman Empire; it had to decline and fall, or it would not have ended.[17]

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[12] Preamble to the Constitution of Ireland (1937).

[13] Bernard Williams, *In the Beginning Was the Deed: Realism and Moralism in Political Argument* (Geoffrey Hawthorn ed, Princeton UP 2008) 3. See also Goldoni and Wilkinson (n 7) 592.

[14] See William Shepheard, *Of Corporations, Fraternities, and Guilds* (London, H Twyford, T Dring, & J Plate 1659) 1-2; William Blackstone, *The Oxford Edition of Blackstone: Commentaries on the Laws of England, Vol 1: Of the Rights of Persons* (first published 1765, David Lemmings ed, OUP 2016) 455.

[15] Eva Micheler, *Company Law: A Real Entity Theory* (OUP 2021) 21.

[16] ibid 103 et seq (on the role of government and statutory law in corporate governance) 197.

[17] Henry Kissinger wrote that 'every civilization that has ever existed has ultimately collapsed. ... So, as a historian, one has to live with a sense of the inevitability of tragedy.' James Reston, 'Partial Transcript of an Interview with

States, like all things ordained by and for man, cannot last forever. They exist in time and subject to it, temporal and temporary, but the governance of a state is, under normal circumstances, nevertheless carried out as though it were an eternal project. This is the negative capability of the constitutional vision. States persist in and despite the knowledge that even 'Athens was not immortal',[18] but this is not a counsel of despair. Everyone living in a state knows that it will end someday, but that knowledge must be put out of mind to work at making it last as long as possible. Constitutional orders are thus an infinite conceit in defiance of finitude. The state's mortality does not change the duty of its custodians to care for its continuation as heirs to a distinct past that must be pushed as far as possible into the future in defiance of the inevitable.[19]

1.1.2 The People and their State

The vitality of the state—its will to endure—is the will of its people to continue associating over generations against internal and external threats. This is another respect in which the state differs from a corporation. Corporate personhood is a convenient fiction that allows the interests of a company to be treated in law as distinct from the interests of the people who own and direct it. An extreme example of this can be seen the relationship between a private corporation and a sole shareholder. In *Singularis Holdings Ltd v Daiwa Capital Markets Europe Ltd*,[20] the UK Supreme Court held that a bank owed a duty of care to a corporate client not to execute orders to distribute

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Kissinger on the State of Western World' *New York Times* (New York, 13 October 1974) 34. This is also true of anyone who studies states and their constitutions.

[18] Pierre Trudeau, Hansard (Canada), Senate Debates (30 March 1988), 2999 ('Thucydides wrote that Themistocles' greatness lay in the fact that he realized Athens was not immortal'). If he meant Thucydides, the reference may be to Pericles rather than to Themistocles. See Thucydides, *The Peloponnesian War* (PJ Rhodes ed, Martin Hammond tr, OUP 2021) bk 2, ch 64. Alternatively, he may have half-remembered Themistocles' advice, reported by Herodotus, that even though Athens had fallen, the Athenians would have a city as long as they retained their ships. Herodotus, *The Histories* (Tom Holland tr, Penguin Classics 2014) 544, bk 8, ch 61. cf Jean-Jacques Rousseau, 'On the Social Contract' in *The Major Political Writings of Jean-Jacques Rousseau* (first published 1762, John T Scott ed, U Chicago P 2012) 231 ('If Sparta and Rome perished, what state can hope to last for ever?').

[19] For an exploration of existence in time in the face of death with reference to 'heritage' and 'fate', see Martin Heidegger, *Being and Time* (Joan Stambaugh tr, State U of New York P 1996) 353.

[20] [2019] UKSC 50.

company funds in a manner that constituted a misappropriation of those funds even though the orders were made by the company's sole shareholder, who was also director, company chairman, president and treasurer with ultimate and unquestioned authority over the company's affairs. Although Singularis Holdings 'was effectively a one-man company and [its sole-shareholder] Mr Al Sanea was its controlling mind and will', the court held that the acts of its 'controlling mind and will' should not be attributed to the company.[21] Unlike a limited liability company, where the interests of the company are separable from the human interests behind it, a state has no meaningful existence apart from the interest of its people.[22] This is why Burke said that a 'state ought not to be considered as nothing better than a partnership agreement in a trade of pepper and coffee, callico or tobacco, or some other such low concern, to be taken up for a little temporary interest, and to be dissolved by the fancy of the parties'.[23]

Richard Ekins made a related point in his review of Barber's *The Principles of Constitutionalism* when he inverted Barber's account of the relationship between the state and the people. While '[t]he point of a state, for Barber, is to secure the wellbeing of its people,' Ekins wrote, it is more accurate to say 'that a people should form and maintain a state because this is a reasonable means to secure their common good'.[24] In other words, it is more accurate to speak of the people and their state than of a state and its people: when using the genitive case, the people should come first. Ekins notes that Barber's formulation, which conceives of a state as conceptually separable from its people, as a corporation is separate in law from its shareholders, 'is a familiar account of statehood, central to public international law and its concern for relations *between* states'.[25] But even in international law, where a distinction may be drawn between a state and its people insofar as

[21] ibid 37-38.

[22] Edmund Burke, *Reflections on the Revolution in France* (first published 1790, OUP 1993) 96.

[23] ibid.

[24] Richard Ekins, 'The State and It's People' (2021) 66 AmJJuris 49, 54.

[25] ibid 51.

treaty commitments remain in place although governments change and generations eclipse each other over time, the distinction between a people and their state is not as clear as that between shareholders and a corporation. The purpose of corporate personhood is to separate the corporate identity from the individual identities as well as the collective identity of its shareholders and directors so that the latter can have a mediated relationship with other persons. But the people in a well-functioning state cannot disassociate themselves so easily from its interests or actions; for all practical purposes, what the people do as a whole, the state does.[26]

The point may be illustrated as follows: if all the people of a state were by unanimous decision to take up arms against a neighbouring state, it would be futile to say that the state had not committed an act of war; by contrast, if the sole shareholder and director of a corporation breaks into my house, it would not be accurate to say that the corporation had committed trespass. A people and their state are mutually identified in a way that a corporation and its shareholders are not. A corporation has no *raison d'être* without its shareholders, but its failure does not usually entail a similar existential failure of its shareholders, much less their demise. By contrast, a state also has no *raison d'être* without its people, but its failure is usually an existential matter for its people. This is because, unlike the case of a corporation, the perpetual nature of the state is under normal circumstances coincident with the perpetual existence of its people. If its sole shareholder dies, a corporation may continue to exist in law (and in social fact) for some time thereafter; if the people of a state were to be eradicated, the state would cease to exist at that same moment both in law

[26] I mean here what a people do *qua* 'a people' or as an apostrophised 'People'. See the Comte d'Antraigues's insistence on the eve of the French Revolution that 'the People is the foundation of the State; indeed, it is the State itself'. Quoted in Simon Schama, *Citizens: A Chronicle of the French Revolution* (Alfred A Knopf 1989) 121. For an exploration of popular sovereignty in early modern thought, see Daniel Lee, *Popular Sovereignty in Early Modern Constitutional Thought* (OUP 2016) 317-18. For a distinction between popular sovereignty and democracy, see Jeremey Waldron, *Law and Disagreement* (OUP 1999) 255-58.

and fact. It would make no sense to speak of the continuation of a state and its treaty obligations in some fictional form without its people. For the state to endure, so must the people.[27]

Of what does this congruence between a people and their state consist? Aristotle describes the relationship among the people of a state as a form of friendship that he calls *politike philia*, which is often translated as 'civic friendship' but which, following Michael Oakeshott, I will call the 'civil condition'.[28] Because the civil condition requires (or more likely presupposes) the existence of a state, it can be said to be an essential characteristic of a state without being its overriding goal: a precondition rather than a purpose.[29] The civil condition is important because it conduces to concord (*homonoia*), which in turn helps to keep the state united.[30] In function, it is something less than virtue friendship and something more than advantage friendship.[31] It is a thickening of relationships strong enough to hold the people together so they can pursue the mutual advantages for which men form and perpetuate states, but not so strong that it insists on the mutuality of affection of true friendship or family bonds. This is why Endicott is right to say that a state exists 'for its members (and not for others) in the sense that *it is their technique for acting as a community*'[32] and that the state's proper role 'is to make and to sustain a political community that does what a community can do to support people, without taking over control of their lives'.[33]

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[27] Note, the inverse is not necessarily true. A people may continue to exist without a state as was the case for several peoples in Eastern Europe between 1939 and 1991—examples that show why the end of a state is so often a 'calamity' for its people.

[28] Michael Oakeshott, *On Human Conduct* (first published 1975, OUP 1991) 109-84, especially 110-11; Daniel Andrew Skeffington, 'The Concept of the Constitution in the Jurisprudence of Michael Oakeshott' (2020) VI LSE Law Review 1, 6.

[29] In her explication of Aristotle's understanding of civic friendship, Eleni Leontsini discusses two views of the role of friendship: as a limited goal of the state and as a contingent necessity for civic life. Eleni Leontsini, 'The Motive of Society: Aristotle on Civic Friendship, Justice, and Concord' (2013) 19 Res Publica 21, 32-33.

[30] ibid 22-23.

[31] ibid 26.

[32] Endicott (n 3) 70 (emphasis added).

[33] ibid 73.

The circumstances enabled by the civil condition are what Oakeshott (adapting an old phrase to an idiosyncratic purpose) called the *respublica*: the 'public concern' of citizens that captures 'the comprehensive conditions of association'[34] by which members of a polity are joined in a 'somewhat "watery" fidelity called civility'.[35] It is, for Oakeshott, a generally associative rather than a specifically purposive idea that 'has the characteristic of being always self-complete in the sense of having no extrinsic substantive purpose (*autarkeia*)'.[36] He is almost right. The people are not separable from the state, nor the state from the people, because under the civic condition the people are not wholly separable from each other. So far, so good. But the civic condition is not merely a condition of the people. It is, as described above, a precondition for the state, which has an extrinsic substantive purpose, namely, to promote the common good—of the people and generally. As Charles De Koninck explained, 'the common good does not concern society formally insofar as it is an accidental whole: it is the good of the substantial wholes who are members of society. But it is the good of these substantial wholes only insofar as they are members of society'.[37] The intimate and vital relationship between the people of a state in the civil condition is both constitutive of, and only possible because of, the state. Or, as António Rocha Martins put it, "man lives in the *polis*, but the *polis* also lives in man'.[38] It is because the knowledge necessary to hold together a social order is immanent in the understanding—overt and implicit, individually and collectively—of humans within that order that we cannot separate a people and their state

[34] Oakeshott, *On Human Conduct* (n 28) 108.

[35] ibid 147. Oakeshott is alluding to Aristotle's deprecation of the relationships in Plato's *Republic* as *hudare* (dilute). See Aristotle (n 1) II.4.1262b15.

[36] ibid 110. See also Oakeshott's description of Marsilius of Padua's claim that 'a realm has no "end" other than the satisfaction of the common need for a compulsory order'. ibid 217. See also Eric Voegelin, 'Letter to Robert Heilman, August 20, 1959' in *Robert B Heilman and Eric Voegelin: A Friendship in Letters 1944-1984* (Charles R Embry ed, U of Missouri P 2004) 194.

[37] Charles de Koninck, *The Writings of Charles de Koninck. Vol 2* (Ralph McInerny ed, U of Notre Dame P 2009) 98. See also St Thomas Aquinas, *On Charity* (*De Caritate)* (Lottie H. Kendzierski tr, Marquette UP 1960) 28

[38] António Rocha Martins, 'The *Zoon Politikon*: Medieval Aristotelian Interpretations' (2019) 75 *Revista Portuguesa de Filosofia* 1539, 1542.

conceptually in the same way that we can disentangle other forms of corporate personhood both in law and fact. The civil condition thus exists on a spectrum between the family and the commercial partnership, but closer to the former than to the latter. No reasonable person would die for a commercial partnership.

1.1.3 A Note on Democracy as a Non-Essential Good

Although it is tempting to look for the connection between a people and their state in the modern form with which we are most familiar, namely democratic self-government,[39] the connection is both older and more universal. Its pre-modern pedigree is evident in the venerable doctrine of 'odious' debts. As early as 1625, Grotius linked the legitimacy of the state to the public good of the people, writing that 'contracts made by the sovereign that are of no advantage and harmful to the State should not be honoured, and in particular where public money has been pledged for purposes that are not for the public good'.[40] Updating Grotius in the early part of the last century, Alexander Nahun Sack described odious debts as an exception to the general rule that a state's debts survive changes in regimes[41] that applies when the debt in question has been 'contracted and spent against the interests of the population of a State, without its consent, and with full awareness of the creditor'.[42] Jeff King recently offered a restatement of the doctrine. There are, he said, 'four distinct lines of authority that come together as tributaries into one conceptual river, that river being the concept of odious debts' and a 'uniting thread is that each is an instance of a purported debt that was knowingly contrary to the interests of the population' of

[39] Margot E Salomon and Robert Howse, 'Odious Debt, Adverse Creditors, and the Democratic Ideal' in Ilias Bantekas and Cephas Lumina, *Sovereign Debt and Human Rights* (OUP 2018) 425.

[40] Robert Howse, 'The Concept of Odious Debt in Public International Law', United Nations Conference on Trade and Development, Discussion Papers, No 185 (July 2007) 5 <https://unctad.org/system/files/official-document/osgdp20074_en.pdf> accessed 21 August, 2023. Two thousand years earlier, Aristotle dodged what was then, as now, a difficult question. Aristotle (n 1) III.3.1276a6-1276b15

[41] Jeff King, *The Doctrine of Odious Debt in International Law: A Restatement* (CUP 2016) 51.

[42] Howse (n 40) 2.

the state.[43] Notably, this rationale may apply not just in the traditional context of state succession, but also 'in cases of change of government', for example when debts were incurred by the former leaders for their private benefit.[44]

The doctrine of odious debts shows why democratic self-government is a good way—perhaps the best way[45]—of realising the essential connection between the interests of the state and the interests of the people, but it is not the *reason* for the connection. Grotius, writing in the early 17th Century, did not have democracies in minds when he rooted the connection in the concept of the 'public good'; nor did Sack, writing in the first half of the 20th century, expressly link odious debts to the nature of the regime, let alone to all the liberal appurtenances that undergird the distinctly modern version of democracy.[46] In fact, Sack affirmed that '[e]ven if one despotic regime is overthrown by another, which is no less despotic and no more responsive to the will of the people, the "odious" debts of the fallen regime nevertheless remain its personal debts and are not obligations of the new power'.[47] More recently, Robert Howse, writing for the United Nations, has said that '[i]t is well established in international law that a political transition, even from an oppressive regime to a popularly legitimized one, does not *in itself* break the continuity of state-to-state debt obligations'.[48] In other words, it is not the lack of democratic legitimacy that taints a state's debt and even electoral democracy may not save state debt from taint.[49]

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[43] King (n 41) 57.

[44] ibid 179.

[45] Richard Ekins, 'Self-Government and the Kingdom of Heaven,' in Nicholas Aroney and Ian Leigh (eds), *Christianity and Constitutionalism* (OUP 2023) 216.

[46] ibid 429.

[47] Alexander Nahum Sack, Les *Effets des Transformations des Etats sur Leurs Dettes Publiques et Autres Obligations Financieres* (Recueil Sirey 1927) 157. See also *Aguilar-Amory and Royal Bank of Canada claims* (Great Britain v Costa Rica), 18 October 1923, Reports of International Arbitral Awards vol I pp 369, 379, 393-94 <https://legal.un.org/riaa/cases/vol_I/369-399.pdf> accessed 23 August 2023. See also Howse (n 40) 12.

[48] Howse (n 40) 21.

[49] Salomon and Howse (n 39) 444-45.

Democracy may be the most reliable system of government yet devised for binding the interests of a people to the government of their state and vice versa, but it is not the only possible one,[50] and '[t]he need for government comes before the question of who should govern'.[51] More important than the form of government is the basic condition that 'citizens ... see themselves in the decisions of the state'.[52] Before the introduction of universal suffrage in the twentieth century, all societies, even ostensibly democratic ones, operated with a general popular submission to a temporal authority (or in some cases spiritual authority[53]) that was subject to the political influence of a minority of powerful persons and interests. But—and this should be stressed—an acceptance of non-democratic authority was not incompatible with considering the people to be both the subject and object of the state. Daniel Lee describes the case of early modern Europe:

> Popular sovereignty ... takes on a certain priority, essential to all states, whatever their accidental and contingent features. Whether democratic or autocratic, monarchical or republican, liberal or authoritarian, Marxist or fascist, all states are constituted as a people or, as some of our authors have preferred to call it, as a body politic, a political community, a commonwealth.[54]

This was true of the English constitution before modern democracy. Even before there was an institution recognisable as a Parliament, the deep-roots of popular sovereignty were already sprouting proto-democratic shoots. Maitland showed that even before Edward I's Parliament of 1295, 'the representative principle was growing' and '[t]he notion of the representation of a

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[50] Ekins, 'Between Authority and Usurpation?' (n 4) 48. For an extreme view, see Jean Bodin's belief that popular sovereignty requires non-democratic authority. Lee (n 26) ch 6.

[51] Richard Ekins, 'The Balance of the Constitution' (2022) 67 AmJJuris 199, 212; Conor Casey, 'Constitutional Design and the Point of Constitutional Law' (2022) 67 Am JJuris 173, 180.

[52] Richard Ekins, Review of *The Principles of Constitutionalism*, (2019) 135 LQR 515, 517. See also Endicott (n 3) 77-79; Conor Casey, 'Common Good Constitutionalism and Constitutional Change' in Oran Doyle and Mariana Velasco-Rivera (eds) *Research Handbook on Comparative Constitutional Change* (Edward Elgar, forthcoming 2026). For a discussion of the minimal conditions of popular representation, see Richard Ekins, 'How to Be a Free People' (2013) 58 AmJJuris 163, 172. See also John Finnis, *Aquinas* (OUP 1998) 254-56; Lee (n 26) 318.

[53] Examples are Iran, the Holy See, and Tibet before the Chinese invasion and occupation. A residual (perhaps vestigial) respect for religious authority remains in the constitutional role of the Lords Spiritual in the United Kingdom's House of Lords and the King's position as head of the established Church of England.

[54] Lee (n 26) 318.

community by some of its members must have been old' because '[a]lready in the *Leges Henrici Primi* we find that in the local courts the townships are represented by the priest, the reeve and four of the best men'.[55] At a time when much of what we would consider governing was conducted through courts rather than popular assemblies, this relatively modest representation would have been important to bind the people to the formal institutions of the state. Still, we should be careful not to confuse this early popular acceptance of government with the peculiar dogmas of modern democracy. Unless we are prepared to say that ancient states that managed the challenges of change successfully over many generations were not successful states, and to exclude most modern states before a point within living memory,[56] we must admit the possibility of successful non-democratic states, at least according to the terms by which this thesis defines 'success'.[57]

1.2 Permanence and Change in the State

In Part 1.1, I argued that endurance is a necessary condition of the success of a state, and the foundation for other criteria of success, because the state is an associative project of a people relating to each other in the civil condition to further their common good (and the good more broadly) not just once but for as long as possible. This prompts the question of *how* a state can best endure over time. Because endurance is a temporal phenomenon, the key phrase here is 'over time'. Four categories of things threaten the survival of the state over time: internal mismanagement; external human forces; external natural forces; and supernatural forces that, to avoid theological controversy, I will group under the heading of *wyrd*—that queer Anglo-Saxon concept that describes the fate of all things subject to 'the otherwise than humanly appointed order

[55] FW Maitland, *The Constitutional History of England* (CUP 19) 70-71.

[56] Virtually no countries qualified as full democracies by current standards as they did not allow women to vote on equal terms (United Kingdom: 1928; Canada: 1918 (with qualifications); United States: 1920; France: 1945).

[57] Williams (n 13) 4.

of things'.[58] To endure, a state must manage the first three threats; the fourth is beyond its control. To do this over time, the state must be able to organise itself and to manage change among different generations of its people as they face different internal and external pressures at different times. This requires tools that are suited not just to shifting circumstances but to managing the process of change itself, sometimes by resisting and sometimes by adapting to it. This is not a new idea. The idea that the government of a state requires regular pruning to ensure healthy growth has deep roots in the Anglo-American constitutional tradition. We hear its echo in the sovereign's commitment to constant improvement in the old British coronation oaths, through which the sovereign swore 'to abolish evil laws and customs, and to maintain the good'.[59] Or, as Leo Strauss described the same sentiment in a more modern context, '[a]ll political action aims at either preservation or change. When desiring to preserve, we wish to prevent change for the worse; when desiring to change, we wish to bring about something better'.[60] Good government means reforming and adjusting over time; choosing what to preserve and what to revise; reconciling the desire for permanence with the necessity of change.

Change is 'the great law' which 'we must all obey', as Edmund Burke wrote in a letter to the Sir Hercules Langrishe, his long-time friend and a member of the Irish Parliament:

> It is the most powerful law of Nature, and the means perhaps of its conservation. All we can do, and that human wisdom can do, is to provide that the change shall proceed by insensible degrees. This has all the benefits which may be in change, without any of the inconveniences of mutation.[61]

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[58] Joseph Bosworth and T Northcote Toller, *An Anglo-Saxon Dictionary* (OUP 1898, 1921 supplement) 1287. 'All is full of hardship in this earthly realm / the course of wyrd changes the world under the heavens.' Eleanor Parker, *Winters in the World: A Journey Through the Anglo-Saxon Year* (Reaktion Books 2022) 59 (translation of *The Wanderer*).

[59] This language was included in the coronation oaths of Richard I, John, and Henry III, and perhaps Edward I. Maitland (n 55) 99.

[60] Leo Strauss, 'What is Political Philosophy' in Leo Strauss, *What is political philosophy?* (first published 1959, U of Chicago P 1988) 9, 10.

[61] Edmund Burke, 'A Letter to Sir H. Langrishe Bart. M.P. On the Subject of the Roman Catholics of Ireland &c' in *The Works of Edmund Burke, vol 3* (Little & Brown 1839) 527. See also Lucretius, *The Nature of Things* (Alicia Stallings tr, Penguin Classics 2007) 2.69-79. Pace Burke, there will be times when change must not proceed insensibly and the state's response cannot be gradual, though even then it should avoid mutation. See section 1.3.2.

JGA Pocock and Paul Lucas both noted the similarity of Burke's position to that of the common law jurist Matthew Hale half a century earlier on this point.

> Although the world 'immemorial' often implied the words 'static' and 'unchanging' in content, this was not necessarily so. For lawyers like Matthew Hale, the ancient constitution was a complex and imperceptibly changing structure of customs that was being constantly tested by empirical experience, adapted to new situations, and refined in the law courts. ... Thus the ancient constitution was both immemorial and up to date: it was a record of a society's experience.[62]

A state existing in and through time is always in motion, always confronting the fact of change and always changing in response. And because the change is often imperceptible, a snapshot of the state at any given moment cannot tell us much about its endurance. For that we must try to view it diachronically. Burke provided a memorable description of what this means in practice in a famous passage. A society, he observed:

> is a partnership in all science; a partnership in all art; a partnership in every virtue, and in all perfection. As the ends of such a partnership cannot be obtained in many generations, it becomes a partnership not only between those who are living, but between those who are living, those who are dead, and those who are to be born.[63]

It is notable that Burke does not invoke the idea of a multigenerational partnership simply because the 'ends' of a society cannot be achieved in a single generation but because they 'cannot be obtained' *even in many generations*. I would go further and say that the partnership must endure both because the 'ends' can never be finally and forever achieved this side of eternity,[64] and because a partnership of overlapping generations cannot end unless the generations end, which as I described earlier would mean the end of the state.[65]

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[62] Paul Lucas, 'On Edmund Burke's Doctrine of Prescription: Or, an Appeal from the New to the Old Lawyers (1968) 11 The Historical J 35, 56. See also JGA Pocock, 'Burke and the Ancient Constitution—A Problem in the History of Ideas (1960) 3 The Historical J 125, 142-43.

[63] Burke, *Reflections* (n 22). See also Martin Loughlin, 'Burke on Law, Revolution and Constitution' (2015) 29 Giornale di Storia Costituzionale 49, 52.

[64] cf John Finnis on the project of self-determination, which is 'never consummated, never successfully and finally completed'. John Finnis, *Natural Law and Natural Rights* (2nd edn, OUP 2011) 96.

[65] See also Graham Gee and Grégoire Webber, 'A Conservative Disposition and Constitutional Change' (2019) 39 OJLS 526, 539 citing Michael Oakeshott, 'On Being Conservative' in Michael Oakeshott, *Rationalism in Politics and Other Essays* (first published 1962, rev edn, Liberty Fund 1991) ('[Burke's] account of the community ... denies that

The success, which is to say the survival, of an intergenerational partnership extending vanishingly into the future requires the state to accommodate itself to the 'great law' of change. Burke himself connected these thoughts when he wrote elsewhere in the same work that '[a] state without the means of some change is without the means of its conservation' and '[w]ithout such means it might even risk the loss of that part of the constitution which it wished the most religiously to preserve'.[66] For a state to last, it must adapt and change over time.[67] Of course, if everything were to change at once, that would hardly be consistent with the endurance of the state. Revolutionary change threatens the stability of state and the unity of the people. Burke cautioned against this in his letter to Langrishe when he advised that change should be 'gradual and cautious' to avoid 'sullen discontent in those who are at once dispossessed of all their influence and consideration' and to prevent others 'from being intoxicated with a large draught of new power'.[68] Change, even dramatic change, may be inevitable, but for a state to endure indefinite intergenerational succession, it must manage the process of change in ways that minimise discontinuity and social disruption. The permanence of the state requires its change, but not just any change: the process of change must be orderly and continuous, not arbitrary or disjunctive.

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the community has a specific end, enterprise or goal that one can plan to achieve in one lifetime or many. Governing a community is not like achieving a definite plan with efficient means and stipulated ends.')

[66] Burke, *Reflections* (n 22) 21-22. See also Burke on the passing on of both the form and content of government as an inheritance, which includes 'a principle of conservation, and a sure principle of transmission' without 'excluding a principle of improvement'. ibid 33 as quoted in Grégoire Webber, 'Can the Constitution of a Fruit Fly Be Written?' in Michelle Madden Dempsey and François Tanguay-Renaud (eds), *From Morality to Law and Back Again: A Liber Amicorum for John Gardner* (OUP 2023) 21. A similar idea is expressed by Janus Vitalis in a much-translated poem, which Dr Johnson discussed with Boswell in 1778. ('*immota labescunt; / Et que perpetuó sunt agitate manent.*' [The motionless disappears; it is constant motion which abides.']) James Boswell, *The Life of Samuel Johnson, LL.D., vol III* (first published 1791, G Walker 1820), 287-8.

[67] This is pithily expressed by the young Tancredi Falconeri when he tries to convince his cautious royal benefactor of Garibaldi's revolutionary cause. Giuseppe Tomasi di Lampedusa, *The Leopard* (Archibald Colquhoun tr, Random House 1960) 40 ('If we want things to stay as they are, things will have to change'). Of course, under Italian reunification everything changed, and nothing stayed as it was. For a discussion of Heraclitus's idea of flux 'not as destructive of constancy' but 'paradoxically, a necessary condition of constancy' see Daniel W Graham, 'Heraclitus' in *The Stanford Encyclopedia of Philosophy* (Winter 2023 Edition) <https://plato.stanford.edu/archives/win2023/entries/heraclitus/> accessed 12 October 2025. See also St John Henry Newman, *An Essay on the Development of Christian Doctrine* (2nd edn, James Toovey 1846) 58.

[68] Burke, 'A Letter to Sir H. Langrishe (n 61) 527.

Oakeshott captured something of this idea when he wrote that a political tradition is constantly changing, always in flux, so that '[e]verything is temporary', but it avoids chaotic unintelligibility because 'all its parts do not change at the same time and ... the changes it undergoes are potential within it'.[69] This is also true of a state that wishes to manage the process of change. Rapid simultaneous change risks destabilising social order (or, perhaps more often, it will be the product of an already destabilised social order). This is why, in Oakeshott's terms, the process of change in a successful state must be 'steady' rather than violent, so that 'though it moves, it is never wholly in motion; and though it is tranquil, it is never wholly at rest'.[70] And while '[e]verything is temporary' in a state that is successfully managing change, 'nothing is arbitrary'.[71] To understand a state's constitution as it undergoes healthy change, it helps to consider its changes from an internal perspective; that is, participants in the processs of change should be able to discern reasons for the changes; whether changes are actively directed or passively allowed to happen, they should be both comprehensible and sensible to someone intimately familiar with the state, its constitution, and its *nomos*.[72] Or as Grégoire Webber put it, somewhat enigmatically, '[t]o know a tradition is to discern stability in its movement'.[73] This sort of change is intelligible because it is organic, which means that whether the change is insensible (as Burke advised) or results from a drastic and sudden exercise of governmental power, seen in the light of all relevant circumstances

[69] Oakeshott, 'Political Education' (n 1) 61. Compare Burke: 'in what we improve, we are never wholly new; in what we retain, we are never wholly obsolete'. Burke, *Reflections* (n 22) 34.

[70] ibid.

[71] ibid.

[72] In the sense not of mere custom but of a 'concrete form of life established' at the original and most basic level of the state. Martin Loughlin, 'Nomos' in David Dyzenhaus and Thomas Poole (eds), *Law, Liberty and State: Oakeshott, Hayek and Schmitt on the Rule of Law* (CUP 2015) 72. See also Mariano Croce and Andrea Salvatore, *Carl Schmitt's Institutional Theory: The Political Power of Normality* (CUP 2022) 125, 127, 132 (on "the concrete order of a concrete community' in Carl Schmitt, *On the Three Types of Juristic Thought* (first published 1934, Josephy W Bendersky tr, Praeger 2004) 50). Lukas Van den Berge, 'Law, king of all: Schmitt, Agamben, Pindar' (2019) 13 Law and Humanities 198, 218, 221.

[73] Grégoire Webber, 'Eulogy for the constitution that was' (2014) 12 ICON 468, 476. More poetically: 'We must be still and still moving'. TS Eliot, *East Coker* (Faber & Faber 1942) 17.

it accords with the internal logic of the constitution. That is what Oakeshott meant when he said that the changes that a tradition of political behaviour undergoes 'are potential within it'.[74] They follow, if not an inexorable logic, then an orderly and evolving process that is consistent with the principles of an underlying constitutional ethos (constitutional here being used in both the legal and non-legal senses).[75]

Oakeshott called these guiding principles 'intimations', which are discernible from within a social tradition.[76] They are 'what is intimated in [a polity's] practices, customs, conventions, laws and institutions—that is to say, what is intimated in [a polity's] traditions of behaviour'.[77] Graham Gee has explained that these traditions 'necessarily narrow what is perceived as the range of available decisions' when a society faces a choice about how to change because 'knowledge of what to do today is informed by our traditions of behaviour',[78] which we might express as 'the tradition of intuiting an underlying constitutional ethos from a mass of political and institutional exchanges'.[79] Or to put it in terms used later in this thesis, for a state to endure it must manage the process of change in its political and social orders (which include but extend beyond its laws) in a way that conduces to social stability and avoids unnecessary and destabilising social disruption. Returning to Oakeshott, I would say that the process of change within a state should follow a

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[74] Oakeshott, 'Political Education' (n 1) 61.

[75] One might say a 'hermeneutic of continuity'. Benedict XVI (Joseph Ratzinger), Address of His Holiness Benedict XVI to the Roman Curia Offering them His Christmas Greetings, Thursday, 22 December 2005 <www.vatican.va/content/benedictxvi/en/speeches/2005/december/documents/hf_ben_xvi_spe_20051222_roman-curia.html> accessed 23 October 2023. cf Burke's admonition that reforms 'be carefully formed upon analogical precedent, authority, and example'. Burke, *Reflections* (n 22) 31.

[76] Gee has noted that JAG Griffith explicitly endorsed something like Oakeshott's idea of 'intimations' and suggests that his views were not so different from Oakeshott's. Graham Gee, 'The Political Constitutionalism of JAG Griffith' (2008) 28 LS 20, 42-43 quoting JAG Griffith, 'Why we need a revolution' (1969) 40 PolQ 383, 384.

[77] ibid 42. See also ibid 40.

[78] ibid.

[79] ibid quoting Michael Foley, *The Politics of the British Constitution* (Manchester UP 1999) 14. The idea echoes Montesquieu's discussion of law's relation to social and even environmental conditions. Charles de Secondat, baron de Montesquieu, *The Spirit of the Laws* (first published 1758, Anne M Cohler, Basia Carolyn Miller, and Harold Samuel Stone, trs and eds, CUP 1989) 309, 308-333.

'principle of *continuity*'—whatever its source—by which 'authority is diffused between past, present, and future; between the old, the new, and what is to come'.[80] What this continuity looks like, how it conduces to order in the state, and how entrenchment can help achieve it, is the subject of the next and final part of this chapter.

1.3 Continuity and Order in the State

1.3.1 Continuity and Identity

Continuity, like endurance, is a diachronic phenomenon, and as I use the terms they are correlative: for a state, endurance is the fact of survival, while continuity is the process of survival. Endurance means survival over time through a continuous process of change such that the state and the constitution at each point in time is connected intelligibly (ie, the changes makes sense from an internal perspective, as described above) to each past form of the state and the constitution, even if its current form has since been altered beyond external recognition from its past form(s).[81] This understanding of continuity embraces the potential for both growth and decay, as long as each is a continuous process. In this way, Overton's yew trees may be said to have 'survived' almost two millennia despite bearing little resemblance to their original saplings, and Giotto's frescoes of the life of St Francis in Assisi may be said to have 'survived' more than seven-hundred years despite deterioration, earthquake damage, and questionable restoration.[82]

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[80] Oakeshott, 'Political Education' (n 1) 61.

[81] There is a vast literature on the question of identity over time, which is beyond the scope of this thesis. To the extent it is relevant, I assume that continuity of identity is possible through a transitive relation over time in the way described by Derek Parfit in his elaboration of John Locke's earlier account. Derek Parfit, *Reasons and Persons* (OUP 1984) 206. There is no need to accept the fantastical and, indeed, gothic implications of Parfit's thought experiments to understand why belief in the continuity of collective identity gives us reason to care individually about the future of the state after our own death, contra what Parfit calls 'the extreme claim'. id 307. See also Jed Rubenfeld, *Freedom and Time: A Theory of Constitutional Self-Government* (Yale UP 2001) 131-140.

[82] See also FW Mote on Suzhou's continuously rebuilt Great Pagoda in Simon Leys, 'The Chinese Attitude Towards the Past' in Simon Leys, *The Hall of Uselessness* (Black Inc 2011) 239.

Applied to Burke's idea of an intergenerational project, this means that a state may change over time in many ways, but unless it suffers internal collapse, external invasion, or natural cataclysm, it will remain in an important sense the same state through the generations. What matters is intelligible continuity with what came before.[83] George Orwell illustrated this idea when he wondered, 'What can the England of 1940 have in common with the England of 1840?' and answered his own question with an analogy: 'But then, what have you in common with the child of five whose photograph your mother keeps on the mantelpiece? Nothing, except that you happen to be the same person'.[84] Despite the changes of a turbulent century—multiple Reform Bills, universal suffrage, rapid technological change, and the weakening of London's hold on the Empire—Orwell concluded that:

> there is something distinctive and recognizable in English civilization. It is a culture as individual as that of Spain. It is somehow bound up with solid breakfasts and gloomy Sundays, smoky towns and winding roads, green fields and red pillar-boxes. It has a flavour of its own. Moreover it is continuous, it stretches into the future and the past, there is something in it that persists, as in a living creature.[85]

Time-bound though his references were (the towns, at least, are no longer smoky), Orwell's comparison captures the organic nature of continuous growth. David Hume, also considering the idea of continuity, arrived at the same comparison from the other direction:

> we may observe, that the true idea of the human mind, is to consider it as a system of different perceptions or different existences, which are link'd together by the relation of cause and effect, and mutually produce, destroy, influence, and modify each other. … One thought chaces [sic] another, and draws after it a third, by which it is expell'd in its turn. In this respect, I cannot compare the soul more properly to any thing [sic] than to a republic or commonwealth, in which the several members are united by the reciprocal ties of government and subordination, and give rise to

[83] Consider Charles de Gaulle's conversation with Phllippe Viannay the evening before the liberation of Paris. Viannay spoke excitedly about the opportunity to harness the energy of the Resistance to remake France, to which de Gaulle replied: 'France is not a country that is beginning; it is a country that is continuing'. Quoted in Julian Jackson, *A Certain Idea of France* (Penguin Books 2019) 371. This anecdote shows that continuity may be as much a matter of spirit as of fact and, in extreme cases, the spirit may be carried through a political interregnum in the imagination of a single man. It is internally perceived continuity that matters, not external reality.

[84] George Orwell, 'England, Your England' in George Orwell *England, Your England and Other Essays* (Secker & Warburg 1953) 194. Leo Amery used the same metaphor to describe continuity in the British constitution. Leo Amery, *Thoughts on the Constitution* (OUP 1947) 2.

[85] Orwell (n 84) 194.

> other persons, who propagate the same republic in the incessant changes of its parts.[86]

How far back one can press this claim in respect of a state an interesting question. It may be that even organic evolution can, over time, effect such a dramatic change that a state can no longer be identified in any meaningful way with an earlier point in its development. Even then, '[t]he child is the father of the man',[87] and excepting cases of comprehensive political and social revolution or similarly cataclysmic disasters, it will be difficult to draw a clean line and say that nothing that came before a certain date is relevant to the future development of the state. Thus, despite wholesale changes in form and function in both the British state and its constitution, Edward I's first Parliament is identifiably an embryonic stage of the modern Parliament.[88] Despite many dramatic upheavals and even revolutionary changes, a distinct through-line is discernible. Similar genealogies can be traced back from institutions of the Canadian and American constitutions to a similar era.[89]

1.3.2 Entrenchment and Order

Codified constitutions, ordinary laws, and non-legal forms of entrenchment all participate in the continuity that enables the endurance of a state. John Finnis has observed (in amusingly Carollian language) that 'the most general and basic function of "the law"' is 'to relate the past to the present, by providing a present guide to actions which take place and have effect in the future

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[86] Hume, *Treatise of Human Nature* (first published 1739, Lewis Amherst Selby-Biggie and PJ Nidditch eds, 2nd edn, OUP 2014) 261.

[87] William Wordsworth, 'My heart leaps up' in Henry Reed (ed), *The Complete Poetical Works of William Wordsworth* (Troutman & Hayes 1851) 73.

[88] Maitland (n 55) 76. See also JWF Allison, *The English Historical Constitution* (CUP 2007) 145-6 quoting Arthur Von Mehren, 'Judicial conception of legislation in Tudor England' in Paul Sayre (ed), *Interpretation of Modern Legal Philosophies, Essays in Honor of Roscoe Pound* (OUP 1947) 762.

[89] 'When President Nixon got into his helicopter and left the White House lawn and his office, he did so because he was afraid he would be impeached. … Impeachment in the American constitution does not bear an accidential or trivial relationship to that which brought down Michael de la Pole, Earl of Suffolk, chancellor of England, in 1386. It was the same procedure and the descent can be traced without any shadow of doubt'. James Campbell, *The Anglo-Saxon State* (Hambledon and London 2000) 267.

(when this present will be in the past)'.[90] The endurance of a legal order is a form of continuity in itself that also provides continuity within and for the state whose people the law serves.[91] Building on Finnis, Ekins has explained the importance of this 'general principle of continuity' in law:

> This standing willingness to maintain past rules accepted by the group in the past and not since changed by a rule of change accepted by the group makes clear that the unity of the legal system is the unity of the political community whose laws they are. And this unity consists in the joint intention to form and remain one political community.'[92]

The connection between the continuity of law and the unity of a political community adds a new dimension to the joint project of statehood that helps to explain how a state manages the challenge of Burke's 'great law' of change. Because the state provides the structural conditions through which the people carry on the perpetual joint project of living together in the civil condition,[93] for the state to endure over many generations it must have ways of managing change within and to these conditions. The law, and more broadly a *legal tradition*, is one such important change-managing mechanism. A state's legal tradition reduces the destabilising potential of change by limiting possible civic changes in response to the great law of change to those that are consistent with a continuous and intelligible tradition, which is to say it channels change in a way that tends towards the organic and predictable rather than the arbitrary or stochastic.[94] Because the law, like a people and the state that serves it, exists over time, the unity of the law could not extend horizontally across an entire legal system in a coherent way unless it also extended vertically through time. The

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[90] John Finnis, "Revolutions and Continuity of Law," in *Philosophy of Law, Collected Essays, Vol IV* (OUP 2011), 423. What is a legal amendment versus what is an illegal revolution is beside the point; what matters is continuity and orderly change. If the only alternative is disjunctive and disorderly revolution, then the constitution may require an orderly revolution, *viz* one that preserves the stability and underlying continuity of the state. A revolution may be 'Glorious', if it is stabilising. On the benefits of kairotic change, see Charles Taylor, 'Leading a Life' in Ruth Chang (ed), *Incommensurability, Incomparability, and Practical Reason* (Harvard UP 1998) 180.

[91] Compare Oakeshott's description of continuity as relating change 'between past, present, and future; between the old, the new, and what is to come'. Oakeshott, 'Political Education' (n 1) 61.

[92] Ekins, 'How to Be a Free People' (n 52) 170.

[93] Oakeshott, *On Human Conduct* (n 28) 108.

[94] Martin Loughlin, 'The Silences of Constitutions' (2019) 16 ICON 922, 929.

unity of the law is thus inseparable from the continuity of the law, which requires orderly change to cohere and endure.

Describing what he terms 'the historical constitution', John Allison has written that:

> [w]hat is constituted at the centre of the historical constitution is not a principle [eg, AV Dicey's 'supremacy of parliament', Trevor Allan's 'rule of law, liberal constitutionalists' 'principle of equality', or Friedrich Hayek's liberty-promoting 'predictability'] but an overarching mode of change that respects continuity, at least in form, *and the reassurance it affords*. That mode is not derived from normative theory but has evolved in legal and political practices of conservation and innovation by which the institutions of government are controlled and facilitated as they evolve, and stability is secured and re-established.[95]

Here we see the legal tradition located within a larger constitutional tradition, which quite apart from any principles concocted by theorists (and especially by proponents of normative theories) to make sense of it, functions in practice as a 'mode of change that respects continuity'.[96] Regardless of our own preferred theory of the constitution, we should never forget that a constitution is a practice, not a theory. And, in practice, it is no more or less than the sum of all the ways by which a state manages change in a way that reassures the people that their state is intelligibly ordered.[97] The constitution's stability *reassures*, and that reassurance in turn stabilises the constitution. While I believe this is an accurate and useful way of understanding a constitution, it is not essential to my thesis, and I rely on Allison here only for his insight into the relationship between a 'mode of change that respects continuity' and the promotion of 'reassurance' and 'stability'.[98] The constitution, in Allison's assessment, does not merely change over time, it 'evolves' in a way that links the past in continuity with the present and 'harmonise[s] modern with ancient law'.[99] This

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[95] Allison (n 88) 243 (emphasis added).

[96] ibid 47.

[97] cf ibid. ('I will invite the viewer to view the constitution as not, at heart, some central institution, rule or principle, abstracted and ossified at the arbitrary and fleeting moment of analysis'.)

[98] ibid 243.

[99] ibid 57 quoting Sir Frederick Pollock and Frederick William Maitland, *The History of English Law before the Time of Edward I* (2nd edn, CUP 1898) 511-12

view of the historical constitution is the legal tradition writ large as it is brought to bear on the institutions and arrangements of the state to order the dynamic tension between permanence and change. This means, at a minimum, that a constitution cannot be reduced to a permanent, unchanging document or to a fixed set of institutions and arrangements. It must be capable of evolving and changing in response to the evolving and changing needs of the state.[100] And because in a healthy constitutional order this evolutionary change follows an orderly and organic process, we can say that, while JAG Griffith may have been right in a narrow sense to say that 'the constitution is ... what happens',[101] it does not follow that just '*anything can happen*'.[102]

When talking about the constitution in these terms, it is easy to sound glib, which is excusable when the effect is intentional, as it was with Griffith's notorious quip, but otherwise risks devolving into tautology. Joseph Raz's musing on the relationship between longevity and legitimacy skirts this line, flirting with facetiousness while making an important point. 'Constitutions, at least old ones', he wrote, 'do not derive their authority from the authority of their authors. But there is no need to worry as to the source of their authority. They are self-validating. They are valid just because they are there, enshrined in the practices of their countries.'[103] 'It follows', according to Raz, that 'practice-based law is self-vindicating' and '[t]he constitution of a country is a legitimate constitution because it is the constitution it has'.[104] Although this thesis conceives of a constitution more broadly than Raz's article does,[105] even granting that difference I place at least as much

[100] ibid 247. cf Henry Fielding, 'An Inquiry into the Causes of the Late Increase of Robbers &c' [1751] in Thomas Roscoe and George Cruikshank (eds), *The Works of Henry Fielding, Complete in One Volume* (Bohn 1852) 759, 760 ('[A]ll seem to have the conception of something uniform and permanent, as if the constitution of England partook rather of the nature of the soil than of the climate, and was as fixed and constant as the former, not as changing and variable as the latter.')

[101] JAG Griffith, 'The political constitution' (1979) 42 MLR 1, 19.

[102] Gee (n 76) 42. See also Martin Loughlin, 'Towards a Republican Revival?' (2006) 26 OJLS 425, 434.

[103] Raz (n 6) 348. See also Kent Greenawalt, 'The Rule of Recognition and the Constitution' (1987) 85 Michigan L Rev 621.

[104] ibid 348-49.

[105] Early in the article, Raz catalogues the features of a constitution, one of which is that it has a 'canonical formulation' which 'usually means that it is enshrined in one or a small number of written documents', and

emphasis on the fact that constitutions enshrine the practices of their countries as on the fact that, as Raz says, they are also 'enshrined in the practices of their countries'. If the two things are not quite the same, it is a close two-way relationship. There is no doubt that the way in which a people's present reception of their constitution (for this purpose let us imagine, as Raz does, the constitution as a codified text) and the way in which they conform their practices to its strictures is both evidence of the constitution's legitimacy and a source of its legitimacy, but this will only be the case if the written constitution remains broadly consistent with necessary and desired state practices. The constitution's continued legitimacy is not entirely self-validating because it also depends on its continued relevance, which in turn derives from its ability to change in ways that accommodate it to the changing needs of the state and desires of the people. If the text ceases to correspond in a meaningful way with those needs and desires, then the constitution's legitimacy will become merely symbolic and other functional sources of authority and order must be found. Legitimacy, in the richer sense that I take Raz to mean, requires the constitution to change with the state.

Perhaps one reason Raz doesn't give enough credit to this two-way relationship in this article is because he conceive of the constitution as 'a framework for the public life of a country, giving it direction and shape' within which change happens.[106] This metaphor is too limited and too limiting because it does not recognise the need for changes to the framework itself. Even a codified Constitution may need to be changed, as the twenty-seven amendments to the United States Constitution and at least thirteen amendments to the Canadian Constitution since 1982 attest. And those are only the formal amendments. If one includes changes in constitutional interpretation by courts or other political actors, there would be many more. Probably hundreds. And if one takes an even broader view of the constitution that includes conventions, practices, and constitutional statutes, one could count still more constitutional changes. Probably thousands.

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immediately following the passage quoted above, he refers to 'knowledge ... of the text'. ibid 324, 350. However, in various places he also refers to unwritten parts of a constitution and to conventions. ibid 325, 350.

[106] ibid 350-51.

The concept of a constitution that endures over time must be more than the brittle exoskeleton Raz describes; its lineaments must be supple, protean, elastic.[107] Sometimes it must constrain a state's responses to change, and sometimes it must stretch or change itself. It is less like a framework and more like Burke's description of the constitution as a supple 'vestment' that 'accommodates itself to the body'.[108] Raz describes a framework constitution as providing social stability by limiting changes to those that fit within it,[109] but because we know that a constitution (even if we restrict ourselves to the narrow definition of a single codified document) will itself change over time, an account of the stabilising function of a constitution must also include the ways in which the constitution itself changes its shape, draping and enfolding a state that is always in motion. When Raz then considers how a constitutional framework itself can change, he describes it happening slowly over time as the result of many small changes that occur within the framework itself. 'Of course', he writes, 'the cumulative effect of small-change reform may well amount to a radical change in constitutional law over the years' and 'stability is consistent with slow change, whatever its cumulative effect'.[110] I regret that Raz did not provide an example of these cumulative

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[107] WS Holdsworth, 'Lecture I: The importance of our legal history' in *Some Lessons from Our Legal History* (Macmillan 1928) 6 quoted in Allison (n 88) 21 ('[A]ll long established legal systems must possess a background of old institutions, and of old technical principles and rules, sufficiently stable to give security to the ordering of society, and yet sufficiently elastic to allow the changes needed by altered social needs, and an altered public opinion'.).

[108] In a speech to the House of Commons that he prepared but appears not to have delivered, Burke wrote:

> [the constitution] is a choice not of one day, or one set of people, not a tumultuary and giddy choice; it is a deliberate election of ages and of generations; it is a constitution made ... by the peculiar circumstances, occasions, tempers, dispositions, and moral, civil, and social habitudes of the people, which disclose themselves only in a long space of time. It is a vestment, which accommodates itself to the body.

Edmund Burke, 'On a Motion Made in the House of Commons' [1782] in *The Works of the Right Hon. Edmund Burke volume II* (Holdworth and Ball 1834) 487. cf Joseph de Maistre similar sartorial metaphor: 'Given the population, the morals, the religion, the geographical situation ... [is the constitution not] to find the laws which suit it?' Quoted in John Dominic Upton, *The Constitutional Thought of Joseph de Maistre* (Thesis submitted to the Department of Law of the London School of Economics, London, November 2008); Orestes Brownson, *Brownson's Quarterly Review vol 2* (BH Greene 1874) 212 ('We care little about forms of government, and agree with the French professor who said, "Forms of government are like the forms of shoes-those are best which best fit the feet that are to wear them"').

[109] Raz (n 6) 350-52.

[110] ibid 364.

changes within a framework that, over time, may alter the framework itself because, as a logical matter, the process is impossible.[111] How can a series of events that occur only within a framework change the framework itself? When a series of 'small-change reforms' over time change the constitutional framework, it must be because one or more of them is not in fact a change within the framework but a change to the framework itself, which means they are not merely changes that occur 'within existing frameworks and do not upset them', as Raz posits.

1.4 Conclusion

Unlike an enterprise association, a state is not a project with a goal that can be finally achieved; it can only be sustained for as long as possible by and for the good (in all senses) of the people.[112] A state's endurance is a measure of its success, and a precondition for its success in other senses. The process of a state's endurance requires continuity over time. Continuity is achieved by managing change, whether it is the result of internal or external forces, in ways that conduce to order and stability in the state. Orderly change is usually organic and always intelligible. An important way in which states promote orderly change and discourage arbitrary or unnecessarily radical change is by entrenching institutions and arrangements in different forms and to different degrees: constitutionally, legally, and socially. With this context established, chapter 2 begins the discussion of entrenchment.

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[111] Because I agree with Oliver Wendell Holmes that the life of the law is not logic but experience, I hesitate to impugn a statement of legal theory on logical grounds. Oliver Wendell Holmes, *The Common Law* (first published 1881, Little, Brown and Company 1923) 1. However, Raz's position here is contrary to both logic and experience.

[112] Oakeshott, *On Human Conduct* (n 28) 114-24. A church and a university are, in this respect, more like states than economic partnerships. A family is unlike a state because the choice not to propagate the family line is not necessarily a failure, except in amoral genetic terms. If all my children die in defence of the state or are called to celibate religious life, those are good moral ends that will also end the family.

Chapter 2: ENTRENCHMENT

2.1 Why Entrench?

Because change is inexorable and continuity is necessary for a state to endure, states needs ways of managing the process of change that promote continuity. To do this, they embed institutions and arrangements that, first, provide resistance to change and, second, allow the state to direct the process of change to minimise discontinuity and social disruption and generally keep the state from being a passive hostage to mutable fortune. The primary way by which states manage change is through their constitutional orders, which by convention or codification establish the central institutions of society, distribute power, settle questions of political succession, and, in modern codified Constitutions, set out special procedures for changing these institutions and arrangements. One of the goals of this thesis is to show that this codified constitutional entrenchment is only one of many forms of legal and non-legal entrenchment. Together, these forms of entrenchment combine, overlap, and interact in a network of legal, political, and social practices that are generally understood and accepted and, together, allow a society to maintain order through change. It is the precise combination of different forms of entrenchment in a state, which is the product of its unique history, that provides the strength and suppleness, firmness and flexibility, that is necessary at different times and in different ways to manage the challenges of change over time.

In the next four chapters, I will examine these different types of entrenchment in more detail, but first it will be helpful to understand why entrenchment is a universal phenomenon. Or, to put it bluntly: Why entrench? I have grouped possible answers into four general categories, which are: (1) the case from stability; (2) the case from expression; (3) the case from constraint; and (4) the case from being-in-time. I will consider the merits of each answer in turn.

2.1.1 The Case from Stability

Nick Barber begins his article titled 'Why Entrench?' by noting, as I did in my introduction, that the term 'entrenchment' has not been used consistently:

> At its most general, entrenchment has been used to describe any rule that is difficult to alter. There is a sense in which we could talk of the rules that constitute the British National Health Service (NHS) as being politically entrenched. … Taken this broadly, almost all legal rules are entrenched to some degree. After all, most legal rules have a quality of stickiness: their removal will unsettle or disturb expectations, and there will be some opposition to their change.[1]

Barber proposes a definition that he calls 'a middle course', one that 'takes entrenchment to signify a legal rule that makes it more difficult for a body to change the law in an area that, but for the entrenching rule, would fall within its jurisdiction, and be alterable under the default rules of legal change'.[2] He then answers his titular question by arguing that '[e]ntrenchment can make an area of law more stable by making it harder to change'.[3] This is important because '[s]tability is a desirable—and, to a degree, a necessary—quality of a legal order'.[4] Barber calls this the 'general argument for entrenchment'.[5]

Barber's argument from stability advises that a state's form and being should not be improvised endlessly and capriciously. Its future should be tethered to choices made in the past, and those past choices must be entrenched precisely to prevent a daily plebiscite on them, but not so entrenched to make reconsideration impossible. This is, incidentally, why Ernest Renan chose the wrong analogy when he said that '[a] nation's existence is (if you will pardon the metaphor) an

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[1] NW Barber, 'Why Entrench?' (2016) 14 ICON 325, 327.

[2] ibid. Notably, his chosen meaning did 'not encompass political entrenchment'.

[3] ibid 335.

[4] ibid. Barber compares the virtue of stability to 'what Joseph Raz [speaking of the rule of law] has called a "negative virtue"'. See also Aquinas (attributed): '[T]he good and wellbeing of a community united in fellowship lies in the preservation of its unity. This is called peace, and when it is removed the community is divided against itself, social life loses its advantage and instead becomes a burden.' St Thomas Aquinas, 'De regimine principum' in *Aquinas: Political Writings* (RW Dyson ed and tr, CUP 2002) Book I, ch III, 10.

[5] ibid.

everyday plebiscite, just as an individual's existence is a perpetual affirmation of life'.[6] A plebiscite is not the right analogy because it is too precarious. A plebiscite may go either way, depending on the people, the question, and the moment. As with Quebec sovereignty in 1995 and Brexit in 2016, a referendum is often an extremely close-run thing, even when it concerns the actual (as opposed to Renan's metaphorical) future of a nation. Fortunately, the continued day-to-day existence of a state is almost never an open question of this kind. The people of a state do not wake up each morning facing a blank slate, without individual or collective memories, and a state could hardly endure if everything, including its most basic and longest-lived features, were always up for grabs.

Renan does better with his second analogy of a nation's existence to 'an individual's existence [as] a perpetual affirmation of life'.[7] By merely continuing to do the same thing we did the day before, and the day before that—sometimes consciously but usually unreflectively—we 'affirm' our existence over our non-existence. We keep on living, as a nation keeps on existing, because our life is the continuation of a project in which we are invested by virtue of having a past and expecting a future. We continue to live because that is what living things do until they don't (which is also not, under normal conditions, a choice). Similarly, a nation endures because that is what nations do (with the same caveat). Life, whether the life of a man or a nation, is not a series of constant life or death choices—we are not all Prince Hamlets, thank goodness!—it is a continuum of experience in which we must assume and follow a high degree of path-dependence, or we could not function. As John Finnis put it, '[t]hose who participate in the life of the polity must go on, day-in and day-out, acknowledging that what was done by way of selecting a scheme

[6] Ernest Renan, 'What Is a Nation?' in Ernest Renan, *What Is a Nation? and Other Political Writings* (first published 1882, MFN Giglioli ed and tr, Columbia UP 2018) 261-2. There is something oddly post-modern about the way Renan describes this mode of living anew each day. cf Zygmunt Bauman, *Postmodernity and its Discontents* (Polity Press 1997) 89 (the post-modern 'life strategy' is 'a determination to live one day at a time. ... To forbid the past to bear on the present.') quoted in Jed Rubenfeld, *Freedom and Time: A Theory of Constitutional Self-Government* (Yale UP 2001) 5. See also ibid 91, 100, 143.

[7] ibid 262.

did settle that question not only for then but also for now'.[8] Curiously, Renan said all this quite convincingly just before he offered his inapposite analogy to a daily plebiscite. 'The nation', he wrote, 'like the individual, is the culmination of a long past of efforts, sacrifices, and devotion'; it 'cannot be improvised' but must be lived chronologically, with all the endurance of joy and suffering that that entails.[9] Here we have a much more convincing description of the ongoing state of a state than a daily plebiscite.

Entrenchment increases stability in a state because it increases predictability, but predictability is not the same as certainty. Entrenchment is not a promise, either by a state to itself or to anyone else.[10] Promises are the way 'individuals create obligations for themselves and their words are recognized as content-independent peremptory reasons for their own action',[11] but the entrenched commitments of a state are only presumptive, not peremptory. Entrenchment is only a contingent intention: an intention to commit oneself to a rule of action that contains within it the implicit assumption that one might, at some time in the future, decide that it would be better to commit to a different rule of action.[12] For a promise to be so flexible, it would have to come with that caveat at the time of promising. At the time a commitment is formally entrenched, it may be almost inconceivable to the people of the state that it will one day need to be repudiated—but only *almost*, or there would be no need for the process of amendment that is included in a codified Constitution.

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[8] John Finnis, 'Law's Authority and Social Theory's Predicament' [1984] in *The Collected Essays of John Finnis, Vol IV* (OUP 2011) 63.

[9] Renan, 'What Is a Nation?' (n 6) 261. Compare Johann Gottlieb Fichte, *Addresses to the German Nation* (Gregory Moore ed, CUP 2008). See also Bernard Yack, 'Popular Sovereignty and Nationalism' (2001) 29 Political Theory 517, 521.

[10] Jed Rubenfeld is appropriately nuanced on this point. Rubenfeld, *Freedom and Time* (n 6) 126, 127.

[11] HLA Hart, 'Commands and Authoritative Legal Reasons' in HLA Hart, *Essays on Bentham* (OUP 1982) 260.

[12] John Finnis, 'On Hart's Ways: Law as Reason and as Fact' (2007) 52 AmJJuris 25, 32-33. cf Jean-Jacques Rousseau, 'On the Social Contract' in *The Major Political Writings of Jean-Jacques Rousseau* (first published 1762, John T Scott ed, U Chicago P 2012) 180 ('[I]t is absurd for the will to enchain itself with regard to the future'.)

Entrenchment is also unlike a promise because it is a promise a state makes to itself—there is no third-party promisee.[13] A promise binds the promisor for the benefit of the promisee(s), whereas constitutional and legal entrenchment are commitments made by one generation that applies to future generations for whose ostensible benefit the commitment is made. It would be a strange kind of promise that binds the promisee rather than the promisor. Entrenchment is also different from a self-promise, which binds (if at all[14]) by moral sanction even if it can be broken without implicating a third party.[15] More to the point, we should not *want* entrenchment to function like a promise. A commitment by the people of a state to abide by a specific principle in enacting future legislation or to follow a specific political process for electing officials is not—or should not be—a promise that the people will never change their mind, no matter how experience or unforeseen circumstances confound the entrenched principle or process.

The argument for entrenchment from stability is that entrenchment helps to stabilise a state by shaping and structuring future decision-making. But if the entrenchment is unbreakable, like a solemn vow or a promise, it will be too rigid to permit necessary changes. Unlike the case of an individual who is free (though not necessarily consequence free) to change his mind, a constitutionally entrenched commitment that makes it too difficult (and, perforce impossible) for

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[13] Jon Elster, *Solomonic Judgements: Studies in the Limits of Rationality* (CUP 1989) 196. See n 54 for caveats. Per Raz, even a promise is not a bind as '[t]he presence of reasons of a certain kind will justify breaking the promise'. That is, even though people 'have an obligation to keep their promises … this does not mean that they ought to keep their promises come what may'. Joseph Raz, 'The Institutional Nature of Law' in Joseph Raz, *The Authority of Law* (OUP 1979) 103, 114.

[14] St Thomas Aquinas, *Summa Theologica* 1-Il, q. 96, art. 5, Reply Obj. 3, in Dino Bigongiari (ed), *The Political Ideas of St. Thomas Aquinas: Representative Selections* (Hafner 1953) 74 ('[P]roperly speaking, no man is coerced by himself'). For similar reasons, Jean Bodin thought that a sovereign could be bound by his promises, but not by his own laws. Jean Bodin, *The Six Bookes of Commonweale* (first published 1576, Kenneth Douglas ed, Harvard UP 1962) 91-2. See also Jeffrey Goldsworthy, *The Sovereignty of Parliament: History and Philosophy* (OUP 2001) 93.

[15] David Hume did not believe that a self-promise is morally binding. David Hume, *Treatise of Human Nature* (first published 1739, Lewis Amherst Selby-Biggie and PJ Nidditch eds, 2nd edn, OUP 2014) III.II.V, 516-525. On whether self-promises are binding, see further Hobbes (no) and Rosati (yes). Thomas Hobbes, *Leviathan* (first published 1651, Richard Tuck ed, CUP 1997) at II.26, 184; Connie Rosati, 'The Importance of Self-Promises' in Hanoch Sheinman (ed), *Promises and Agreements: Philosophical Essays* (OUP 2011) 125–155. In any event, entrenchment is distinct from a self-promise in other ways.

future generations to pursue different rational needs or preferences will entrench sclerosis, which as Barber rightly argues is a threat to stability.[16]

2.1.2 The Case from Expression

Much has been written about the expressive features of codified Constitutions,[17] but before considering the scholarship as it applies to entrenchment it is helpful to distinguish between two ways in which Constitutions can convey meaning. The first, which Richard Albert has called the 'communicative' function, 'refers to an actual *intent* to convey meaning' while the latter, which he has called the 'expressive' function, 'refers to an act or omission that *unintentionally* conveys meaning'.[18] As is clear from Albert's description, this is a simple intent-based distinction. The first function is especially clear in Constitutional preambles, where a state communicates the 'ostensible "essence" of the people or nation in whose name the constitution has been drafted'[19]—even if the substance of the communication is more aspirational than descriptive and necessarily glosses over divergent social and political views in the state.[20] The decision to entrench specific rights or freedoms in particular has a communicative as well as a substantive aspect as the state advertises that it is the kind of polity where such rights or freedoms are protected (whether or not they are in practice). The communicative function thus describes a state to itself and to third parties as it wishes to be and be seen. This communicative function is particularly useful for a new state that wishes to justify its independence or for an old state that wishes to justify a new constitutional

[16] Barber (n 1) 342.

[17] For a general overview of the literature, see Richard Albert, 'The Expressive Function of Constitutional Amendment Rules' (2013) 59 McGill LJ 225.

[18] Richard Albert, 'Constitutional Handcuffs' (2010) 42 Arizona State L J 663, 700 (internal citations omitted; emphasis added).

[19] ibid 700.

[20] Mark Tushnet, 'Some Reflections on Method in Comparative Constitutional Law' in Sujit Choudhry (ed), *The Migration of Constitutional Ideas* (CUP 2006) 79; Sanford Levinson, 'Do Constitutions Have a Point? Reflections on "Parchment Barriers" and Preambles' (2011) 28 Social Philosophy and Policy 150, 177-78.

order.[21] The communicative function of a Constitution may also build on or be supplemented by extra-constitutional writing. This communication may be official (the American Declaration of Independence), unofficial (commentaries on the English constitution by Walter Bagehot and AV Dicey or the novels of Anthony Trollope), or semi-official (statements about the 'purpose' or the 'essence' of the constitution by judges in prominent judgments or speeches by constitution-makers like James Madison, Charles de Gaulle, and Pierre Trudeau).

The 'expressive function' is more complicated than the communicative function, but more interesting. While 'communication is a gesture ... whose meaning is usually settled by the communicator herself', expression 'is ... dissociated from intent'[22] and can be discerned by third parties within or without the state who may judge the nature of the state by looking at what it does rather than what it says when the two diverge. The importance of the 'expressive' function can be seen in cases where there is an obvious disjunction between a state's constitutional language and its constitutional practice.[23] The old Soviet Constitution, which ostentatiously 'communicated' the importance of individual rights while disdaining them in practice is an obvious case.[24] More interesting than the distinction between the two functions, however, is where they overlap. Albert has observed that in the case of entrenchment the functions are especially blurred.[25] This is because the act of '[e]ntrenchment openly marries expression with communication by, first, clearly

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[21] The former include the Constitution of the United States of America of 1789 and the Constitution of the Russian Soviet Federative Socialist Republic of 1918; the latter include Canada's *Constitution Act, 1867* and the French Constitution of the Fourth Republic of 1946.

[22] Albert, 'Constitutional Handcuffs' (n 18) 700.

[23] Albert, 'The Expressive Function' (n 17) 258-59. See also David S Law & Mila Versteeg, 'The Evolution and Ideology of Global Constitutionalism' (2011) 99 Cal L Rev 1163.

[24] David S Law, 'Constitutions' in Peter Cane & Herbert M Kritzer (eds), *The Oxford Handbook of Empirical Legal Research* (OUP 2010) 376.

[25] One way to unblur them conceptually is to bear in mind JL Austin's distinction between locution (the act 'uttering a certain sentence with a certain sense and reference'), illocution (the 'performance of an act *in* saying something as opposed to performance *of* an act of saying something') and perlocution (bringing something about consequentially by saying something). JL Austin, 'Lecture VIII' and 'Lecture IX' in JL Austin, *How to Do Things with Words* (OUP 1962) 94-107 and 108-119, especially 99, 198, 116-17. Or perhaps not.

identifying a constitutional provision as unamendable and, second, just as clearly manifesting the intent to convey the meaning behind the decision to have made that provision unamendable'.[26] In other words, constitutional entrenchment is a public act that not only expresses *this is who we are* (which ordinary legislation already does) but consciously communicates *this is who we have firmly committed to being*.[27] And because constitutional entrenchment can take different forms representing different degrees of entrenchment, the communicative content of such entrenchment includes not just the decision to entrench a provision but the decision of how deeply to entrench it relative to other provisions.[28] When it comes to formally entrenching a hierarchy of protected institutions and arrangements, as in the Canadian Constitution, both the act and the degree of entrenching communicate what the act and degree of entrenchment express. The two functions merge.

Communication and expression, however, decouple when instead of looking at what is *formally* entrenched in law you focus on what is *actually* entrenched in practice. Because entrenchment can only be communicative when it is intentional, unintended forms of entrenchment can communicate nothing even as they express much about a state. Of the forms of entrenchment discussed in this thesis, only some are formal, deliberate and communicative; others are informal and expressive. What delegates at a Constitutional convention decide to entrench beyond the reach of temporary majorities may be described as communicative (and usually also expressive). The same is true for laws passed by a legislature, which entrench a new status quo pending legislative repeal or revision. By contrast, a practice that calcifies into a constitutional convention will not normally be linked to a clear communicative act,[29] and thus will be almost entirely expressive. This is even more true of social entrenchment, whether it takes the

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[26] Albert, 'Constitutional Handcuffs' (n 18) 700-01.

[27] ibid 700. See also Jon Elster, 'Constitutionalism in Eastern Europe: An Introduction' (1991) 58 U Chicago L Rev 447, 471.

[28] Albert, 'The Expressive Function' (n 17) 244, 250-51, 281

[29] Though it can be, as it was in the case of the declaration of the Salisbury-Addison convention in 1945 and the Sewel Convention in 1998.

'natural' form of enduring popular support for an arrangement or institution or the 'unnatural' form of a constitutional deformity that prevents constitutional amendment.[30]

The best accounts of the communicative or expressive value of entrenchment are as complex as the life of a state itself. Gary Jacobsohn, for example, makes a compelling case that 'a constitution acquires an identity through experience' and that this identity 'emerges *dialogically* and represents a mix of political aspirations and commitments that are expressive of a nation's past, as well as the determination of those within the society who seek in some ways to transcend that past'.[31] Albert also invokes the metaphor of dialogue to describe the relationship between entrenchment and constitutional (and state) identity. He writes that '[t]here is a grave danger in presuming that a constitutional structure, for instance entrenchment, can shape political culture, specifically social values'; indeed, 'continuing dialogue about this very matter ... demonstrates only one point beyond doubt: that constitutional structure and political culture enjoy a bi-directional relationship in which the form and fate of one is linked to the fate and form of the other'.[32] They are both right, but I would put the matter somewhat differently. Considering the question not from the perspective of constitutional identity but instead from the perspective of state endurance, the entrenchment that matters is more likely to be a function of necessity than the product of intention. Considering entrenchment as a tool for state endurance, entrenchment may be done deliberately for show, but what matters is its function over time. What a state chooses to entrench communicates something about the state, but that is not the primary purpose or function of the act of entrenchment.

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[30] Richard Albert, 'Constructive Unamendability in Canada and the United States' (2014) 67 Supreme Court L Rev 181. This phenomenon is discussed with respect to the 'unamendability' of the Canadian Constitution below at nn 35-37.

[31] Gary Jeffrey Jacobsohn, *Constitutional Identity* (Harvard UP 2010) 7.

[32] Albert, 'Constitutional Handcuffs' (n 18) 701. Dialogue is too limited a metaphor. In culturally divided societies, where competing visions expose the constitutional order itself to political contest, the negotiation of differences may look more like a particularly contentious meeting of the prince-electors of the Holy Roman Empire. James Tully, *Strange Multiplicity: Constitutionalism in an Age of Diversity* (CUP 1995) 183-84.

Looking only at the communicative text of the Canadian Constitution, for example, we may learn which institutions and arrangements the men and women who drafted and approved it considered important. We can also learn from the fact that they expressly provided for amendments that they did not think that their judgement would necessarily be permanent. Finally, by looking at the different degrees of entrenchment imposed by different amending formulas, we may infer which institutions and arrangements they considered more foundational, in the sense that they should require a greater degree of unanimity to amend.[33] That is what the text communicates. It says a lot, but hardly everything. For a full picture of the constitutional order, we also need to look at what is entrenched in practice. The fact that the Canadian constitution has proved impossible to amend in significant ways despite serious efforts and the support of enough provinces to satisfy the constitutional amending formula expresses something important about the state that is unknowable from the text.[34] It tells us something about the challenges of governing a geographically dispersed and politically disparate federation; about the growing demographic power of the western provinces since 1982, and certainly since 1867; and about the conundrum of Quebec's place in a constitutional order that it has never formally accepted.[35] Looking at other forms of entrenchment, such as the 'quasi-constitutional' status of certain statutes, adds further colour and texture to the picture of Canada. That laws protecting the status of official languages, for example, are more deeply entrenched than other laws expresses something unique about the country.

If we look at which institutions and arrangements are practically entrenched in the constitutional orders of other states, we also find in them much that is invisible in the constitutional

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[33] Albert, 'The Expressive Function' (n 17) 244, 250-51, 281; Stephen A Scott, 'Pussycat, Pussycat or Patriation and New Constitutional Amendment Processes' (1982) 20 U of W Ontario L Rev 247, 304; Peter W Hogg, *Constitutional Law of Canada* (Thomson Reuters 2023) 107 ('The five listed topics [in s41] are specially entrenched because they are deemed to be matters of national significance which should not be altered over the objection of even one province.')

[34] Peter W Hogg, 'The Difficulty of Amending the Constitution of Canada' (1993) 31 Osgoode Hall L J 41; Albert, 'Constitutional Handcuffs' (n 18).

[35] Hogg, *Constitutional Law of Canada* (n 33) 85-90.

text. Like the Canadian Constitution, the American Constitution has also been described as effectively unamendable.[36] As in Canada, this 'constructive unamendability' is the result of a 'political climate that makes it unlikely, though not impossible, to achieve the requisite supermajorities to pass a formal amendment'.[37] It is an unintended and anomalous form of entrenchment that reflects underlying social conditions ranging from the jealous guarding of regional interests (which makes the existing allocation of power in each federal state effectively unamendable)[38] to politically-polarised citizenries (which make mustering supermajorities difficult).[39] Looking at constitutional statutes, we learn even more. In the United States, the practical entrenchment of the 1964 Civil Rights Act and the 1965 Voting Rights Act reflects the intractable social and political legacy of slavery and segregation in America. And in the United Kingdom, the Bill of Rights 1689, the Acts of Union 1707 and 1800, the Parliament Acts 1911 and 1949, and the Scotland Act, Northern Ireland Act and Government of Wales Act 1998 we can read the reflected history of, respectively: the emerging power of the people in Parliament; the union of disparate national polities into a single constitutional order; the rise of popular democracy; and the incomplete union of the aforementioned national polities. Finally, if we consider the different degrees of political entrenchment reflected in the habits, practices, customs, and conventions of officials in each country and the social entrenchment of popular policies in the minds and hearts of their respective peoples, we can begin at last to see a complete picture of each state's constitutional order—a picture that is, at best, adumbrated by the constitutional text alone, and then often with the flattering brush of a society portraitist.

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[36] Albert, 'Constructive Unamendability' (n 30) 182; Richard Albert, 'Constitutional Disuse or Desuetude: The Case of Article V' (2014) 94 Boston U L Rev 1029, 1042-44. See also the discussion of '*de facto* unamendability' in Melissa Schwartzberg, *Democracy and Legal Change* (CUP 2007) 12-13.

[37] Albert, 'Constructive Unamendability' (n 30) 182. Constructive unamendability is at least as likely to reflect an intractable social problem as a poor constitutional choice.

[38] ibid 182-85.

[39] Bettina Petersohn, 'Constitutional Reform and Federal Dynamics: Causes and Effects' in Arthur Benz and Jörg Broschek (eds), *Federal Dynamics: Continuity, Change, and the Varieties of Federalism* (OUP 2013) 297, 307-07, 315-16.

Considering the expansive approach to entrenchment I take in this thesis, the communicative function of entrenchment can only ever provide a partial answer to the question 'Why entrench?' The case from expression provides a fuller answer, one that better reflects entrenchment in action rather than in theory. Through their deliberate choices about what to entrench and in what ways, constitutional and legal drafters communicate their ideas about the character of the state. What is entrenched in practical terms—whether it is intentional, unintentional, or even contrary to intention—expresses something more about the actual character of the state. In both cases, however, the communicative and expressive functions of entrenchment are secondary features rather than primary purposes of entrenchment. Neither alone provides a compelling *reason* to entrench.

2.1.3 The Case from Constraint

In his long essay, *Ulysses and the Sirens*,[40] Jon Elster argued that 'precommitment' or 'self-binding'[41] is a rational strategy used by man—an animal neither wholly rational nor wholly irrational but exhibiting elements of both—to minimise the consequences of irrationality (which is alternatively described as a 'weak will' or with reference to Aristotle's 'passions').[42] Elster described this self-binding as 'second-best or imperfect rationality' that 'takes care both of reason and of passion', though he added, rather wistfully, that '[w]hat is lost, perhaps, is the sense of adventure'.[43] This coda is not simply a poetic flourish; it makes a point elaborated by others about the trade-offs between democracy and innovation. Melissa Schwartzberg, for example, has argued that the lack of formal entrenchment in Athenian democracy enabled a 'pragmatic innovation' that

[40] Jon Elster, *Ulysses and the Sirens: Studies in Rationality and Irrationality* (CUP 1979).

[41] Different writers cited use different terms for the same ideas, including 'commitment', 'precommitment', 'self-commitment', and 'self-binding'. I have tried to use the terms favoured by each author in the discussion of their works, but the reader should understand that no distinction not explicitly made in the text is thereby implied.

[42] Elster, *Ulysses and the Sirens* (n 40) 36-47.

[43] ibid 111.

'was a source of pride for them and was envied by others'.[44] In the modern context, Schwartzberg writes that the diminishment of the civic capacity for constitutional adventure is a trade-off in favour of social stability, but if the loss is too great—that is, if it prevents an ongoing critical democratic appraisal of the merits of entrenched laws and their underlying principles—the trade-off may in fact compromise long-term stability. Permanent and inflexible entrenchment, she warns, may 'inhibit the critical engagement with constitutional rules that will ensure their future legitimacy'.[45]

Two decades later, Elster revised and expanded his essay with specific new consideration paid to 'self-binding' in the constitutional context. He begins the revised essay by posing the counter-intuitive question of 'why individuals may want to restrict their freedom of choice'.[46] The answer, he says, '[b]roadly speaking' is that 'they may want to protect themselves against passion, preference change, and … time-inconsistency' and they do this 'by removing certain options from the feasible set, by making them more costly or available only with a delay'.[47] In general terms Elster proposes 'that sometimes *less is more* or, more specifically, that sometimes there are benefits from having fewer opportunities rather than more'[48]—ie, when those foregone opportunities would, on balance, have led to worse choices. This answer is consistent with his earlier view that it is rational to guard against future irrationality by structuring our environment to make it more difficult to act in irrational ways when the temptation arises. However, this answer is still vulnerable to Schwartzberg's democratic critique and to Julian Eule's related objection that entrenchment 'prevents those with the greatest knowledge of societal needs [ie, the present generation] from

[44] Schwartzberg (n 36) 195.

[45] ibid 208.

[46] Jon Elster, *Ulysses Unbound* (CUP 2000) 1.

[47] ibid.

[48] ibid.

acting'.[49] In other words, it ignores the possibility that future generations may disagree with us not because they are in thrall to the passions that the entrenching generation feared but because, in light of further experience and after considering the same reasons that led their ancestors to entrench the rule, they calmly and rationally disagree on the merits. It is hindsight and not foresight, after all, that is proverbially '20:20'. This is of particular concern considering, as Jeremy Waldron has pointed out, 'the future has a disconcerting tendency to vindicate the wisdom of those whose views or apprehensions [were] in the minority'.[50] Entrenched precommitments may calcify hubris to the extent that they foreclose rational as well as irrational reconsideration.[51]

There are also problems with transferring Elster's strategy directly from the case of the individual to the case of a constitutional state that should make us more cautious in that context (as Elster acknowledges). First, 'a country, unlike an individual, cannot use the legal system to bind itself' for the obvious reason that in the standard case '[t]here is nobody else that can hold a country to its commitment',[52] or as he put it elsewhere '*nothing is external to society*'.[53] A state entrenching constitutional commitments is in the position of a man who makes a commitment to himself but takes no action to bind himself externally to his commitment.[54] Second, a state may be divided among competing factions, which can be analogised only imperfectly to the divided impulses

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[49] Julian N Eule, 'Temporal Limits on the Legislative Mandate: Entrenchment and Retroactivity' (1987) 12 American Bar Foundation Research J 379, 387. See generally ibid at 386-91.

[50] Jeremey Waldron, *Law and Disagreement* (OUP 1999) 274.

[51] ibid 272, 274.

[52] Elster, *Ulysses Unbound* (n 46) 58.

[53] Elster, *Solomonic Judgements* (n 13) 196. Waldron, however, has shown how institutional constraints that operate '*within* the framework overall controlled by "the people"' may be effectively, if not absolutely, binding in and on a state. Waldron (n 50) 261, 275**.** It may also be possible for a country to bind itself in limited ways under the terms of international loans or the coercive authority of a supranational body that has the power to inflict real-world consequences, such as the European Union's enforcement of the EU Treaty's fiscal framework rules. I am ignoring for these purposes (as Elster also does) the idea that a state may commit itself in its constitution to upholding certain internationally agreed standards of action. These are still contingent commitments, even if there may be consequences for breaking them.

[54] Waldron (n 50) 260.

within an individual person. The good-faith political differences in a polity cannot be compared usefully to the ways in which a person may torn between competing needs and desires.[55] As Waldron has explained, while a person in a moment of rational lucidity may reasonably bind himself from acting under the influence of future passions, in the case of a state the future action prevented by entrenchment may simply be the alternative preference in a political disagreement between reasonable, lucid, and legitimate factions in the polity.[56] In that case, the self-binding will not be a prophylactic against future irrationality but the entrenchment of a current (reasonable) majority view against the possibility of a different future (reasonable) majority view. This would not be an example of Elster's positive theory of constraint but a co-option of constitutional entrenchment for narrowly factional or partisan ends. This second reason points to a third, which is that the successive (and always overlapping) generations of a state are not the same as an individual's existence over time. This difference is explored more fully in the next section, but for now it is enough to mark Elster's observation that 'one generation (or its elite) trying to bind its successors' looks more like 'an act of paternalism' than the 'self-paternalism' of an individual's precommitments.[57] That is, constitutional self-binding looks more like suspicion of an unknown group of people than an act of virtuous *self*-binding.[58]

Although Elster concludes that constitutional self-binding is sometimes undesirable (because it tends to over-constrain the legitimate disagreement that is at the heart of politics and popular self-government), often unfeasible (because of the absence of external powers to hold a state to its precommitments), and generally disanalogous to the individual case for constraint, he argues that '[i]n a few cases, we may talk about *self*-binding' by a state 'in a literal sense'.[59] This

[55] Elster, *Ulysses Unbound* (n 46) 168.

[56] Waldron (n 50) 266-70.

[57] Elster, *Ulysses Unbound* (n 46) 59, 170.

[58] ibid 92.

[59] ibid 96.

includes when 'a constituent parliament unanimously decides to give up some of its powers to another branch of government', especially 'if the majority in the constituent assembly also expects to be the majority in the first legislature'.[60] Elster cites post-Soviet constitution-making in Eastern Europe as an example. He also suggests that 'a constitution that binds future generations may also, in a looser sense, be seen as an act of self-binding'.[61] That a society can self-bind in this way appears to contradict Elster's earlier assertation that state cannot effectively self-bind because there is no external power to bind it, but that statement only holds true for absolute self-binding. Precommitment 'in a looser sense'—a non-absolute form of entrenchment—is still possible.

Even the flimsiest self-promise entrenches a presumption that alters our behaviour in the future without absolutely (or perhaps even significantly) constraining it. If I decide to go up to London next Saturday, that mere decision will change the way I think about other decisions that conflict with my travel plans even if I have told no one else about my decision and have taken no steps to act on it and incurred no anticipatory costs. I am always free to change my mind, but having made the decision I will no longer think about other decisions in the same way as before. The fact of the decision creates a psychological presumption that must now be rebutted. Before my decision, Saturday was a blank slate; after my decision, all other options for the day will be potential conflicts. The more costs I incur in furtherance of my decision (purchasing a non-refundable ticket or arranging to see a friend in town, which requires them to make their own precommitments with cascading effects on the plans of still more people), the more entrenched the decision becomes even though I did not incur those costs because I wished to bind myself against a future change of plans due to weak will or irrationality. It is simply a requirement of living an ordered life that one must make decisions and that those decisions will alter the way we think

[60] ibid.

[61] ibid This argument is made at greater length by Samuel Freeman in Samuel Freeman, 'Constitutional Democracy and the Legitimacy of Judicial Review' (1990) 9 Law and Philosophy 327.

about the status quo in ways that constrain future decisions (though not necessarily absolutely).[62] I can always absorb the cost of the ticket and the lunch reservation or disappoint my friend; I can even, in theory, leap from the train right up to the last minute before I arrive in London and make my way home. But the fact that I remain the 'master of my fate' does not mean I am not constrained.

By creating barriers to change, which range from ordinary legislative procedures to onerous processes of constitutional amendment, a state makes change more difficult under normal conditions without completely and irrevocably 'self-binding'.[63] By choosing to entrench a specific law, a state changes the status quo of an institution or arrangement; future changes to that institution or arrangement will now be required to repeal or amend that law. At the very least, entrenchment acts as a constraint in the same way as my decision to travel up to London does, but in practice it will usually be much more constraining. Once again, the differences between individuals and states matter. In my hypothetical, the decision to travel shaped my future choices even when I had not communicated it to anyone else, but it constrained me even more once I acted further to my decision and informed others, thereby shaping their present and future actions, and those of others affected by their decisions. In a state, only the social entrenchment of popular opinion operates like my uncommunicated decision (and even then, inexactly).[64] All the other forms of entrenchment—ordinary legislation, constitutional statutes, constitutional provisions, even conventions—involve multiple persons and public communication to convey a common understanding of what is entrenched. This is because, to state the obvious, unlike an individual, a state is compound and manifold.

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[62] See John Finnis, *Natural Law and Natural Rights* (2nd ed, OUP 2011) 103-05.

[63] I say 'under normal conditions' because in the heat of revolutionary ferment all bets are off. 'A knot that the law does not permit to be untied can always be cut by the sword.' Eule (n 49) 384.

[64] One does not have to accept Rousseau's idea of the general will—or anyone else's for that matter—to perceive the force of popular opinion in and on the mass of the people.

In Elster's standard model of precommitment, a person imposes a rational strategy for constraining a specific future action: a habitual drink driver, for example, gives a friend his keys when he knows he will be drinking, or a smoker throws out all his cigarettes. Constitutional precommitment, however, is more complicated. The decision by a constitutional assembly to assign responsibility for enforcing a Bill of Rights to an independent judiciary is often compared to the simple model of individual precommitment. It has been described as 'Peter sober' wishing to bind 'Peter drunk', where 'Peter sober' is the constituent assembly and 'Peter drunk' is the future legislature.[65] But assigning the application of a Bill of Rights to a court is not like entrusting your keys to a friend. Giving effect to your precommitment decision not to drive drunk involves virtually no discretion: your friend knows exactly why you gave him the keys and under what conditions he is to withhold them. Both the action to be taken and the conditions triggering it are clear to the point that a robot equipped with a breathalyser test could do the job.[66] By contrast, it will not always be clear when a future legislature is acting as 'Peter drunk'; that assessment will require a complicated and contentious judgement call. And even when that call is made, the proper application of a Bill of Rights pitched in abstract terms will often generate reasonable disagreement: not all disagreement, even passionate disagreement, will rise to the level of irrational intoxication.

Nor is it a valid response to say that those who entrench the delegation of decision-making to the courts understand and assume the risk that the courts will make decisions that are not anticipated at the time of entrenchment ('t_1' to use Elster's notation) and may even be contrary to the strong preferences of the majority at t_1 as well as the majority at the time the decision is made ('t_2').[67] That is still not a form of *precommitment*. First, if we accept that the court's decision at t_2 may

[65] Stephen Holmes, 'Precommitment and the Paradox of Democracy' in Stephen Holmes, *Passions and Constraint: On the Theory of Liberal Democracy* (U Chicago P 1997) 135. See also Elster, *Ulysses Unbound* (n 46) 89.

[66] Waldron (n 50) 262.

[67] This presumably would be Ronald Dworkin's response. See Ronald Dworkin, *Freedom's Law: The Moral Reading of the American Constitution* (Harvard UP 1996) 7-12. For Waldron's critique of Dworkin on this point, which is echoed in my independent analysis in the previous paragraph, see Waldron (n 50) 262-66 and ch 13.

be inconsistent with the decision that the entrenching majority at t_1 would have wanted the court to make, we are already outside Elster's standard model of precommitment. The delegation of such expansive judgement is not an act of reason but a leap of faith.[68] It will often be impossible to connect causally—let alone mechanically—the court's decision to the original act of delegation, so the court's interpretation of the Bill of Rights at 't_2' will be an intervening exercise of independent judgement rather than the execution of a specific desire. One cannot even say for certain that such an exercise of judgement at t_2 was *itself* the execution of the specific desire at t_1, because in some cases there may be no way for the court to know exactly how much interpretive discretion the original act of delegation anticipated.[69] That is, it will often be impossible to say that any specific court decision fulfils the majority's intent at t_1—not just as to the substance of the decision but as to whether the decision even falls within the intended range of independent decision-making authority. Finally, it is not obvious that assigning the enforcement of a Bill of Rights to independent courts is a rational strategy over time. It may just shift the risk of irrational governance decisions from one human institution to another, which is subject to many of the same pathologies that the delegating body wishes to protect against[70] as well as to additional weaknesses, including the risk that procedural unaccountability invites substantive irresponsibility.[71]

If the argument for entrenchment from precommitment is flawed, how then to account for the universal phenomenon of entrenched political institutions and arrangements? Are these not forms of precommitment? No ... and yes—but the 'no' is the key. Waldron distinguishes

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[68] Or, as Waldron says, 'submission'. Waldron (n 50) 265.

[69] ibid 271.

[70] The copybooks of courts called upon to restrain popular passions in times of crisis are blotted like a Dalmatian. See, eg, *Abrams v United States* 250 US 616 (1919); *Buck v Bell* 274 US 200 (1927); *Korematsu v United States* 323 US 214 (1944); *Reference re Persons of Japanese Race* [1946] UKPC 48, [1947] AC 87.

[71] I have in mind here the charge that an insulated judicial elite may be 'out of touch' with society at large. See Diane P Wood, 'Why Term Limits for Supreme Court Justices Make Sense' in Brennan Centre for Justice <www.brennancenter.org/our-work/analysis-opinion/why-term-limits-supreme-court-justices-make-sense> accessed 19 August 2024. See also Kathy Mack, Sharyn Roach Anleu, and Jordan Tutton, 'The Judiciary and the Public: Judicial Perceptions' (2018) 39 Adelaide Law Rev 1, 8.

between precommitment, in the sense that Elster uses that term, and predecisions. Precommitment, as we have seen, is a rational decision made at t_1 to bind oneself to that same decision at t_2, when one fears that one will be tempted to make a different, irrational decision. A predecision, however, simply establishes at t_1 the procedures for making a decision at t_2. The decision that there will be elections every four years and that there will be a single president allow the people to elect the next president without predetermining the decision of who the president should be. As Stephen Holmes has explained, '[d]ecisions are made on the basis of predecisions' but, unlike precommitments, they do not causally determine the outcome of those decisions.[72] Predecisions establish the 'rules of the game' and, like the rules of the game they do not determine the winner but allow a winner to be determined. If two teams want to play football, they must first decide whether they are to play American, Canadian, Australian, or association football. Predecisions are functional predicates for orderly communal action. Otherwise, in the political context, '[i]f [the] rules themselves are up for grabs in the very sessions they are supposed to structure', as Waldron warns, 'it will be hard for a large group of diverse deliberators to proceed with any assurance that they are not talking at cross purposes or going round in circles'.[73] Without entrenched predecisions, a state cannot accomplish much. They are required for the people of a state to exercise their will in an organised manner at all, let alone on a particular issue.

Of course, predecisions, like precommitments, also constrain choice. Having decided that there will be elections every four years to select a single president, the people cannot then decide to elect a triumvirate after two years. Not, at least, without first changing the predecision. Predecisions are like precommitments insofar as they are not arbitrary choices. The choices to have elections every four years and a single president do not merely settle the questions of what kind of governance the state should have (unitary, democratic), they also reflect the considered

[72] Waldron (n 50) 276 quoting Stephen Holmes, *Passions and Constraint: On the Theory of Liberal Democracy* (U Chicago UP 1997) 167.

[73] ibid.

judgement of the entrenching majority as to the best methods of governance (or at least the best methods that could be agreed upon and adopted under the circumstances).[74] Entrenching this predecision settles the rules of government, but it may also be intended to prevent reconsideration of the specific choice of rules in the future. In case of deliberate (and deliberated) constitutional entrenchment of 'the constitutive rules of political institutions',[75] this is indisputable.[76] To the extent that entrenched predecisions are intended to entrench decisional rules that will constrain the range of substantive outcomes, they are vulnerable to the same reservations described above about the virtues of precommitment. With or without this intention, however, predecisions perform a valuable rule-setting function. The argument for them from utility or even perhaps from necessity can—and should—be separated from the general argument from precommitment.

That preconditions provide the ground rules necessary for ordered government is an argument for entrenching them, but—and this goes to the heart of the argument of this thesis—it is not an argument for entrenching them in a specific form, let alone in a codified Constitution. The right form and degree of entrenchment of constitutional rules will depend on the state's constitutional history. Relevant to that consideration will be that predecisions about the institutions and arrangements of government should not preclude reconsideration of them while, on the other hand, the benefit of settled rules is lost if they are changed too often. Neither fixing constitutional predecisions beyond reconsideration nor the constant reconsideration of them conduces to stable and orderly government. Without fixed rules over time, Burke warned, '[n]o one generation could link with another' and '[w]e would become little better than the flies of a

[74] This will be the case most obviously when an institution or arrangement of government is adopted and entrenched after constitutional deliberation, but it also applies *mutatis mutandis* to the organic development of institutions and arrangements of government such as the prerogatives of Parliament and the Crown, which though not deliberated and decided at single moment in time have been debated repeatedly as they have evolved over centuries.

[75] Waldron (n 50) 275.

[76] The Federalist Papers and the proceedings of the Constitutional Convention are testament to the desire of the American framers to entrench rules not merely to allow for future government but specifically to prevent future tyranny.

summer.'[77] The question is thus not whether to entrench governmental institutions and arrangements as predecisions but how and how deeply to entrench them. They must be stable enough to provide for orderly government but not so rigid that they cannot develop and evolve over time as states learn from the past and anticipate future threats. Nor are all predecisions of the same importance. Some rules should be easily adaptable either because the activities they govern are relatively trivial or because external circumstances are in flux. Examples of these include rules governing superficial matters such as dress codes in Parliament or Congress and important but *ad hoc* institutions, such as a war cabinet.[78]

Other arrangements in a state, while fundamental, should be adaptable *because* they are so fundamental that a state cannot risk them becoming obsolescent or unsuited to their purpose. It is not surprising, therefore, to find that the rules governing the day-to-day functioning of legislatures are generally left to the legislatures themselves to decide, even when a state has a codified Constitution. This is the case with the standing rules and the conventions governing the UK and Canadian Parliaments, and the American Constitution 'empowers "Each House" to "determine the Rules of its Proceedings"'.[79] The work of the legislature is simply too important to risk getting the rules wrong or letting them become stale and unworkable—a risk that would be increased if the rules were too deeply entrenched to adapt easily to social expectation or technological and other changes. This was why Lord Denning advised that '[o]rdinary legislative machinery' must be able to meet changing needs 'without a great deal of fuss and bother', so no generation should enjoy the power to 'fetter the hands of future generations'.[80] Even in the case of the most fundamental constitutional predecisions, such as the rules governing how often

[77] Waldron (n 50) 277 (quoting Burke).

[78] Jonathan Schneer, *Ministers at War: Winston Churchill and His War Cabinet* (Basic Book 2015) 47-113.

[79] United States Constitution art. 1, s5, cl. 2.

[80] Lord Denning, *The Changing Law* (Stevens & Sons Ltd 1953) 17

elections must be held, there may be benefits to ease of reconsideration and revision.[81] The ability to suspend elections during the Second World War likely benefited the United Kingdom in a way that would not be open to the United States under similar circumstances.[82] And who is to say the Canadian Senate will always provide sufficient benefits that the Canadian Constitution should require the almost impossibly high standard of unanimous consent of the provinces to abolish it (as every province that formerly had an upper house has already done for itself, and New Zealand did to its upper chamber in 1951)?

Formally entrenching these arrangements so deeply that they are put effectively beyond reconsideration risks handcuffing the state in precisely those exigent circumstances when constitutional agility is necessary for the state's stability and survival. Even if one accepts that, in principle, fundamental constitutional predecisions should be deeply entrenched, this is still not an argument for formal codified entrenchment. As I will show in chapter 3, there is not necessarily a correlation between formal and deep entrenchment. The experiences of the British and Canadian constitutions show that constitutional conventions, such as those that decide who serves as prime minister, may be deeply entrenched in practice without being codified or even written.

2.1.4 The Case from Being-in-Time

The case from 'being-in-time' answers the question, 'Why entrench?' by demurring that this should not even be a question. Entrenchment, of one kind or another it says, is simply an unavoidable condition for any being-in-time, including a state. It is impossible to conceive of a state not entrenching at least some institutions and arrangements for the same reason that, as I

[81] See Waldron (n 50) 275.

[82] United States Constitution art. 2, s1, cl. 2. Those circumstances include being under attack and imminent risk of invasion. The fact that formally entrenched constitutional predecisions have sometimes been changed (eg, the imposition of a two-term limit on the US presidency and the popular election of US Senators via United States Constitution Amendments XII and XXII, respectively) is no guarantee that they will be changed when necessary in the future.

have argued, we do not remake our lives from scratch every day. Returning to a theme from chapter 1, we cannot explain the diachronic existence of a people and their state without reference to the different forms of entrenchment they use to negotiate the tension between permanence and change.

A good account of the necessity of entrenchment can be found in Jed Rubenfeld's analysis of what it means to live through time. Although Rubenfeld's book is intended as a defence of the peculiarly modern (and, in his case, specifically American) practice of using a codified Constitution applied by independent judges to limit the powers of the legislature, one does not have to accept that conclusion (which, for reasons discussed above and below, do not necessarily follow) to draw value from his underlying argument. Rather than adopting that underlying argument *holus bolus*, however, I will start by clarifying an important point of disagreement. Rubenfeld's argument rests on a distinction between what he calls a 'speech-modeled conception of human identity,' which is a ruthlessly presentist way of being and acting in the world, and a 'writing-modeled' conception, which takes a longer view of identity stretching both back into the past and forward into the future.[83] The similarities between Rubenfeld's description of a writing-modelled conception of identity as an expression of the commitments of a 'generation-spanning people acting as a political subject' and 'struggl[ing] to memorialize and hold itself to its own fundamental political and legal commitments over time'[84] and this thesis's discussion of the nature of a state over time should be obvious. However—and crucially—I do not agree that this way of being through time can be so easily separated from the idea of popular will, which Rubenfeld associates only with the speech-modelled conception of identity and with which he contrasts the 'writing-modeled' alternative. While my disagreement, if warranted, undermines some of Rubenfeld's conclusions, I will show

[83] Rubenfeld, *Freedom and Time* (n 6) 140.

[84] ibid 12.

that it does not negate other of his important insights about what it means for a state to exist over time.

Instead of identifying the 'speech-modeled' conception of identity as the expression of a 'popular will' that must be constrained in favour of the 'writing-modeled' conception, it is more useful to see them as two different modes of the popular will. There is what I will call 'in-the-moment volition', which is desire untethered from past commitment or future responsibility—the spontaneous mode of action 'in the heat of the moment'. This is essentially the perspective Rubenfeld attributes to the 'speech-modeled' conception of identity. Then there is what I will call 'all-things-considered volition', which is desire informed by reflection on the past and careful anticipation of the future—the considered mode of action '*all things considered*'.[85] This is the perspective Rubenfeld attributes to the 'writing-modeled' conception of identity. However, when we consider them, as I propose to, not as different models but simply as two modes of the popular will, we can see that while they are conceptually distinguishable, they are not necessarily opposed. Indeed, they often operate simultaneously in the same person or state. Consider, for example, the common feeling of desperately wanting to do one thing, but after taking the time to consider past commitments, the expectations of others, and perhaps the advice of reliable guides, choosing (reluctantly, but decisively) to do another thing.[86] In that case, the question we face is whether to

[85] Note, I do not by this distinction intend a distinction between rational and irrational or reasoned and emotional volitions. A volition may be rash but rational, just as a careful commitment may be made in a moment of high emotion, as Rubenfeld himself notes. ibid 129-30. Furthermore, I am consciously assuming the risk of confusion by using, or rather reclaiming, the term 'all things considered' from Rubenfeld himself, who uses it in a different way, one that pointedly *does not* consider all things. It is only by excluding one's prior commitments from all the things that are to be considered that Rubenfeld can claim that 'all-things-considered reflection' is a form of 'presentism' that is incompatible with his idea of 'commitmentarian' living. Rubenfeld can be forgiven this odd use, because it is also how we tend to use the phrase in colloquial speech. For example, a man who has chosen to attend his child's school play might say, 'all things considered, I'd rather be fishing'. In contrast to both Rubenfeld and our ruefully dutiful father, I mean the term not colloquially but literally. In my definition, 'all-things-considered' volition really does include 'all things'; it takes seriously our earlier commitments seriously and regularly looks back (using Rubenfeld's convoluted locution) 'to our earlier looking forward' (*i.e.*, from the time we made the commitment). ibid 94-95, 124-25. The father reveals his true preference by his attendance. Compare Joseph Raz, *Practical Reason and Norms* (OUP 1999) 36.

[86] Rubenfeld captures this feeling well when he observes that '[a] man may honor a commitment while damning himself for a fool to have made it'. ibid 127.

obey our 'in-the-moment' volition or our 'all-things-considered' volition. However—and this is the nub of my disagreement with Rubenfeld—we would not normally say that our 'all-things-considered' choice was not a genuine expression of our will, or that we had failed to act on our 'true' will. Nor should we then say that the decision of a people to honour a past commitment (and the expectation that it created at the time it was made about how the state would act in the future, which is now the present) is not a genuine expression of the 'popular will,' ie, the people's true will in the present.[87]

So, while I agree with Rubenfeld's claim that 'democratic freedom ... is never possible at any present moment' I would cavil with his characterisation of how democratic freedom works in practice. Where he says that we should '[suppose] ... that democracy consists not in governance *by the present will* of the governed ... but rather in a people's living out its own self-given political commitments over time—apart from *or even contrary to popular will at any given moment*',[88] I would respond that the significance of living through time is not that it denies the importance of the popular will 'at any given moment' but that it constantly pits an 'in-the-moment' popular will against an 'all-things-considered' popular will. If we existed in the eternal moment beyond time, floating free of obligations to ourselves or others then there would be no choice to be made, but then we would not be human, for to be human is to be time-bound: bound by the knowledge of the past and an apprehension of the future (and, as Rubenfeld reminds us, aware of how in the past we anticipated how we should act in the future, which is now our present, and thus able to judge our present actions in light of our past commitments not just as they look in the present but also as they looked at time we made them, which means our will is similarly time-bound). Keeping the two modes of volition in mind, we can see that the choice in the present to act according to the reflective, time-bound, 'all-things-considered' volition is not to act 'contrary to' the popular

[87] For the same reason, a decision not to honour that commitment would be as well.

[88] Rubenfeld, *Freedom and Time* (n 6) 11 (emphasis added). See also Jed Rubenfeld, *Revolution by Judiciary: The Structure of American Constitutional Law* (Harvard UP 2005) 112.

will, as Rubenfeld describes it, but to act on a genuine expression of the popular (literally, the people's) will *sub specie temporis*.

There is an even more basic objection to Rubenfeld's claim that 'democracy does not consist ideally of governance by present democratic will, but also, in fundamental part, of adhering to the nation's fundamental, self-given commitments over time',[89] which is that the claim does not amount to much. As a statement of constitutional practice, it just means the constitution isn't always up for grabs. The 'present democratic will' is free at any point to reconsider those 'self-given commitments,' which are only 'commitments over time' until such time as they are changed.[90] From the fact that a state rarely makes such changes, and almost never change its most 'fundamental' constitutional commitments, we can infer only that the people at any given time believe that changing those commitments is less desirable than maintaining them. I say 'only' not to signify the lightness of this fact, but to minimise the import of Rubenfeld's claim, which purports to contrast two conditions—'governance by present democratic will' and 'adhering to the nation's fundamental, self-given commitments over time'—that are not necessarily opposed. The most that we can take from his claim is that the constitution, though changeable, is rarely changed. The relevant question, then, is why? There could be positive or negative reasons. It could, for example, be because the wisdom of the arrangements and institutions to which the state has committed itself is still evident to the people today. Or it could be that those arrangements are no longer desirable but the process for changing them is too onerous to permit change (or has raised the social or political costs of changing them above the substantive benefit of the change). In the latter case, it would be strange to celebrate the fact of continued constitutional commitment. We would hardly praise a people for their adherence to an iniquitous institution that was

[89] Rubenfeld, *Revolution by Judiciary* (n 88) 112.

[90] 'It is not through the laws that the state subsists; it is through the legislative power. Yesterday's law does not obligate today, but tacit consent is presumed from silence, and the sovereign is assumed to be constantly confirming the laws it does not repeal while being able to do so. Everything that it has once declared it wills, it still wills until it revokes it.' Rousseau (n 12) 231.

constitutionally entrenched by an earlier generation, simply because the people today are unable to change it. The general equation of democracy with adherence to past commitments must therefore be qualified depending on the form, degree, and consequence of their entrenchment.

Rubenfeld accepts that a people may deviate from prior commitments (how could he not?), and he provides a strong justification for why it is sometimes important that they do so. Early on, he says that 'commitments are breakable' and '[t]here is always the freedom to repudiate, to walk away'.[91] Later, comparing a polity changing its mind about a prior commitment to an individual doing the same thing, he says that '[a]t a certain point, a large group of persons may come to feel that a certain course of action long engaged in is in fact intolerable' and reorient its commitment accordingly.[92] Making commitments, he suggests, may be how we work out what we believe over time, which paradoxically *requires* that our commitments must be repudiated when, by dint of 'living out some previously commenced course of action, we may be made forcibly aware that something we thought was acceptable is not'.[93] This makes intuitive sense, and it is a familiar experience both for individuals and states. For the latter, Rubenfeld offers the example of the repudiation of slavery after a century of constitutional commitment to that peculiar institution. But Rubenfeld is both too pessimistic and too optimistic when he assumes that judicial enforcement is a necessary part of this process. His own example refutes his conclusion: in neither the United States nor the United Kingdom, which abolished slavery even earlier, did judicial enforcement play the role he attributes to it. In the United Kingdom, a majoritarian parliament abolished slavery, and in the United States, the barriers (including the judicial barriers) to ending the odious practice were so strong that it took the deaths of more than 700,000 Americans to amend the Constitution.

[91] Rubenfeld, *Freedom and Time* (n 6) 96.

[92] ibid 129; see also ibid at 128.

[93] ibid.

The necessity of working out what a state believes over time also raises the question of why a people should have confidence in the judgment of the generation that made the initial constitutional commitments. Or, for that matter, why a people should have confidence in its own judgement in the present. Is there a reason to defer, as a rule, to one or the other? As discussed in the previous section, Elster has shown that, far from being a constraint imposed by 'Peter when sober on Peter when drunk',[94] codified Constitutions are often drafted 'in turbulent circumstances when judgment is clouded by the passions of the moment'[95] and, in any case, by men and women motivated by personal or partisan interests operating under the dictum that 'in politics, people never try to bind themselves, only to bind others'.[96] It is easy to think of constitutional commitments, especially in the American context, that we are very glad were since changed, and no doubt future American generations will be appalled by constitutional commitments the present population considers reasonable today. This realisation presents the uneasy prospect that there will never be a fixed, objective vantage point in time from which we can with certainty measure the wisdom of entrenched commitments. If we believe that being later in time, as a rule, provides a superior vantage point from which to judge constitutional arrangements and institutions, then the argument for entrenchment becomes precarious, if not outright counter-intuitive. On the other hand, if we believe that the wisdom of the ages has a presumptive claim against our transient understanding, this may provide a presumptive reason to respect existing entrenchment, but it is not a strong reason for trusting ourselves to make new entrenchments.

The dilemma is finally resolved in favour of the 'present democratic will' not by a weighing of relative wisdom between generations from a non-existent objective vantage point but by practical necessity. We do not have to believe that a society's longstanding commitments are judged

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[94] Elster, *Ulysses Unbound* (n 46) 89 citing Friedrich Hayek, *The Constitution of Liberty* (U Chicago P 1960) 160.

[95] ibid 161.

[96] ibid ix, 170-74 (attributed to Norwegian historian Jens Arup Seip).

better by the present generation to accept that they must be judged by the present generation for the obvious reason that there is no one else to do the judging. That judgment should include, of course, Burke's admonition that we should presumptively respect longstanding commitments, but that is just another way of describing what I have called 'all-things-considered' present volition. In any event, even without formal entrenchment there is always a presumption against change—a sort of constitutional, legal, political, and social inertia—because change takes an act of will backed by political energy, while the status quo just is. For this reason, it is never an even contest between the status quo and change. This is why Rubenfeld's statement that 'democracy does not consist ideally of governance by present democratic will, but also, in fundamental part, of adhering to the nation's fundamental, self-given commitments over time' is true only as a truism. It is true because it is the nature of the present will to contend always with past commitments. Present will is not by nature opposed to past commitments, but it exists and is exercised within the world created by those commitments and is always shaped and constrained by them. This is why Burke was able to counsel respect for existing arrangements and institutions in a state in which constitutional change was, at least in theory, possible by bare majority vote of the 'present democratic will' expressed through Parliament. And it is why Rubenfeld's claim makes a (banal) case for the present will respecting past commitments, but it does not make the case for artificially obstructing the present will (or, rather, future present wills) by formally entrenching commitments in codified constitutional form.

Rubenfeld's core argument is that by '[r]estoring time to democracy'—that is by viewing democracy as played out over generations rather than as a series of discrete moments—we can understand why apparent counter-majoritarian constraints on the present generation are not materially different from the constraints an individual places on his own life. These include, for Rubenfeld, making (moral) commitments to oneself,[97] but also contracting legal obligations, living

[97] Or rather something very like a 'moral' commitment, as Rubenfeld repeatedly abjures the moral nature of what he is describing, preferring instead to refer to right and wrong 'but not necessarily right or wrong in a moral sense'. I

as a trusted member of a society, and all the other consequences of the 'passionate engagement with the world and with the future' that he rightly identifies as 'a central element of human freedom'.[98] But there is an important difference between his description of personal commitments and the conclusions he draws about the way a state and its people should formally enshrine their constitutional commitments: an individual's promises, contracts, and the expectations of others exert a strong and often determinative 'all-things-considered' reason for acting in a way that would not violate them, but they do not *in fact* stop him from acting against them.

Commitments of all kinds may act as moral as well as practical, emotional, and financial constraints on an individual's actions, but there is nothing stopping us from reflecting on and reconsidering them. We cannot ignore them, but we may reject and repudiate them. By contrast, when a state adopts constitutional commitments with a system of strong form judicial review, it denies the ability of the people themselves (considered either in the moment or over time) to reconsider those commitments, even as an act of 'all-things-considered' volition. This is why Rubenfeld is right to say that '[c]onstitutional law [is] the institution through which a people struggles to memorialize and hold itself to its own fundamental political and legal commitments over time' but he is wrong to extend the point to an argument for strong form judicial review and extrapolate from it the counterfactual conclusion that 'constitutionalism as democracy [ie, democracy in which a people commit themselves over time] ... cannot exist without judicial review'.[99] As individuals reconsidering past commitments, we may incur negative consequences for repudiating them (in the case of a broken contract, monetary penalties; in informal cases, social opprobrium or damage to personal relationships) but we face no external barriers analogous to a

use the word 'moral' in parentheses because Rubenfeld is talking about morality, whether or not he is prepared to call it that. Rubenfeld, *Freedom and Time* (n 6) 128.

[98] ibid 92.

[99] ibid 172, 174. New Zealand and the United Kingdom belie the point.

cumbersome constitutional amending process let alone a judge enforcing the Constitution against our present 'all things considered' will.

The proper analogy to the individual would be the people of a state, facing a present decision, being required to confront the commitments made by an earlier iteration of 'the people' but, having done so, being free to act 'all things considered' either to honour those commitments or deviate from them. The requirement of convincing an independent third party (the courts, which even when posited as acting on behalf of 'the people' are not themselves 'the people'[100]), a supermajority, or majorities in multiple states of a federation, in order to deviate from a prior commitment has no direct parallel in the individual's experience of commitment and cannot be defended as a constitutional requirement by analogy to it.[101] Rubenfeld is wedded to the formal barriers to change provided by a codified Constitution and strong-form judicial review because he assumes that the 'self's present will' is always an 'in-the-moment' volition that succumbs to the temptation of impulsive and ill-considered change. This is wrong because, as explained above, the 'present will' of a people, like the present will of an individual, is also an 'all-things-considered' volition, which means erecting barriers to reconsideration of prior commitments can unnecessarily inhibit change when it is necessary, all things considered (or just, all-things-considered, not unreasonably desired).

Rubenfeld's model is also too absolute because it assumes an idea of a codified Constitution in which the only commitments that count as 'real' or 'serious' commitments are those that are entrenched through constitutional codification. This turns commitments into 'all or nothing' propositions: something is either a commitment, in which case it must be insulated from popular change, or it isn't, in which case it may be left open to 'in-the-moment' volitional change. It leaves no room for degree. But ordinary laws, conventions, and social practices also signal a

[100] Rubenfeld calls the courts 'a body insulated from [the present political] will'. Rubenfeld, *Freedom and Time* (n 6) 172.

[101] See Ekins (n 52) 168.

state's commitment to the arrangement or institution the law, convention, or practice secures. These forms of commitment also create an expectation of continuity and a presumption against change, and in a country without a codified Constitution like the United Kingdom, they are the primary means by which the state's commitments are entrenched.

2.2 Conclusion

Shorn of his assumptions about codified Constitutions and strong-form judicial review, Rubenfeld's account of 'commitmentarian freedom' offers a compelling case for entrenchment from the exigencies of being-in-time. While Barber's argument from stability offers a practical reason for entrenchment as the solution to the problem of managing change in an orderly manner, Rubenfeld's account adds a metaphysical depth and texture to that functional justification. Just as personal commitments are an important—inevitable, even—part of living and growing as conscious beings through time (that is if we are to live as humans and avoid what Rubenfeld aptly calls 'the state of grace hungered after by stray dogs'),[102] entrenched commitments allow the people of a state to test and adjust policies and principles to discover which conduce to the best government for them at the time, to adjust to new circumstances, and, ideally, to correct old errors. This is because only a real commitment, a serious commitment of the kind (though not necessarily the form) that Rubenfeld has in mind, will test the principle or policy committed to, giving us the evidence we need to decide whether to allow it to continue or to change it. Entrenchment is a means of managing change by tempering change to promote stability,[103] and it does this most effectively when it binds us sufficiently to prior commitments such that to change them requires us to exercise real 'all-things-considered' volition but not so tightly that we cannot give effect to

[102] Rubenfeld, *Freedom and Time* (n 6) 141.

[103] 'At some basic level, after all, most constitutions—whether a traditional customary constitution such as that of the United Kingdom or a modern codified constitution such as those of most other jurisdictions—attempt to temper change.' Graham Gee and Grégoire Webber, 'A Conservative Disposition and Constitutional Change' (2019) 39 OJLS 526, 533.

such 'all-things-considered' reconsideration. This balance is what allows a state to pursue deliberate (and, in a democracy, deliberated) ends.[104] This, then, the answer to the question: Why entrench? To promote stability, which is a good in itself,[105] by ordering the process of change through deliberate (and, in the case of formal entrenchment and some informal entrenchment, deliberated) processes of consideration and reconsideration that facilitate the constant and never-finished search for better government for the people of a state under changing circumstances. The case from stability and the case from being-in-time, together, capture this underlying reason for entrenching and explain why entrenchment is a universal feature of states, while the best version of the case from constraint provides an account of how entrenchment performs theis function and the case from expression provides, at most, a secondary reason for entrenching.

This answer to 'why entrench?' brings us to the question of 'how?' As mentioned above, entrenchment is not a uniform thing but a matter of degree. Different forms and depths of entrenchment provide different types and degrees of resistance to change that, working together, (ideally) increase stability and order in the state. How these different forms of entrenchment work in practice in different states is the subject of the next four chapters. In chapter 3, I consider the idea of permanent entrenchment; in chapter 4, I consider varieties of constitutional entrenchment in the United Kingdom, the United States, and Canada; in chapters 5 and 6, respectivel, I consider examples of legal and non-legal entrenchment in the same states.

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[104] 'Deliberation' does not necessarily imply calm debate and cool reasoning. See Robert Crowcroft, 'Political Parties' in Peter Cane and H Kumarasingham (eds), *The Cambridge Constitutional History of the United Kingdom*. (CUP 2023) 431, 438-39 ('The constitution is at least as much the product of conflict, and the resolution of conflict, as it is of reasoned reflection.'); id 451-52.

[105] Albeit a contingent good. See the discussion of Abu Hamid al-Ghazali in chapter 1, n 1.

Chapter 3: Degrees of Entrenchment and the Pull of Permanence

Nick Barber's argument from stability, reinforced by Jed Rubenfeld's deliberation-enhancing justification, shows why entrenchment is an unavoidable fact of social organisation, and perforce of the political organisation of a state. Together, they explain why formal entrenchment in particular is a feature of every state and why it is impossible to imagine a state surviving even a single generation without entrenching a variety of arrangements and institutions. Formal entrenchment is necessary to order a state's processes of decision-making as it encounters, initiates, and then manages change. It is an essential tool of good governance, a social technology implemented at one point in time to make it easier for the state to function in the future. And while Barber and Rubenfeld focus almost exclusively on formal entrenchment, to understand its role in a state we must also understand how it works in conjunction with informal entrenchment: the social morality, habits, and political conventions, practices, customs, and norms around which legal and codified constitutional provisions operate. To be a stabilising force, formal and informal entrenchment must produce something definite and predictable: either a response to a legal, political, or social challenge from external or internal change or an agreed-upon way of determining a response. In the case of constitutional or legal entrenchment, this response will usually be conscious and deliberate (and deliberated); in the case of non-legal entrenchment, the response may still involve public deliberation but will likely also be more reflexive—that is, reflective of social behaviour that changes, when it does, according to more organic and fluid social processes. Most questions of formal entrenchment will have to account for and will affect non-legal forms of entrenchment, so the two, while conceptually and practically different, are inter-related and inter-reliant ways of ordering behaviour in a state. In a healthy state, they will be complementary means of preventing change up until the point when change is more likely to preserve stability.

In this chapter, I consider the question of whether formal entrenchment can or should ever attempt to be permanent. Although none of the three states that I focus on in this thesis has any permanent and unamendable codified provisions of their Constitutions (I am speaking here

of Canada and the United States; the United Kingdom, of course, does not have a codified Constitution), this is not the case in all states. As discussed in greater detail in the next chapter, Canada and the United States, have codified *degrees* of Constitutional entrenchment, but they have not attempted permanent entrenchment. Other states, however—notably France and Germany—have deliberately attempted to codify permanence using so-called 'eternity clauses', while in still other states—notably India and Israel—the courts have applied a so-called 'basic structure doctrine' to declare core provisions of their codified Constitutions unamendable. This second phenomenon is of particular interest to my thesis because what the Supreme Court of Canada has said about the underlying structure of the Canadian Constitution echoes the reasoning of the Indian and Israeli, even if it has not (yet) adopted that doctrine. I will discuss the implications of that in chapter 4. But first, in this chapter, I consider attempts at permanent formal entrenchment from theoretical and practical points of view.

3.1 Entrenchment as a Matter of Form and Degree

Change is not a uniform phenomenon. It is unpredictable and contingent, occurring in different ways and at different paces in different places at different times. At times it appears to be in abeyance, only to strike with the force of a sudden storm.[1] And when it comes, its impact depends on the health of a state's social and political institutions and conditions. Because change manifests in different and unpredictable ways, if entrenchment is to be a way of managing change, entrenchment itself must take different forms. Entrenchment cannot be a uniform proposition for the same reason that personal commitments are not all of a kind: like individual commitments, the commitments of a state may be more or less important and more strongly or weakly held. As individuals, we are not equally committed to all of our commitments. Decisions to marry or to take religious vows are, rightly, weightier than decisions to buy a house or leave a job, which in

[1] Barbara W Tuchman, *The Guns of August* (MacMillan 1962); Margaret MacMillan, *The War That Ended Peace: The Road to 1914* (Random House 2013).

turn are weightier than decisions as to where to holiday or which book to read next for pleasure. It would be absurd to pursue these commitments with equal zeal; a life lived according to maximal commitment in all things is impossible, and if it were possible it would be nonsensical. Similarly, a state's commitments to a form of self-government or to prohibiting slavery should not be equal to its commitment to a maintaining a specific corporate tax rate or form of divorce law. Given these different levels of political commitment, we should expect to see different forms of entrenchment that attempt to correspond to different degrees of entrenchment, whether or not they do so in practice.

In his article, 'Why Entrench?', Nick Barber acknowledges these varied forms of entrenchment when he observes that even ordinary legislation is entrenched to the degree that it has 'a quality of stickiness' and that laws may be entrenched by social pressure as well as by formal legal or constitutional mechanisms.[2] The argument from expression, which I discussed in the previous chapter, also presupposes different types and degrees of entrenchment insofar as it assumes that different levels of formal constitutional entrenchment will reflect the relative importance of different constitutionally-protected matters.[3] This is also why, although the concept of entrenchment is often equated with (and limited to) constitutional entrenchment, such an approach is too narrow if we want to provide a complete account of how a state uses entrenchment to manage the process of change over time. To describe all the different ways in which a state gives effect to different commitments and manages different kinds of change, often simultaneously, it is necessary to recognise different forms as well as different degrees of entrenchment. Form, in this sense, means the legal or non-legal mechanism by which an institution or arrangement is entrenched, such as by codified constitutional provision, ordinary law, political convention, or social practice. Degree, here, means how deeply an institution or arrangement is entrenched, which

[2] NW Barber, 'Why Entrench?' (2016) 14 International Journal of Constitutional Law 325, 327.

[3] See also the discussion of the Canadian Constitution in chapter 4.

is to say how easy it is to change. Thus regulated,[4] change is more likely to be orderly: predictable rather than stochastic; considered rather than impulsive; continuous rather than disruptive.

Here a brief terminological digression may be helpful. In his discussion of constitutional change that I considered in the last chapter, Joseph Raz uses the term 'continuity' in opposition to 'change'. By contrast, I have used 'continuity' to include a specific kind of change that follows a 'dynamic of fidelity'[5] with respect to what came before and builds on it. In this sense, constitutional 'continuity' is not opposed to 'change' but to 'rupture'.[6] Applied to a state, which cannot avoid changing in response to internal and external exigencies, this sense of continuity does not mean 'continuing without any change', but rather 'moving forward in a way that is faithful to what came before'. It is orderly change, not the absence of change (which is impossible), that conduces to stability in the state over time. Putting this idea of change *to* the constitution together with Raz's approval of change *within* the framework of the constitution, we get a multi-track approach to reconciling change and stability: generally slower (or at least less frequent) in what is fundamental; generally faster and more frequent in what is incidental. If stability may be consistent with both frequent (and usually easier) minor reforms as well as more infrequent (and usually more difficult) fundamental reforms, then we have established that there are likely to be different speeds of change at play simultaneously in the state. And because how a thing changes and what prevents it from changing are just two sides of the same process, by implication this means that there will be different ways in which change is resisted or inhibited, different brakes on change of different relative strengths at play simultaneously. This process—in all its different forms and degrees—is

[4] In both senses.

[5] Benedict XVI (Jospeh Ratizinger), Address of His Holiness Benedict XVI to the Roman Curia Offering them His Christmas Greetings, Thursday, 22 December 2005 <www.vatican.va/content/benedict-xvi/en/speeches/2005/december/documents/hf_ben_xvi_ spe_20051222_roman-curia.html> accessed 23 October 2023.

[6] In a similar spirit, Edmund Burke said of the 'Glorious' Revolution that 'When the legislature altered the direction [of succession], but kept the principle [of hereditary descent], they shewed that they held it inviolable'. The change, though radical, did not produce a rupture. Edmund Burke, *Reflections on the Revolution in France* (first published 1790, Oxford Paperbacks 1993) 22.

the sense in which I conceive of 'entrenchment' in this thesis. This digression thus brings me back to where I left off, with different forms and degrees of entrenchment acting at the same time to regulate change in the state.

The multi-track approach to reconciling permanence and change involves different forms and degrees of entrenchment operating simultaneously. Or, to switch analogies, different institutions and arrangements in a state will be entrenched at different depths, with the speed of change and degree of resistance varying for each. In the case of non-constitutional changes, entrenchment is likely to be shallow both in form and degree; constitutional changes, by contrast, will usually have to overcome deeper entrenchment, whether formal or informal. But just as the dichotomy between 'constitutional' and 'non-constitutional' is a false-binary concealing a range of forms of entrenchment, there are also more than two 'depths' or 'degrees' of entrenchment. As Raz noted:

> … one may distinguish in every country between the basic political culture of that country, and its more detailed and transient arrangements. The basic political culture usually includes both ways of deciding political issues (such as a federal system) and some substantive principles concerning the rights and duties of governments and of individuals. The distinction between basic framework and transient regulation *is one of degree*, and is not susceptible to precise description. It does not coincide with any distinction of issues. Some aspects of the decision-making procedure belong to the transient part of the political arrangements of the country, others to its basic framework, etc. The distinction is one of stability and importance in the eyes of those who participate in the political process.[7]

Although Raz begins by describing a simplistic binary distinction between a society's 'basic framework' and 'transient regulation', he later makes it clear that the distinction is not either/or but '*one of degree'*, and those degrees are determined by the 'stability and importance' of a particular arrangement.[8] This is the multi-track model of entrenchment that I have posited and which I intend to explore in the rest of this thesis.

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[7] Joseph Raz, *The Morality of Freedom* (OUP 1986) 259 (emphasis added).

[8] 'Take but degree away, untune that string, / And, hark, what discord follows!' William Shakespeare, *Troilus and Cressida* (first published 1609, David Bevington ed, Bloomsbury Arden Shakespeare 2015) Act I, scene iii.

While most constitutional scholarship focuses on the most obvious form of entrenchment—the codified Constitution—this can leave the impression that entrenched commitments are 'all or nothing' propositions: either an arrangement or institution is entrenched (because it is inscribed in a codified Constitution), or it isn't. I have already shown that constitutional entrenchment is not one thing and how a state may also entrench institutions and arrangements through ordinary laws, unwritten understandings among political officials (conventions), or social commitments. There are also degrees of entrenchment within these forms, both intentional and unintentional, which reflect even finer degrees of commitment to different institutions and arrangements. As I will show in the next three chapters, a codified Constitution may contain different amendment procedures, some more onerous than others; within the ordinary law, some statutes or precedents may be accorded special status as 'constitutional'; some conventions may be treated as absolute and others as contingent; and some social commitments may be clearly acknowledged, like the political commitment to the NHS in the United Kingdom, while others remain tacit because they are so deeply entrenched they are taken for granted.

This list of the different forms of entrenchment appears to follow a descending hierarchy, however, if we were to measure depth of entrenchment by how difficult it is in practice to change a specific arrangement or institution, we would find that some matters that are more deeply entrenched *formally* (in form) may not be as entrenched *in practice* (in degree) as less formally entrenched matters are. Despite an inconsistent correlation between the form of entrenchment and the practical effectiveness or 'degree' of entrenchment, there are several reasons why it nevertheless makes sense to organise the exploration of entrenchment by form, starting with the forms that are usually *intended*[9] to be the most inhibitive (and, in extreme cases, prohibitive) of change. First, because the three states on which this thesis focuses share most of the same forms of entrenchment, organising the discussion by form will make it easier to compare varieties of

[9] Intention applies to codified Constitutions and ordinary laws, less obviously to most conventions (though clearly to some), and only in a general sense to political and social entrenchment.

entrenchment across jurisdictions. Second, considering forms of entrenchment from those intended to be 'deepest' to those intended to be 'shallowest' will allow us to see more clearly where the form of entrenchment appears not to align with the practical degree of entrenchment. Third, revealing where form and degree do not align lays the ground for chapter 7, where I will consider the consequences of such misalignment and explore how states deal with it in better and worse ways. But before I turn to these forms and degrees of entrenchment in the constitutions of the United Kingdom, Canada, and the United States, it is necessary for the sake of completeness to look further afield for something those states lack, namely the *ne plus ultra* form and degree of entrenchment: deliberate permanent constitutional entrenchment.

3.2 The (im)possibility and wisdom of permanent formal entrenchment

Before asking whether it would be a good thing to entrench certain provisions and principles of a state's constitution permanently, it is worth asking whether, in the endless contest between permanence and change, anything constitutional can ever really be truly permanent? If we mean literal permanence the answer is obviously 'no'. All states are ultimately impermanent.[10] What is meant by constitutional permanence is thus an *intention* of permanence, that is a marked intention that, so long as the constitution endures, it should endure without changing in some fundamental way or ways. In contrast to other forms of constitutional entrenchment, which are intended to last for a long time, but which anticipate amendment, an intention of permanence may be stated explicitly or inferred from the absence of an amending formula. In the first case, this may be a clear written statement in a codified Constitutional text, such as the eternity clause (*Ewigkeitsklausel*) of Article 79(3) of the German Basic Law. In other cases, permanence may not be explicitly indicated at the moment of Constitution-making but is 'discovered' later, typically by courts charged with interpreting the Constitution. In such cases, the court infers from the totality

[10] See chapter 1.

of the Constitution and in light of the purpose of the constitutional project that certain principles were intended to be permanent and unamendable; if the text did not specify this intention that is only (according to the court) because what is self-evident does not need to be said.

From even a cursory glance at attempts to entrench constitutional permanence, it clear that intended permanence is compatible with dramatic impermanence in fact, either because unforeseen circumstances alter the conditions that made permanence initially desirable or because the entrenched arrangement or institution proved unproductive or futile in practice. So, for example, the Acts of Union 1800 purported to unite the kingdoms of Great Britain and Ireland together 'for ever', including uniting the Churches of England and Ireland.[11] As Julian Eule noted, '[a]lthough too much can be made of phrases such as "forever," it is clear that Parliament meant to bind the action of all future Parliaments'.[12] Permanence was intended. And, yet, despite the best laid schemes o' mice an' ministers, the church union of was dissolved by parliament not 70 years later.[13] And the Act's 69 years of 'permanence' is an eternity compared to the 'permanence' of the American Articles of Confederation of 1781, which lasted a mere eight years despite declaring that they 'shall be inviolably observed by every state and the union shall be perpetual'.[14] Intended permanence is no guarantee of permanence in fact.

On the question of whether entrenched permanence is a desirable intention in the first place (and without pre-empting a later, longer discussion[15]), I will simply note that, although they disagree on many things, Barber, Richard Albert, Jon Elster, Jeremy Waldron, and even Jed Rubenfeld all agree that attempts at permanent entrenchment are counterproductive and contrary

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[11] An Act for the Union of Great Britain and Ireland, 39 & 40 Geo III, c 67.

[12] Julian N Eule, 'Temporal Limits on the Legislative Mandate: Entrenchment and Retroactivity' (1987) 12 American Bar Foundation Research J 379, 384 citing AV Dicey, *Law of the Constitution* (10th edn, MacMillan & Co 1920) 64.

[13] Irish Church Act 1869, 32 & 33 Vict c 42; DB Mitchell, 'Sovereignty of Parliament-Yet Again' (1963) 79 LQR 196, 206

[14] Art of Confed, art XIII cited in Eule (n 12) 384 n11.

[15] See chapters 7 and 8.

to good government.[16] This is because even deeply-entrenched arrangements and institutions are only the best current guess at what will work for the state in the future. They may also reflect compromises struck by political or social factions to allow the state to be governed as well possible under contingent circumstances that become anachronistic over time as factions and circumstances change.[17] Sometimes, as Waldron reminds us, they will only be the rules that the current majority (or a powerful minority) *wants* to work for the state now and in the future—a weak and wishful form of intention. Permanently entrenching principles, institutions, or arrangements therefore risks locking in best guesses, contingent resolutions, or temporary partisan advantage. It also curtails what Melissa Schwartzberg has identified as the important, actively-critical disposition of a people towards the laws and norms of their state—including 'the most fundamental rules of society'—over time.[18]

Nevertheless, despite these misgivings, attempts at permanent entrenchment are common enough to merit consideration on their own terms for two reasons. First, because they are, as I have already described them, the *ne plus ultra* form of entrenchment and so form a baseline against which other forms of entrenchment may be considered; and second, because, as I will show in the next chapter, one can discern intimations of permanence in, or just behind, the American, Canadian, and British constitutions as well. I will begin with eternity clauses and then turn to the basic structure doctrine.

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[16] Barber's, Elster's, and Waldron's views noted in my discussion of their work in chapter 2. See also Jed Rubenfeld, *Freedom and Time: A Theory of Constitutional Self-Government* (Yale UP 2001) 174; Richard Albert, 'Constitutional Handcuffs' (2010) 42 Arizona State L J 663, 677, 698-99.

[17] The provisions of the American Constitution adopted to put off the final resolution of the slavery question fall into this category.

[18] Melissa Schwartzberg, *Democracy and Legal Change* (CUP 2007) 196. See also Albert (n 16) 698-99. ('To withhold from citizens the power of constitutional amendment is to withhold more than a mere procedural right. It is to hijack their most basic of all democratic rights. ... Sequestering this democratic right commandeers the sovereignty that gives democracy its meaning'.)

3.3 Permanent Entrenchment in Practice

3.3.1 Eternity clauses

'Essentially, a constitution is designed to last a long time.'[19] That was the opinion of Pierre Trudeau, sometime Prime Minister of Canada, who as the moving force behind Canada's current Constitution is better qualified than most to opine on constitutional design.[20] By his use of the word 'designed', Trudeau makes it clear that he is speaking of a modern, codified Constitution rather than an 'historic, customary, evolutionary—ie traditional—constitution'.[21] While the British North America Act had, *mutatis mutandis*,[22] transplanted the customary form of the British constitution in Canada,[23] since 1982, Canada has had a (mostly) codified Constitution intended 'to last a long time'. What is odd about this account is that, by contemporary standards, Canada already had a constitution that had lasted 'a long time'. Since 1867, Germany, France, Italy, Russia, China, and Japan had all undergone significant constitutional (and in several cases, revolutionary) change. Even the American constitution had been substantially amended in 1868 by the ratification of the Fourteenth Amendment, which may be considered a signal moment of constitutional

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[19] Pierre Trudeau, 'Quebec and the Constitutional Problem' in Pierre Trudeau, *Federalism and the French Canadians* (MacMillan 1968) 1, 42. This line is from an essay written in 1965, but it shows how, and how long, he had conceived of the project. See also Joseph Raz, 'On the Authority and Interpretation of Constitutions: Some Preliminaries' in Joseph Raz (ed), *Between Authority and Interpretation* (OUP 2009) 324 ('[A constitution] is, and is meant to be, of long duration').

[20] The patriation of the Canadian constitution was part preservation, part renovation, and part construction. It confirmed (with adjustments) most of the terms of the British North America Act, which it renamed the *Constitution Act, 1867*, and it approved a new *Constitution Act, 1982*, which contains the *Charter of Rights and Freedoms* as well as new provisions for amending the constitution, protection of Indigenous rights, and other clauses thought necessary to update or amend the relationship between the institutions of the federal government and between the federal and provincial governments. Together, the two statutes make up the codified Constitution of Canada.

[21] Martin Loughlin, *The British Constitution: A Very Short Introduction* (2nd edn, OUP 2023) 6-21. Although intentional permanence is considered a mark of modern Constitutions, the original constitutional entrencher was Lycurgus, whose suicidal stratagem to secure the permanence of Spartan law is recounted by Plutarch. *Plutarch's Lives* (Bernadotte Perrin tr, Harvard UP 1914) 293-97.

[22] The primary change being a division of powers between Parliament and the provincial legislatures, which meant that from the beginning judges played a part in the allocation (though not the substantive approval) of government power in Canada. Even then, they were still interpreting a statute, albeit a very special kind of statute. *Edwards v Canada* 1929 UKPC 86, [1930] AC 124, 107 ('The object of the Act was to grant a Constitution to Canada'.)

[23] 'Whereas the Provinces of Canada, Nova Scotia, and New Brunswick have expressed their Desire to be federally united into One Dominion under the Crown of the United Kingdom of Great Britain and Ireland, *with a Constitution similar in Principle to that of the United Kingdom*'. *Constitution Act, 1867*, 30 & 31 Vict, c 3 (emphasis added).

transformation,[24] if not a national 'refounding'.[25] Canada, by contrast, had experienced no civil war and relatively little civil unrest. A century and more of peace did not obviously cry out for a constitutional overhaul, and the last ties between Canada and the Westminster parliament could have been cut without introducing any of Trudeau's constitutional innovations and renovations. Trudeau, however, had long believed that Canada needed a new Constitution to secure the place of Quebec—and more broadly, of the French language and culture—in Canada, and that the way to do this was to guarantee certain social, cultural, and economic rights through a codified bill of rights.[26] Entrenching these rights meant they would endure for 'a long time', but endurance did not mean rigidity in all respects. In a 1967 speech to the Canadian Bar Association, Trudeau (then Attorney General of Canada) said:

> I do not accord an absolute and eternal value to the political structures or the constitutional forms of states. ... *With the exception of a certain number of basic principles that must be safeguarded, such as liberty and democracy*, the rest ought to be adapted to the circumstances of history, to traditions, to geography, to cultures and to civilizations.

The new Constitution was, therefore, to be a 'living' constitution.[27] It would be capable of adaptation 'to the circumstances of history', but at the same time not so easily changed that it encouraged social instability. 'A country where [citizens know that the constitution can be easily changed]', he wrote, 'oscillates between revolution and dictatorship.'[28] The example Trudeau had in mind was France, which, he observed, 'once it had started down the slippery path, gave itself eighteen constitutions in 180 years'.[29]

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[24] Bruce Ackerman, *We the People: Foundations* (Harvard UP 1991) 41, 91, 336.

[25] Noah Feldman, *The Broken Constitution: Lincoln, Slavery, and the Refoundng of America* (Picador 2022).

[26] Pierre Trudeau, 'Quebec and the Constitutional Problem' (n 19) 44; Pierre Trudeau, 'A Constitutional Declaration of Rights' in Pierre Trudeau, *Federalism and the French Canadians* (MacMillan 1968) 52-59.

[27] Pierre Trudeau, 'Federalism, Nationalism, and Reason' in Pierre Trudeau, *Federalism and the French Canadians* (MacMillan 1968) 182, 193-4 (emphasis added).

[28] Trudeau, 'Quebec and the Constitutional Problem' (n 19) 42-3.

[29] ibid 43.

A critic might demur that the source of French instability had been social rather than legal, and that no Constitution—howsoever permanently-intended and unamendable—could have prevented the social and political ructions that echoed for more than a century after the violent overthrow of the constitutional order between 1789 and 1799. That critic would likely buttress his case by observing that, during the same period the constitutional laws of the United Kingdom could be amended at will by a majority of parliament, yet that country had been among the most stable in Europe. Nevertheless, when Trudeau finally did preside over the drafting of what would become the *Constitution Act, 1982*, his government took special care to provide for a spectrum of amendment procedures for different parts of the Constitution, meaning that some parts would be more 'living' than others.[30] Oddly, given his earlier statement that 'a certain number of basic principles [such as liberty and democracy] … must be safeguarded' permanently, the Charter of Rights and Freedoms was *not* permanently entrenched or even granted the highest degree of protection in the new Constitution. Reflecting his long preoccupation with the constitutional place of French Canadians, however, 'the use of the English or the French language' was.[31]

The omission of most basic rights from the most-protected core of the Canadian Constitution stands in contrast to the so-called 'eternity clauses', that other states have entrenched in their post-war Constitutions to protect similar rights. Eternity clauses, which purport to fix forever certain legal principles or political arrangements by excluding them from the possibility of repeal or substantial amendment, are the strongest form of intentional constitutional entrenchment. Immune to change even by the normal processes of amendment, they may only be dislodged by an act of constituent power that supersedes the constitutional order that entrenched them; indeed, to their framers their repeal would itself be evidence of a constitutional revolution. This is because the principles and arrangements entrenched in eternity clauses are deemed so

[30] Political exigencies, however, meant that almost as soon as the new Constitution was adopted it was mostly unamendable. This is discussed in detail in chapter 7. For now, I am concerned only with the intended design.

[31] *Constitution Act, 1982,* Schedule B to the Canada Act 1982 (UK), 1982 (*Constitution Act, 1982*) ss 38(1) and 41(3).

fundamental to the constitutional order, and are so intimately identified with it, that it would be impossible to say that the constitutional order retained its coherence without them.[32] This is why most analysis of eternity clauses focusses on their constitutional grounding function and on how they establish and maintain constitutional identity—two roles that are linked but distinct.

Consider the provision of the French constitution that says, 'The republican form of government shall not be the object of any amendment'.[33] Functionally, this provision establishes the structure of the French government and sets a non-negotiable limit on constitutional change. Whatever changes the people of France may make to their political system, they cannot change its essentially republican character; the architecture of the constitution rests, and must continue to rest, on that foundation.[34] Republicanism, however, is not merely a functional feature of the French Constitution, it is also part of the state's constitutional identity. One could even say that, except as an expression of identity, it is redundant—of course the Constitution of the Fifth *Republic* is a *republican* constitution—but when constitutional theorists speak of a Constitution's identity, they mean something deeper than description. What exactly they do mean is often unclear, but it is captured well by Monika Polzin's use of the term 'constitutional self-image', which keeps the essential relationship between a people and their state's constitution always in view.[35] Whatever else it is, a constitutional identity is the way a people see themselves qua 'a people' in the

[32] Silvia Suteu, *Eternity Clauses in Democratic Constitutionalism* (OUP 2021) 1.

[33] The Constitution of the Fifth Republic (1958), Title XVI, art 89 <www.elysee.fr/en/french-presidency/constitution-of-4-october-1958> accessed 19 February 2024. Compare the 'republican guarantee' clause of the American Constitution, which was left subject to the normal amendment procedure. US Constitution Art IV, s 4.

[34] Alas, for the hopes of modern French legitimists. Samuel M Osgood, 'A Pretender's Concept of the French Monarchy' (1957) 19 RevPol 77.

[35] Monika Polzin, 'Constitutional Identity as a Constructed Reality and a Restless Soul' (2017) 18 German LJ 1595, 1602 (Polzin says she borrowed the term from Robin West, 'Toward a First Amendment Jurisprudence of Respect: A Comment on George Fletcher's Constitutional Identity' in Michel Rosenfeld (ed), *Constitutionalism, Identity, Difference, and Legitimacy* (Duke UP 1994) 245, 251). For another account of constituted identity that does not rely on the logical subordination of the constituted power to the Constitution, but instead on the necessity of a 'myth that presupposes the actuality of a constitution'—a sort of 'noble lie' that preserves the constituted order with reference to the Constitution, see Ulrich K Preuss, 'The Implications of "Eternity Clauses": The German Experience' (2011) 44 Isr L Rev 429, 445.

Constitution of their country. This means that a constitutional identity is unique to each Constitution. There may be similarities and even a related intellectual genealogy between state Constitutions—say, between the Republic of France and the republic of the United States of America—but it must be the case that each state recognises its Constitution, and only its Constitution, as its own. This is true despite the convergence of post-Second World War constitutionalism around a shared set of political, legal, and social norms, with the result that there are many 'familial' similarities between modern Constitutions.[36] But, however similar the Constitutions of states may be, the people of one state can never look at the Constitution of another state and say with conviction, 'this is *our* Constitution'.[37]

Having made this categorical assertion, let me be clear about what I am not saying. I am not saying that the people of a state are of one mind about their Constitution. Nor am I saying that recognition is the same as approval. It may be that some people in a state think their Constitution is partly or wholly rotten. It is probably the case that many people in a state never think about their Constitution at all. What I am saying is that most of the people in a state who do take the time to consider their Constitution recognise it as a reflection of something unique about their state—some combination of its history, culture, customs, and their way of living, whether or not they approve of those things—just as I may look in a mirror and know my own reflection, whether or not I like what I see. It is also necessary to speak precisely here, because discussion of 'constitutional identity' is so closely related to the idea of 'national' or 'state' identity that we must be careful neither to confuse or conflate the two nor—and this is the more common theoretical fault—to so divorce the idea of constitutional identity from the identity of the underlying state that the study of the former becomes abstracted from political reality.

The unique and particular identity of every Constitution is why Polzin is right to say that '[c]onstitutional identity can primarily be constructed from those constitutional norms that can be

[36] Dieter Grimm, *Constitutionalism: Past, Present, and Future* (OUP 2016) ch 18.

[37] See Lawrence H Tribe, *The Invisible Constitution* (OUP 2008) 33-34.

explained by distinct national peculiarities in a given state' and to explain that this is why Constitutional preambles 'often refer to a specific constitutional understanding of the "self" determined by a distinctive national history and other national conditions, such as religious understanding.'[38] In addition to preambles, Polzin says that 'these norms can be found in other constitutional provisions, such as provisions relating to national languages or the federal organization of a state' which 'can be traced back to, or explained by, national, cultural, or historic peculiarities that are also important for a national collective identity.'[39] A good example of this is the German *Ewigkeitsklausel*,[40] which provides that the first twenty articles of the German Basic Law, protecting *inter alia*, the inviolable dignity of persons and human rights as well as the democratic, republican, and federal basis of German government, may not be amended. Together these unamendable provisions were intended to make impossible the recurrence of the constitutional breakdown that led to the systematic violation of these principles under the Nazi regime. As predicted by the case for entrenchment from expression in the last chapter, we can see here the relationship between political function and state identity, albeit this time in the form of a new identity consciously adopted (and in part resurrected) in conscious repudiation of a previous identity. It is not necessary to consider whether the German constitution under the Nazi regime was an aberration from or a genuine reflection of the identity of the German people and their state between 1933 and 1945 to recognise that the adoption of the Basic Law in 1949 committed (West) Germans to a constitutional identity that could be explained by their distinct history and to which they would be committed going forward. The *Ewigkeitsklausel* entrenched a new functional commitment to human rights and democratic government as well as a social commitment to redefining German society—to giving it a new national as well as constitutional identity—that

[38] Polzin (n 35) 1605.

[39] ibid 1606.

[40] Basic Law for the Federal Republic of Germany (1949), Art 79(3); Jens Woelk, 'Germany' in Dawn Oliver and Carlo Fusaro (eds), *How Constitutions Change: A Comparative Study* (Hart 2011) 143, 143-54.

reflected the values underpinning the entrenched rights. The *Ewigkeitsklausel* thus fits the idea of eternity clauses described by Silvia Suteu as an 'expressive site within the constitution' which are intended, and are in fact, viewed as an expressive statement of the 'centrality of the values they enshrine' for that state.[41]

So far I have presented a view of constitutional identity that is more or less synonymous with the identity of the state, which earlier I said is a common error—if that is where the enquiry stops.[42] I have described constitutional identity as 'the way the people see themselves qua "a people" in the Constitution of their country': where Constitutions purport to establish unamendable political arrangements, those arrangements are in fact inseparable from the practical government of the state; and where they purport to express 'values', those 'values' are in fact the values of the state, whether or not it always lives up to them. But a constitutional identity is something conceptually distinct from state identity, even though the two are inextricably bound together.

In his book on the nature of constitutional identity, Michel Rosenfeld writes that 'all constitutions depend on elaboration of a constitutional identity that is distinct from national identity and from all other relevant pre-constitutional and extra-constitutional identities'.[43] No doubt this is true as long as we bear in mind at all times that the relationship between constitutional identity and state identity is both distinct *and* interdependent. Rosenfeld's distinction is most useful when he contrasts the pluralist nature of a state (even the most culturally homogenous state) with its Constitution, which by definition must be singular in its essential provisions.[44] 'To preserve its

[41] Suteu (n 32) 89. See also Gary J Jacobsohn, *Constitutional Identity* (Harvard UP 2010) 31.

[42] I use 'state identity' rather than 'national identity', which is the more common term in the literature. In cases where a state and a nation are wholly congruent, the state's identity is a national identity, but in other cases, including in Canada and perhaps the UK, the identity of a multi-national state is better described as a state identity.

[43] Michel Rosenfeld, *The Identity of the Constitutional Subject: Selfhood, Citizenship, Culture, and Community* (Routledge 2010) 10. For a similar account of constitutional identity, see Jacobsohn (n 41).

[44] That is, a constitution cannot be both republican and monarchist, even if there are members of the state that would favour each form of government.

coherence', Rosenfeld writes, 'at some level the constitutional subject must be imaginable as a single self' while '[a]t other levels, of course, the constitutional subject is made up of different, often mutually antagonistic, selves'.[45] The result is a contingent and potentially fraught constitutional identity that 'distil[s] threads of unity out of [a] complex, diverse, if not downright dissonant, constantly evolving, multiple, fractious, and fragile constitutional subject'.[46] Rosenfeld describes this process as 'dynamic and dialectical', a relationship in which contradictions between the existing constitutional identity and changing political conditions are resolved (easily or uneasily), only for new political changes to throw up new contradictions that need to be resolved, *ad infinitum*. It is a dynamic that 'necessarily remains forever unfinished, if for no other reason, because an existing identity, even if fully stable, would have to be adjusted to account for the presently unknown and to a large extent unknowable needs and aspirations of yet unborn generations'.[47] In the terms of this thesis, the flow of time and the great law of change are always pressing on the state, and its Constitution must be alive to contingency.

3.3.2 The Basic Structure doctrine

Eternity clauses and the basic structure doctrine are closely related insofar as they both assume an unchanging—and, more importantly for the purposes of this discussion, an entrenched and unchangeable—core constitutional identity, but they may be distinguished by their respective sources.[48] Eternity clauses, like the examples cited above from Germany and France, are expressly written into a Constitutional text. They are the deliberate expression of the idea of an immutable constitutional core by the authors and ratifiers of the Constitution. By contrast, 'doctrines of

[45] Rosenfeld, *The Identity of the Constitutional Subject* (n 43) 26.

[46] ibid 27.

[47] ibid 26.

[48] See Oran Doyle, 'Constraints on Constitutional Amendment Powers' in Richard Albert, Xenephon Contiades and Alkmene Fotiadou, *The Foundations and Traditions of Constitutional Amendment* (Hart 2017) 84-87, 93-94.

implicit unamendability, such as basic structure or substantive core doctrines' reach beyond the 'textual anchor' of eternity clauses to read between the lines of the Constitutional text and intuit the underlying premises on which the express provisions of the constitution rely for their meaning or effectiveness.[49] While the explicit and implicit natures of eternity clauses and basic structure doctrines differentiate them, in both cases their claimed legitimacy rests on the same codified text, and thus on the same Constitutional footing. In both cases they are justified by an appeal to a constitutional identity that reflects the intent of the Constitution's authors and the constituent power that approved the text. In the case of an eternity clause, the 'claim' is that the state's constitution and its Constitution may change over time in many ways that reflect the requirements of changing circumstances *so long as* none of those changes trench on the core constitutional identity that is protected by the eternity clause. In the case of the basic structure doctrine, the claim is essentially the same, though the identification of the core constitutional identity requires interpretive work by those claiming to have identified it. In practice the result is the same: courts are empowered by the text (explicitly *ex ant*e or implicitly *ex post*) to police the boundaries of constitutional identity and to reject constitutional amendments that threaten that identity.

Underlying both eternity clauses and the basic structure doctrine is a concept of a Constitution that distinguishes between original and derived (or as they are sometimes described, primary and secondary) powers.[50] This distinction is often attributed to the eighteenth century constitutionalists, and in particular to the Abbé Sieyès, from whom we get the terms constituent power (*pouvoir constituant*) and constituted power (*pouvoir constitué*), though Yaniv Roznai has documented the expression of similar ideas a century earlier.[51] The idea was later taken up by Carl Schmitt, who posited the original constituent power as, legally speaking, a power *ex nihilo* by which the competent power (in a democracy, 'the people' or in a monarchy, the king) establishes the

[49] Suteu (n 32) 1.

[50] Neil Walker, 'Rosenfeld's Plural Constitutionalism' (2010) 8 ICON 677, 682.

[51] Yaniv Roznai, *Unconstitutional Constitutional Amendments—The Limits of Amendment Powers* (OUP 2017) 107-08.

complete 'type and form of the political unity' of the state.[52] Once this political unity is established, subsequent exercises of the constituent power can no longer be said to operate in a vacuum. The essential character of the created political form becomes unamendable because it represents the 'identity and continuity of the constitution as an entirety' and all subsequent acts occur within the new order and owe their legitimacy to it.[53] The constituent power, however, does not simply vanish at the moment of Constitution-making, as James Bradley Thayer colourfully suggested;[54] according to Schmitt, it persists 'alongside and above' the Constitution.[55] But the constituent power is a power that is irretrievably altered by its exercise. It is tamed by the initial act of creation and henceforth its power is limited to working within the Constitution to improve it, like an architect forever trapped in a house he has built, unable to change the original plans for fear it will collapse on him and so limited to using his tools only to preserve the house as it was originally constructed. He may make substantial renovations and even strengthen and improve the original plans, but he may never reconsider them, remove a load-bearing wall, or tear down and rebuild.[56] This newly-limited constituent power is called a secondary constituent power (or, sometimes, the 'amending power' or the 'constituted power'), to distinguish it from the primary constituent power (sometimes, the 'framing power').[57]

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[52] Carl Schmitt, *Constitutional Theory* (Jeffrey Seitzer tr, Duke UP 2008) 75, 77.

[53] Carl Schmitt, *der Hüter der Verfassung* (1931) 113, quoted in Thomas Wischmeyer, 'Review of Yaniv Roznai's *Unconstitutional Constitutional Amendments*' (2017) 15 ICON 1242, 1242-43; Schmitt, *Constitutional Theory* (n 52) 150.

[54] Thayer describes the state of the constituent power after the constitution as that of a quasi-divine sovereign who, 'having written these expressions of his will, had retired into the cloud'. James Bradley Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law* (Little, Brown, and Co 1893) 5.

[55] Schmitt, *Constitutional Theory* (n 52) 140.

[56] This metaphor is mine as expressed, though I subsequently learned it is not original. See Jacques Baguenard, 'La constitution' in Jean-Matie Auby (ed), *Droit public* (2nd edn, Economica 1989) 32 cited in Roznai (n 51) 150.

[57] Roznai (n 51) 120-21. Different theorists use different terms for these concepts, and I note some of them here to recognise that fact, but I will stick to 'primary' and 'secondary' constituent powers for the reasons set out by Roznai below, unless a synonym is clearer or more efficient in the context.

According to Roznai, the 'conceptual relationship between constituent and constituted powers is that of subordination',[58] with the secondary or amending power existing somewhere between a fully constituent power and fully constituted power. Unlike a fully constituted power, it is not entirely subordinate to the Constitution and can exercise Constitution-making power by amending it, but unlike a fully constituent power it can do so only within limits.[59] This relationship between primary and secondary constituent powers is described variously as a 'delegated' power, which is bound to act within the limits of its delegation, or as a 'fiduciary' power, which must act as 'a trustee of "the people" in their capacity as a primary constituent power'.[60] These related ideas of '[d]elegation and trust', which Roznai uses interchangeably despite their different implications for individual cases,[61] are, he says, the 'conceptual keys to the nature, and consequently the scope, of amendment powers' because an amendment power 'necessarily entails limits'.[62] There is, he claims, always 'a hierarchical relationship between the grantor and the receiver' and so the authority to amend is necessarily 'conditional on its fiduciary obligation to comply with the terms of the trust (eg, any procedural or explicit or implicit substantive requirements) and to pursue the end it was established to advance: to amend the constitution.'[63] Note that, according to Roznai, the limits on the amending power may include both explicit eternity clauses and, implicitly, the basic structure of the constitution, which cannot be changed so radically that it obliterates the delegating power. In this, Roznai explicitly follows Schmitt, who believed that the constituent power persists after the original Constitution-making act with continuing authority to amend the constitution but

[58] ibid 109.

[59] ibid 110-13. See also Stephen Holmes and Cass R Sunstein, 'The Politics of Constitutional Revision in Eastern Europe' in Sanford Levinson (ed), *Responding to Imperfection: The Theory and Practice of Constitutional Amendment* (Princeton UP 1995) 275, 275-76.

[60] ibid 133-34.

[61] ibid 118-20, 133.

[62] ibid 119.

[63] ibid.

'only under the presupposition that the identity and continuity of the constitution as an entirety is preserved'.[64] Again we see the idea that, because the secondary constituent power is derived from the primary constituent power, it cannot be fully equal to it. It cannot overleap its paternity and so, as a legal matter, is limited by whatever bounds were set by the primary constituent power as well as by the fact of its filial subordination. These limits include, above all, any explicitly unamendable features of the Constitution.[65]

In *Kesavananda v State of Kerala*,[66] one of the first and still the most-cited account of implicit limits on constitutional amendment, the Supreme Court of India held that, while 'the amending power is a wide power and it reaches every Article and every part of the Constitution' and 'can be used to reshape the Constitution to fulfil the obligations imposed on the State',[67] the power to amend 'is not unlimited so as to include the power to abrogate or change the identity of the constitution or its basic features'.[68] Although the 'identity' and 'basic features' of the Constitution were nowhere explicitly stated in the constitution itself, according to Chief Justice Sikri they could be inferred from the text of the Constitution's preamble as well as from 'the whole scheme of the Constitution'.[69] The Court held that, together, these features formed a 'basic structure' that must be considered a permanent limitation on the amending power in order to uphold the integrity of the Constitution itself. That holding, however, did not go unchallenged. An interesting sidebar to the decision was a debate between judges in the minority and the majority over the nature of constituent power when it comes to exercising the amending power. The debate was long and subtle, and it is beyond the scope of this thesis even to sketch its course, but in the end the judges

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[64] Schmitt, *Constitutional Theory* (n 52) 150 cited in Roznai (n 51) 117.

[65] Roznai (n 51) 105-13.

[66] AIR 1973 SC 1461

[67] ibid 705.

[68] ibid 646(b).

[69] ibid 318.

in the majority adopted the position that, whether or not the amending power should be considered an exercise of constituent power, by its very nature it must be an inherently limited power. Using an argument similar to Roznai's later language of delegation or trust, Shelat and Grover, JJ concluded that, because '[t]he amending body has been created by the Constitution itself ... [i]t can only exercise those powers with which it has been invested'.[70]

Seven years later, in *Minerva Mills*, a sequel to *Kesavananda*, the Supreme Court of India was called on to decide the validity of a series of further proposed amendments to the Constitution, one of which tried to amend Article 368 to remove the limits imposed on the amending power by the Court in *Kesavananda*.[71] Unsurprisingly, given its previous reasoning that the Constitution's basic structure was inviolable and that the Constitution itself imposed inherent limitations on the amending power, the Court quickly disposed of this question with nothing like the lengthy debate over first principles in the earlier case.[72] Chief Justice Chandrachud began by summarising the majority reasons in *Kesavananda*, which he described as the decision's 'theme song', namely:

> Amend as you may even the solemn document which the founding fathers have committed to your care, for you know best the needs of your generation. But, the Constitution is a precious heritage; therefore, you cannot destroy its identity.

Applying this 'theme song' to the proposed amendment to the amending power, Chandrachud, CJ concluded that '[s]ince the Constitution had conferred a limited amending power on the Parliament, the Parliament cannot under the exercise of that limited power enlarge that very power into an absolute power'.[73] He then linked the two principles announced in *Kesavananda*—the textually-implied basic-structure of the Constitution and the theoretical basis for limiting the scope of an

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[70] ibid at 570. The reasons of Hege and Mukherjea, JJ, are also similar to Roznai's view that the amending power is a *sui generis* power with characteristics of both a constituent power and a constituted power. ibid at 713. For the contrary case that the amending power is a full constituent power without limitations, see the reasons of Palekar, J. ibid at 1275-83.

[71] *Minerva Mills Ltd & Ors vs Union Of India* 1980 AIR 1789.

[72] ibid.

[73] ibid.

amending power—by describing these inherent limitations on the amending power as 'one of the basic features of our Constitution'.[74] Henceforth, the basic structure of the Indian Constitution would include the delegation theory of implicit unamendability. This judicial flourish closed the conceptual loop. Although he is not among the hundreds of sources cited in either *Kesavananda* or *Minerva Mills*, the Court's reasoning closely tracks Schmitt's view that the power to amend does not include the power to repeal or replace its essential elements, nor can a limited amending power be used to remove its limitations.[75]

3.4 Conceptual and practical problems with permanent entrenchment

Constitutional unamendability poses several theoretical problems, the most obvious of which is a reliance on legal fictions that elevate abstract logic above practical realities.[76] Justifications for unamendability inevitably sound like a social contractarian 'Just So' story in which we are required to imagine a state of nature that erases all the contingent social facts and complexities of the actual Constitution-making process. This is bad theory and worse history. In the paradigmatic case of modern Constitution-making, the American colonies in 1787 already had their own constitutions, well-established political institutions, and a shared common law tradition reaching back across an ocean and several centuries. They were as far from a state of nature as Rousseau was from Adam. Similar things could be said of the conditions that produced the German Constitutions of the 19th century and even more of the Constitution imposed as an act of enlightened victors' justice after the Second World War (which, notably, was intended to be temporary and transitional).[77] Similarly, the adoption of Canada's current Constitution occurred

[74] ibid.

[75] Schmitt, *Constitutional Theory* (n 52) 150.

[76] For a 'mythical' account of limited constituted power, see Preuss (n 35) 445.

[77] Basic Law for the Federal Republic of Germany (1949), Article 146 ('This Basic Law, which, since the achievement of the unity and freedom of Germany, applies to the entire German people, shall cease to apply on the day on which a constitution freely adopted by the German people takes effect.') <www.gesetze-im internet.de/englisch_gg/englisch_gg.html#p0412> accessed 19 February 2024.

within living memory and did not depend on the 'spectre of a hostile ungoverned state'[78] necessitating the formation of *pactum societatis* or *pactum subjectionis*. In fact, no modern Constitution can plausibly locate its origins in a constituent power acting in a political or legal vacuum.

More practically, arguments for unamendability also glide past the fact that, especially in the case of the older 'modern' Constitutions, the 'we the people' of the primary constituent power looked quite different from 'we the people today', and fail to explain why the current trustees of constituent power should continue to honour the intent of a constitutional settlor whose original judgment was in essential respects repugnant to the trustee's moral sense. How many living Americans would really choose to be governed today by the historical views of the original framers of their Constitution or feel morally bound by a process of ratification that was limited to an unrepresentative minority of 18th Century American men? Waldron puts the problem starkly: unamendability requires us to believe that 'being bound today by formulas laid down by a group of white-supremacist revolutionaries in 1791 is represented as a form of autonomous precommitment by us'.[79] Even discounting for hyperbole, it is an uncomfortable premiss.

Despite the easily discoverable historical contexts of modern Constitution-making, many of the reasons given for distinguishing between an unlimited original constituent power and a limited, derived constituent power efface those social and historical facts and replace them with a legal myth. For example, Marrku Suksi describes the original constituent power as an:

> extra-constitutional, pre-constitutional, latent and inalienable authority of the people to adopt a constitution for itself in a situation where the people's power of enacting constitutional provisions or revising the current constitution completely or drafting a constitution *in a constitutional vacuum* is not subjected to any restrictions of a previous or a current constitution.[80]

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[78] Stephen Buckle and Dario Castiglione, 'Hume's Critique of the Contract Theory' (1991) 12 HistPolThought 457, 462.

[79] Jeremey Waldron, *Law and Disagreement* (OUP 1999) 270.

[80] Markku Suksi, *Bringing in the People: A Comparison of Constitutional Forms and Practices of the Referendum* (Martinus Nijhoff Publishers 1993) 25 (emphasis added). From Roznai (n 51) 115.

Similarly, Roznai cites the 'formal theory developed by French positivist scholars' in which original constituent power is distinguished from derived constituent power because it is 'exercised *in a legal vacuum*, whether in the establishment of the first constitution of a new State or in the repeal of the existing constitutional order, for instance with regime change'.[81] The problem with this justification of the original constituent power—and, more importantly, with it as a justification for limiting the derived constituent power—is that it does not explain why it should apply in cases where the original constituent power did not operate in a legal vacuum, much less a social vacuum (which is most cases).[82]

Ulrich Preuss has offered a solution to this problem with a consequentialist appeal to the power of myth to secure the constitutional order by reference to the original Constitution-making act.[83] Although the people and institutions who adopted the state's most recent Constitution are in an objective sense the same 'we the people' (in a democracy) as those who come after them, we may be more willing to defer to their judgment about the proper limits of our authority if we elevate them to the status of quasi-divine sages analogous to the first law-givers of a more primitive age,[84] or if we believe that the Constitution-making act itself has a special socio-legal significance that we should feel bound (for whatever reason) to respect. For good or ill, the distinction between the original constituent power and the derived constituent power then becomes a self-fulfilling social fact, one that is valid as long as it is believed.

A key difference between Preuss's approach and appeals to the concepts of delegation and trusteeship is that the secondary constituent power is not bound by the limits imposed by the primary constituent power but rather limits itself out of respect to the earlier exercise of power

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[81] Roznai (n 51) (emphasis added).

[82] Even in the hypothetical case of a legal vacuum, the question arises: why should the first mover have a constitutional advantage? The unsatisfying answer is that having moved first, all subsequent action must contend with the first mover's decisions. The advantage is not normative but temporal. That is how history works.

[83] Preuss (n 35).

[84] Roznai uses the term 'special constitutional agents'. ibid 118.

and in the interest of the continuing legitimacy of the constitutional order. It is, we might say, not bound but beholden. But could we not say the same about any theory that distinguishes between a primary and a secondary constituent power? Once the primary constituent power has left the scene, the secondary constituent power—the totality of the living people, the *Ecclesia militans*,[85] as it were—can only ever be limited by an exercise of self-limitation for the simple reason that there is no one else around to limit them. The distinction between primary and secondary constituent powers is more fictive than factual. Unlike the theories of delegation and trusteeship, which rely on such legalistic fictions, Preuss's account is unusually candid for recognising this reality. It is not, however, necessary to resort to constitutional myth when this dynamic of contingent fidelity to past commitment can be explained by practical necessity. Preuss's explanation of the role of the constitutional myth as preventing a reversion to 'an unregulated struggle for power of competing forces, disorder, lawlessness, and possibly civil war'[86] suggests that it might be more useful to look for justifications of constitutional arrangements in practical considerations than in legal theory, much less in analogies to doctrines of private law like delegation and trusteeship.

We do not need to conceive of our parents or grandparents as mythical progenitors to act as their heirs, to carry on family traditions, or to cultivate the land they bequeathed to our care down the generations. At the level of the state, if respecting pre-existing institutions, honouring longstanding (and in some cases more recently-agreed) political arrangements, and following established social practices—in short, adhering to entrenched commitments—conduces to order and avoids 'disorder, lawlessness, and possibly civil war', then that is reason enough to do so without appealing to what Lior Barshack has deprecated as an 'absent sovereignty'.[87] A

[85] The term is most often used to distinguish the body of living Christians from those in purgatory and paradise, but I intend it to recall the Greek *Ekklesia*, which was used to describe the citizens of Athens assembled in the Pnyx to approve the laws.

[86] Preuss (n 35) 445.

[87] Lior Barshack, 'Time and the Constitution' (2009) 7 ICON 553, 555.

constitutional myth may help to keep these commitments alive,[88] but it is epiphenomenal—it is the foam on the wave, it is not the wave. Barshack locates the origins of constitutional mythology in the corporate personality of a society, in which 'the group represents itself to itself'. Analogising this process to Hegel's and Durkheim's (rather different) theories of religion, he says that by associating itself 'with ancestral figures ... and ancestral law' the people today as a corporate body 'cannot fail to be sacred'.[89] Thus, '[t]he religious dimension of political systems and families inheres in their corporate structure.' No doubt he is right, but quasi-religious self-justification via constitutional mythopoeia is secondary to the primary reason that a state adheres (always contingently) to entrenched commitments—namely, practical necessity. The myth may be how a state explains itself to itself, but like all myths it should not be confused with what it explains.

To his credit, Roznai is aware of the limitations of the delegation and trustee account of constituent power and wisely avoids grounding his distinction between primary (original) and secondary (derived) constituent power in a constitutional 'Big Bang' moment that sets the immutable laws of the new Constitution in motion. He recognises that '[a] new constituent process never acts in a *tabula rasa* or as a pure vacuum' and that '[i]t never really starts *de novo*'.[90] He also acknowledges that not all Constitutions 'were formed in revolutionary circumstances, breaking the previous constitutional order, or during state-building'; they can also be 'constituted through international efforts or imposed by foreign and external forces' or, as in the case of post-1989 Eastern Europe and South Africa (I would add Canada) 'the constitution-making process is often exercised in continuity with historic or existing laws'.[91] A Constitution is 'original only in the sense that, by its nature, it does not necessarily derive from nor is bound to prior or existing

[88] Daniel Skeffington, *The Political Constitution: An Idea Worth Protecting?* (The Constitution Society 2022) 33, 44.

[89] Barshack (n 87) 556.

[90] Roznai (n 51) 121.

[91] ibid.

constitutional rules' and a constituent power is only 'original' in the same contingent sense. It is for this reason that Roznai adopts the terms 'primary constituent power' and 'secondary constituent power' in place of 'original constituent power' and 'derived constituent power'. The former is '*primary* not only because it is usually the *initial* action, but also because it is *principal* in its relationship with the amendment power' and the latter is *secondary* 'not merely because it usually comes after the constitution-making process chronologically, but also because it is subordinated to the primary constituent power and inferior to it'.[92]

Roznai does not hide the fact that his terminology comes pre-loaded with the assumptions of his delegation theory of constituent power. This theory presupposes (or, to put it more critically, imposes) the legal character of the Constitution-making act.[93] It does not purport to align with either the understanding or desires of the framers or ratifiers of the Constitutions to which he applies the theory or with the understanding and desires of the people of each subsequent generation in each constitutional state. It is, instead, a way of thinking about constitutional power, which is why his description of the delegation theory repeatedly refers to the 'conceptual' nature of the theory. But it is an argument by analogy that relies for its force on the importation of the private law concept of a 'hierarchical relationship between the grantor and the receiver' to the Constitution.[94] It does not explain why, just because in private law 'the agent is never equal of the principal', we should assume that the same is true in public law. His theory does not offer a practical reason why we should treat the secondary constituent power—that is, present political

[92] ibid 122. At the risk of further crowding a field already cluttered with contending definitions, I would suggest the analogous terms *autexousios* for the free and legally uncircumscribed exercise of the constitution-making power and *hupexousios* for the exercise of a power that is circumscribed by the prior exercise of *autexousios*. Such circumscription may be explicit or implicit in the constitutional text, or simply the result of acting second and having to account for and contend with the legal, political, and social consequences of the existing constitution. The analogy is to the use of these terms by Johann Jakob Grynaeus (in a debate with Jakob Arminius) to refer, respectively, to the unlimited power of God in creation and to the power of man as created by God. Grotius, who popularised the former term, did so by an act of possibly heretical hubris by ascribing the limitless character of God to man. See further Jonathan Price, 'God Created Man αὐτεξούσιον': Grotius's Theological Anthropology and Modern Contract Doctrine' in Peter Róna and László Zsolnai (eds) *Agency and Causal Explanation in Economics* (Springer International 2020) 163-65.

[93] ibid 119.

[94] ibid 120.

actors with the support of the people today—as lacking the full panoply of powers that 'the Sovereignty at the back of the Constitution [ie, the primary constituent power] inherently possesses'[95]—or, more to the point, why the secondary constituent power should act as though it does not possess those powers. Indeed, it does not say why we should conceive of distinct primary and secondary powers at all.

The delegation theory of constituent power requires us to assume a division between the people of the state that does not necessarily reflect the historical or continuing reality. If we think of the people of a state as a single people, existing through time before, during, and after the relevant Constitution-making act, then the designation of the people at one point in time as 'grantors', 'principals' or 'trust-settlors' and the people after that time as 'receivers', 'agents', or 'trustees' looks, if not entirely arbitrary (because we cannot ignore the fact of the Constitution-making act), then at least artificial.[96] The distinction is further complicated if one peels back the layers of cultural mythology to expose the common reality that the constituent power was, if not legally speaking illegitimate (and it may have been), then only weakly and retrospectively self-legitimating. The authority of the original constituent power is the authority of an author. It is an unauthorized authority, the unauthored author of the Constitutional order. But the analogy cannot be extended to say that subsequent generations are characters constrained by the roles written for them by the original author, for that would deny them the independent subjecthood due to a self-governing people.[97] If they are characters, they are post-modern characters in a metafiction who possess the power to question and challenge their putative author.[98] The answer to why a

[95] ibid quoting, in part, CV Keshavamurthy, *Amending Power under the Indian Constitution—Basic Structure Limitations* (Deep & Deep Publications 1982) 13, 50.

[96] See Generally Joseph De Maistre, *The Generative Principle of Political Constitutions* (first published 1847, Taylor and Francis 2017).

[97] Mark Tushnet, 'Comment on Doyle's Constraints on Constitutional Amendment Powers' in Richard Albert, Xenophon Contiades, and Alkmene Fotiadou (eds), *The Foundations and Traditions of Constitutional Amendment* (Hart 2017) 97, 101.

[98] See, eg, Flann O'Brien, *At Swim-Two-Birds* (Longmans Green 1939).

constitutional amendment should conform to a plot established by the original author must be either that there is something mystical about the original author (or the occasion of the original authoring) or that the quality of the authoring has been justified by experience.

The first answer is open to the rather obvious retort that myth is just myth, with only as much power as we allow it to have. It is silly to say that a Constitution cannot be changed because of a myth because myths as well as Constitutions can be changed.[99] This is especially compelling if 'the people' undertaking the amending process is more representative of 'the people' than an original Constitution-making process that, for example, excluded women, or racial minorities, or unpropertied men. The second answer is just the practical argument against change offered in chapter 2, which says that, because the Constitution has proved effective over time, it would be folly to change it. But to say that the Constitution has proved effective over time is only to say, at most, that it has proved effective *until now*. This may give rise to a presumption that it will continue to prove effective—a prejudice in favour of the past, to put it in Burkean terms—but it cannot do more than that. The presumption must then be weighed against the perceived benefits of change according to the judgement of the current generation. Even if the judgement of successive generations against a specific change was wise and correct at those times, it is always open to the next generation to come to a different conclusion. This is the essence of self-determination, which applies to any state, but especially to a modern state of free persons whose freedom to define themselves collectively is itself a defining part of their collective (and constitutional) identity. In Rawls's words, 'free persons do not think of themselves as indissolubly tied to any particular final end, or family of such ends, but regard themselves as always capable of appraising and revising their aims in the light of reasonable considerations'.[100]

[99] Joseph Campbell, *Transformations of Myth through Time* (Harper Perennial 1990).

[100] John Rawls, *Political Liberalism* (expanded edition, Columbia UP 2011) 280.

Richard Ekins has taken up and developed this conceptual argument against permanent entrenchment. While Ekins accepts that 'the community has good reason to aim to protect the objects of its action from itself' and that '[t]he making of such constitutional choices may be a proper exercise of the whole people's intelligent self-direction, limiting the scope for further action in the people's name'—and thus some form of entrenchment is necessary and useful—he warns that:

> it would be a mistake to make many such choices incapable of reversal, if and when the political community repents of them, and it would be unreasonable also to remove from successive generations choices that should reasonably be open to them. A free people, like a free person, should be self-aware and open to repentance.[101]

Even Rubenfeld, who is keener than Ekins on limitations on political action, opposes the permanent entrenchment of any Constitutional limitations for similar reasons. It is an 'unwritten law of written constitutionalism,' he insists, that 'the Constitution must be open to revision'.[102] This is because '[t]he people's freedom to write cannot be surrendered, certainly not by majority vote at a particular moment in time, nor even by a unanimous vote of the entire set of living citizens at a particular time.'[103] For this reason, he continues:

> [t]here can be no such thing, in constitutionalism as democracy, as a permanently entrenched written constitution. *Nor can there even be a single permanently entrenched provision.* The very principle that gives the Constitution legitimate authority—the principle of self-government over time—requires that a nation be able to reject any part of a constitution whose commitments are no longer the people's own. ... Even the writing that sought to formalize this process of rewriting would itself be subject to rewriting.[104]

Note that this rationale applies whether one thinks of a state as serving a single people existing over time exercising a unified will ('the whole people's intelligent self-direction'[105]) or as a

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[101] Richard Ekins, 'How to Be a Free People' AmJJuris 58 (2013) 163, 181.

[102] Rubenfeld (n 16) 174.

[103] ibid.

[104] ibid (emphasis added).

[105] Ekins, 'How to Be a Free People' (n 101) 181.

succession of linked but distinct generations, each of which is bound to, but not by, the generations that came before it.[106]

If we conceive of a state as the home of a single constitutional person, then like any person it must be free to change its mind either because experience reveals error or as a result of intellectual or moral reflection and discernment over time. And if we conceive of a democratic state as the home of a series of generations then it should be a series of *equal* generations, which negates the idea that a Constitution is a legal instrument delegating power from a superior to an inferior in a way that binds subsequent generations any more than is necessary for the state to function intelligibly over time. The most that one generation can do is presumptively entrench commitments to specific principles, institutions, and arrangements, which it is up to the future generations to honour, amend, or reject. As Ekins and Rubenfeld agree, there are good reasons to entrench constitutional commitments, especially commitments to things as fundamental as the form and identity of a state. But whether continued stability requires adherence to specific entrenched provisions (let alone specific codified Constitutional provisions) or departure from them, is a question of judgement. And the people most qualified to answer that question are those who have the benefit of both the wisdom of their predecessors as well as the benefit of experience unknowable to them.

3.5 Conclusion

I have dedicated so much time to the idea of unamendability even though it is not a feature of the three constitutional orders with which I am primarily concerned because a discussion of entrenchment would be incomplete without it. Constitutional entrenchment is often described as

[106] In fact, it is both. The people of a state over time have what Vassily Grossman, referring an army, described as an 'alternating sense of singularity and plurality'. Vassily Grossman, *Life and Fate* (first published 1960, Robert Chandler, tr, New York Rev of Books Classics 2006) 48. The alternation is, however, merely a perceptual effect, like a hologram that changes shape as you change your perspective. Although it can only be seen as one shape at any one time, because it can be seen as either shape at any time, it must also be both at all times.

a counter-majoritarian tool to protect persistent electoral minorities from majority domination,[107] to safeguard the conditions of liberal political morality,[108] or to ensure that the procedural conditions necessary for democracy are not degraded either intentionally or inadvertently.[109] If this is so, then unamendability may be considered a counter-super-majoritarian tool designed to preserve the basic structure of the Constitution even against super-majorities who may amend it in other ways.[110] It is constitutionalism's way of protecting constitutionalism. The fact that this is considered necessary, let alone desirable, however assumes that the Constitution has an existence that is not just conceptually separable from the people of a state but that when the people's clearly expressed preferences conflict with the Constitution, the Constitution trumps. It is a way of thinking in which a people exist according to and perhaps even for the Constitution rather than the other way round. Unamendability is assumed by some distinctly modern conceptions of a Constitution, but the premisses on which it rests are either doubtful or imaginary. Multiplying the number of unsteady legs on which a theory rests makes it less rather than more reliable.

[107] Alexander M Bickel, *The Least Dangerous Branch* (Yale UP 1962); Grimm (n 36) 216.

[108] Rawls, *Political Liberalism* (n 100) 64-193; Andrei Marmor, 'Constitutionalism, Liberalism, and Democracy' Alejandro Linares Cantillo, Camilo Valdivieso-León, and Santiago García-Jaramillo (eds), *Constitutionalism: Old Dilemmas, New Insights* (OUP 2021) 39-42.

[109] Kent Roach, 'Dialogic Judicial Review and its Critics' (2004) 23 SCLR 49, 73075; Andrei Marmor, *Law in the Age of Pluralism* (OUP 2007) ch 1; Rosalind Dixon, 'The Supreme Court of Canada, Charter Dialogue, and Deference' (2009) 47 Osgoode Hall LJ 235; Rosalind Dixon, *Responsive Judicial Review: Democracy and Dysfunction in the Modern Age* (OUP 2023) 272.

[110] See SP Sathe, *Judicial Activism in India: Transgressing Borders and Enforcing Limits* (OUP 2002) 11, defending unamendability for this reason.

Chapter 4: CONSTITUTIONAL ENTRENCHMENT

Having considered the idea of constitutional permanence and attempts to entrench it in other states, I turn now to the examples of the American and Canadian Constitutions to show (a) how they reject the idea of entrenched permanence and (b) anticipate the accommodation of change through different forms of entrenchment. The first thing to note is that nothing in either Constitution is intentionally entrenched beyond the reach of an amending process. The American Constitution provides for two processes of amendment, only one of which has ever been used, while the newer Canadian Constitution employs degrees of formal, codified entrenchment to embed different features of the Constitution in different ways and to different degrees. At one end, some amendments require a greater degree of unanimity than was required to enact the Canadian Constitution; in the middle of the range, the process follows the US model of substantial sub-regional and federal agreement; while at the other end, the amending process is essentially the same as for ordinary legislation. Whether the fact that every part of the US and Canadians Constitutions is at least *potentially* amendable means that they cannot be said to have an 'unamendable core' or 'basic structure' is, however, separate question, which I also address below. Finally, for comparison, I conclude the chapter by showing how, in the UK constitution, the uncodified constitutional principle of the supremacy of parliament is at least as permanently entrenched both in theory and in fact as any provision or principle, express or implied, of any codified Constitution.

4.1 The Origins of Constitutional Entrenchment in the US Constitution

Although some early colonial charters, including John Locke's 1669 constitution for the province of Carolina, had purported to be eternal and unamendable,[1] by the time the framers of

[1] John Locke, 'The Fundamental Constitutions of Carolina' in *The Works of John Locke* vol 4 (W Strahan and C Rivington et al 1773) 519-538. There is a debate over the extent to which the Fundamental Constitutions of Carolina are Locke's original intellectual work. See Holly Brewer, 'Slavery, Sovereignty, and "Inheritable Blood": Reconsidering John Locke and the Origins of American Slavery' (2017) 122 *American Historical Review* 1038.

the American Constitution gathered in Philadelphia in the late spring of 1787 to draft the first codified Constitution of the modern era, they did not believe that the fundamental laws of the new country should be fixed once and for all time. The Constitution approved by the constitutional convention and ratified by the states contained a provision, Article V, that spelled out the process by which the Constitution could be amended in the future by supermajority votes of the states and both houses of Congress.[2] At the time it was ratified, the Constitution shielded just two provisions from amendment. Far from being eternity clauses, however, these provisions were time limited and applied only until 1808, and both have since been repealed or superseded.[3] The only clause in the Constitution that approaches permanent unamendability by design is the clause that ensures that 'no State, without its Consent, shall be deprived of its equal Suffrage in the Senate'.[4] While this provision is not strictly unamendable, it is an exception to the normal amending formula and insofar as it entrenches an essential condition of the nation's founding compact it is part of the deep structure of the Constitution.[5] It guarantees that the federal form that the states agreed to as a condition of ratification will last, if not forever, then until each state consents to change it.[6] Other than this clause, every other provision of the Constitution is, in theory, subject to amendment by the normal amending formula of approval by two-thirds of each of the houses of Congress and three-quarters of the states.

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[2] I am concerned here with constitutional design and not with the fact that, in practice, the American Constitution may now be 'constructively unamendable'. That feature, or rather bug, of the US and Canadian Constitutions is discussed in chapter 7. See Richard Albert, 'The World's Most Difficult Constitution to Amend?' (2022) 110 California L Rev 2005, 2007. See also Donald S Lutz, *Principles of Constitutional Design* (CUP 2006) 170.

[3] The first, which permitted the importation of slaves to the United States, was repealed on 1 January 1808, the first day on which the provision of unamendability expired; the second, which concerned the calculation of taxation, was superseded by the 16th Amendment in 1909.

[4] US Constitution, art V.

[5] Kris Kobach, 'May "We the People" Speak?: The Forgotten Rule of Constituent Instructions in Amending the Constitution' (1999) 33 UC Davis L Rev 127, 56.

[6] Douglas G Smith, 'An Analysis of Two Federal Structures: The Articles of Confederation and the Constitution' (1997) 34 San Diego L Rev 249. See also James Madison, 'The Federalist No 43' in Jacob E Cooke (ed), *The Federalist* (first published 1788, Wesleyan UP 1961) 296.

There is also an extraordinary amending formula that has never been used.[7] This clause permits two-thirds of the states to convene a new constitutional convention, which may propose new amendments that will become part of the Constitution once they are ratified by conventions in three-quarters of the states. While it is tempting to see this as inviting a new exercise of constituent power, the fact that a new convention can only be called according to terms set by the original Philadelphia Convention makes it clear that it is, at most, an exercise of secondary constituent power. Two factors are particularly relevant here. First, the text of Article V provides that this new constitutional convention cannot alter the equal representation of the states in the Senate; and second, the requirement of ratification reduces the risk of a 'runaway' convention that claims to speak for the disaggregated people of a unitary American state. This safeguard may reflect the guilty consciences of the members of the original constitutional convention, who have been fairly accused of abandoning their mandate to propose improvements to the Articles of Confederation by drafting an entirely new centralising Constitution.[8] However, William Partlett has made a convincing case that, unlike the truly 'runaway' French National Assembly in 1789, the Philadelphia convention was at least loosely restricted in its actions by the fact that they acted under the political aegis of state 'Commissioners', that no state was compelled to participate in the convention, and that the product of the convention had to be 'ratified by the Continental Congress as well as the state-created extraordinary ratifying conventions'.[9] The Philadelphia convention was, despite its innovations, a formally delegated convention exercising power on behalf of the several states and not, like a true constituent power, acting unilaterally in the name of 'the people'. And the extraordinary form of amendment-by-convention in Article V is even more firmly nested

[7] US Constitution, art V,

[8] Richard R Beeman, *Plain, Honest Men: The Making of the American Constitution* (Random House 2009) ch 5; Gabriel L Negretto, 'Democratic Constitution-making Bodies: The Perils of a Partisan Convention' (2018) 16 ICON 254, 270.

[9] William Partlett, 'The American Tradition of Constituent Power' (2017) 15 ICON 955, 965-67.

within the structure of the Constitution than the original constitutional convention was within the Articles of Confederation.

The American Constitution was the product of a compromise negotiated primarily by James Madison between the rival visions of the federalists and the anti-federalists.[10] This compromise included the eventual addition of a Bill of Rights, which make up the constitution's first ten amendments and which Madison supported as an alternative to a second constitutional convention.[11] These early amendments are notable for their content, which added guarantees of specific individual rights to the Constitution, but also simply for being amendments. Coming just four years after the Constitution was ratified, the adoption of the Bill of Rights in 1791 made it clear that the Constitution was not a fixed text and that amendments were not just possible but welcome. During the months in 1789 when these amendments were being drafted and debated, Thomas Jefferson, then serving as the American ambassador in Paris carried on a correspondence with Madison in which he insisted that adding a Bill of Rights was crucial not only to American acceptance of the Constitution but to the reputation of the constitutional project among the 'the enlightened part of Europe',[12] specifically that part then gathered in Paris to draft its own Constitution. The overlap between these two projects was extraordinarily tight. Debates and drafts were moving so quickly on both sides of the Atlantic that, while Jefferson and others worked to forge an intellectual link between the two projects, debates and drafting proceeded on both sides faster than letters could carry news of them across the Atlantic.[13]

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[10] Gordon S Wood, *Empire of Liberty: A History of the Early Republic 1789-1815* (OUP 2009) 65-69.

[11] Richard E Labunski, *James Madison and the Struggle for the Bill of Rights* (OUP 2006) 190.

[12] Wood (n 10) 67-68.

[13] The draft Declaration of the Rights of Man and the Citizen was adopted on 26 August 1789, just two days after the House of Representatives approved the first draft of the US Bill of Rights. George Athan Billias, *American Constitutionalism Heard Round the World, 1776–1989: A Global Perspective.* (NYU P 2009) 92. See also Simon Schama, *Citizens* (Alfred A Knopf 1989) 447. In a letter from Paris in 1787, Jefferson notes that Madison's most recent letters have arrived between 4 and 8 weeks after they were dated. Letter from Thomas Jefferson to James Madison, 20 June 1787 in Paul Leicester Ford (ed), *The Works of Thomas Jefferson, vol 5 (Correspondence 1786-1789)* (GP Putnam's Sons 1904) 168.

In both America and France,[14] Jefferson proposed that the constitutional convention be re-convened every generation (which, based on actuarial tables of the day, he determined to be every 19 or 20 years).[15] His justification was about as clear a statement of pure democratic theory, and about as far from Burke's 'partnership' between the dead, the living, and the unborn, as possible. It was also about as far as possible from Rubenfeld's view that "'generations" … ought to regard themselves not as the bearer of the sovereign voice of self-government, but as participating in a temporally extended people' and that '[w]e who live today could not achieve self-government by declaring new constitutional rules perfectly congruent with our present collective will'. [16] Jefferson's eyes were fixed firmly forward. '[T]he dead have no rights,' he declared; 'they are nothing.'[17] Jefferson believed that regular constitutional conventions were necessary to counteract the human tendency to venerate the acts of their ancestors, which might dissuade future generations from using the regular amendment power.[18] 'Some men', he said, 'look at constitutions with sanctimonious reverence, & deem them like the arc of the covenant, too sacred to be touched'.[19] This is because 'they ascribe to the men of the preceding age a wisdom more than human, and suppose what they did to be beyond amendment'.[20] But Jefferson was there, present at the creation, and he believed he knew better. 'I knew that age well,' he wrote, 'I belonged to it, and labored with it'. That age and generation were, he averred, 'very like the present, but'—and for Jefferson, this was of the highest importance for a self-governing people—'without the

[14] For his arguments in France, see Schama (n 13) 442-43.

[15] Thomas Jefferson, Proposals to Revise the Virginia Constitution: I. Letter to "Henry Tompkinson" (Samuel Kercheval), 12 July 1816, Founders Online <https://founders.archives.gov/documents/Jefferson/03-10-02-0128-0002> accessed 27 February 2024. Jedediah Purdy has recently endorsed a similar proposal. Jedediah Purdy, 'The Possible Futures of American Democracy' (2023) 5 Utah L Rev 1009, 1019.

[16] Jeb Rubenfeld, *Freedom and Time: A Theory of Constitutional Self-Government* (Yale UP 2001) 176-77.

[17] Jefferson (n 15).

[18] For James Madison's case *for* constitutional veneration, see The Federalist No 49 in Cooke (n 9) 340.

[19] Jefferson (n 15).

[20] ibid.

experience of the present'.[21] It was this constantly accumulating experience, which gives each new generation an advantage over previous generations, that justified Jefferson's hyper-presentist constitutional theory.

Jefferson's concern about the grip of the constitutional dead-hand does not, however, explain the need for a constitutional convention every 20 years. The problem could also be addressed by making the regular amending process much easier—as easy as ordinary legislation, if necessary. His concern also contains a contradiction. Who is Jefferson to say that future generations will be wrong to hold their inherited constitution in such high and reverent esteem? The personal foibles and failings of the framers, which Jefferson knew from intimate acquaintance, might matter no more to the success or failure of the constitution than the low character of an artist like Caravaggio matters to the enduring power of his art. It is the objective success or failure of the Constitution that future generations must judge and approve, or alter. Jefferson cannot simultaneously trust the accumulated experience of future generations to remake the Constitution anew but distrust them to judge the merits of the Constitution as it appears to them then. The imperative of regular generational conventions is also belied by Jefferson's faith in the character of his people, in whom he located the real source of the constitution. '[W]here then is our republicanism to be found?' he asked, and he answered 'not in our constitution certainly, but merely *in the spirit of our people* [which] would oblige even a despot to govern us republicanly [sic]'.[22] He claimed that the young republic had flourished 'owing to this spirit, and to nothing in the form of our constitution ... but has prevailed in spite of it.[23] Even making allowances for the sentimental patriotism of an old man, this is a remarkable statement. At the very least, it is compatible with

[21] ibid.

[22] ibid. (emphasis added).

[23] ibid.

considerable reliance on social and political forms of entrenchment and undermines the case for a deeply entrenched codified American Constitution.

Jefferson's faith in his countrymen is, in terms of entrenchment, at the opposite end of the spectrum from those who believe the American Constitution contains—and needs—an unamendable core. Lawrence Tribe, for example, for example, while conceding that even morally-repugnant amendments approved using Article V would be legally valid, nevertheless draws an implicit limit around the core principle of self-government and those rights necessary to ensure its continuation. '[I]t may well be that some properly adopted formal amendments could themselves be deemed "unconstitutional"', he avers, 'because of their radical departure from premises too deeply embedded to be repudiated without a full-blown revolution'.[24] The most obvious of these premisses is 'the Article IV guarantee of a "republican" form of government', which Tribe says should be protected even against an otherwise formally valid amendment seeking to replace it with hereditary membership in Congress.[25] This is because, he argues, 'the principle of democratic accountability', which requires at least a minimal level of consensual self-government, is 'central to [the constitution's] being' even though 'nowhere written into the text' or even 'implied by it'.[26] He also suggests that 'the rule of law' and 'the indissoluble character of the Union' may also be unamendable features of the Constitution.[27] These, principles, he says:

> are so foundational to our legal and political order, have so long been regarded as indispensable to its legitimacy, and are so logically central to our governmental

[24] Lawrence H Tribe, *The Invisible Constitution* (OUP 2008) 33.

[25] ibid 33-34; see Article IV, sec 4 ('The United States shall guarantee to every State in this Union a Republican Form of Government').

[26] ibid 90. See also Stephen Holmes, *Passions and Constraint: On the Theory of Liberal Democracy* (U Chicago P 1997) 171. John Rawls made a similar claim about Bill of Rights and, in particular, the principle of equality that he believed was present but underdeveloped in the framers' vision and core to an understanding of their constitutional project. John Rawls, *Political Liberalism* (expanded edition, Columbia UP 2011) 238-39.

[27] ibid 34. Tribe insists that the indissolubility of the Union is a proposition 'written not in ink but in blood'. ibid 29. That may be true of those states that won and lost the American Civil War, but why should it apply to a later addition like Hawaii, a non-contiguous territory that only joined the union in 1959 after decades of colonial government? Even if one ignores the imperialist overtones of such a doctrine when applied to a conquered Indigenous monarchy, there is something odd about saying that the spirit of the constitution in 1958 did not require that there be 50 states, but by 1960 it did.

> system's coherence that their binding status — at least until they are in fact repudiated by a textual amendment — is unimpaired by the fact that they are not stated in, or even plausibly inferable from, any part of the Constitution's text.[28]

Three things stand out from Tribe's account.[29] The first is his curious insistence that these principles are not only not in the text, but neither implied nor even 'plausibly inferable from' it. The second is his equivocation about whether these features are in fact unamendable. And the third is his reason for choosing these specific features of the implied or 'invisible' and (possibly) unamendable core of the American Constitution.[30] I will address each of these briefly (the first alone, and the latter two together) before considering what they say about the nature of constitutional entrenchment in the United States.

Tribe's insistence that the features of the 'invisible constitution' are not even implied by the text is wrong as a factual matter. Tribe is simply incorrect that the principle of self-government—what Tribe, quoting Lincoln, calls 'government of the people, by the people, for the people'[31]—is not implied by the text of the Constitution; on the contrary, it is everywhere assumed. Curiously, immediately before this passage, Tribe actually concedes that there are, in fact, 'a few textual points reflecting' the principle of consensual self-government.[32] He also says of the 'republican guarantee' clause of Article IV that '[a] reader would not need too much imagination

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[28] ibid 33-34. See also Rawls (n 26) 238–9.

[29] Although I focus on Tribe's account of the invisible constitution, his views are not unique. See Stephen Macedo, *Liberal Virtue: Citizenship, Virtue, and Community in Liberal Constitutionalism* (Clarendon Press 1990); Samuel Freeman, 'Political Liberalism and the Possibility of a Just Democratic Constitution' (1994) 69 Chi Kent L Rev 619, 663; Rawls (n 26) 238-9; 182–3; Yaniv Roznai, *Unconstitutional Constitutional Amendments—The Limits of Amendment Powers* (OUP 2017) 120-21. Note, this is a separate question from whether the United States—or, indeed, any constitution—may have unwritten principles that are judicially enforceable but subject to amendment. See Thomas Grey, 'Do We Have an Unwritten Constitution?' 27 Stan L Rev 703 (1975); Michael S Moore, 'Do We Have an Unwritten Constitution?' 63 S Cal L Rev 107 (1989).

[30] The term 'unamendable core' is also used by Richard Albert in his exploration of whether the First Amendment's 'democratic rights' constitute an unamendable core to the American Constitution. Richard Albert, 'The Unamendable Core of the United States Constitution' in András Koltay (ed), *Comparative Perspectives on the Fundamental Freedom of Expression* (Wolters Kluwer 2015) 13, 27-34.

[31] Tribe, *Invisible Constitution* (n 24) 28

[32] ibid 88.

to construe that guarantee as embodying a rule forbidding the open-ended delegation of direct governmental authority over others' lives to private individuals neither elected by the people nor appointed by people so elected'.[33] If this is true, then a principle of self-government is not merely 'plausibly inferable from' the text of the Constitution but difficult *not* to infer from it. This is not to deny that the precise meaning of the clause may be 'extraordinarily elusive'[34] or that there is no consensus as to its precise contours, but it exaggerates the unintelligibility of the text to deny that it establishes a minimal threshold of self-government. You don't have to be certain what something means to have a good sense of what it probably means or, for that matter, to be sure of what it does not mean.

More importantly, if the principle of consensual self-government were not even implied by the text of the Constitution, there would be no reason to believe that it is 'central' to its 'being', as Tribe claims it is. Those two statements might be reconcilable if one were referring to two different senses of a c/Constitution: as a set of historically contingent social conventions, on the one hand, and as a written text, on the other. One could then say, for example, that the written text of a state's Constitution only makes sense in light of, say, the people's specific religious commitments, which are not referred to anywhere in the written text of its codified Constitution but are assumed by everyone in the society. At times that is what Tribe seems to be saying here: that there are social and political institutions that are not required by the text of the Constitution but are so fundamental to the American people's expectations about how their institutions of government should function that it would be illegitimate to amend the Constitution in a way that contradicts them. This is a plausible reading of his description of the implicitly unamendable features of the invisible constitution as having 'long been regarded as indispensable to [the Constitution's] legitimacy, and ... logically central to our governmental system's coherence'. But this mixing of different

[33] ibid 89-90.

[34] ibid. Tribe cites John Adams's confession that he 'never understood' the meaning of the phrase.

conceptions of a c/Constitution produces a paradox. If a feature of the invisible constitution is indispensable to the codified Constitution's legitimacy and logically necessary to its coherence, then why would those features ever be vulnerable to amendment via Article V's democratically-demanding threshold? If there were sufficient popular support for an amendment that altered part of the invisible constitution, that would be good reason to believe that at least that part of the invisible constitution was no longer regarded as indispensable and logically necessary. There is nothing surprising about a constitution's basic structure evolving over time if it is socially-underwritten; indeed, it is what one would expect of a socially entrenched feature of a constitution as the society itself evolves.

This brings us to Tribe's reasons for choosing the specific features of the implied or 'invisible' and (possibly) unamendable core of the American Constitution that he does. According to Tribe, some of the features of the invisible constitution are more deeply embedded than others. There is a core within the core. So, for example, he suggests that prohibitions against torture and the rule that the federal government cannot commandeer states to enforce federal laws might be changed by the usual amending process, even though he believes are both parts of the implicit basic structure of the American Constitution (one substantive, one procedural), but other features, including the principle of self-government, would require 'a full-blown revolution'.[35] This is unsatisfying. If a society's attitudes towards torture may change through a non-revolutionary evolution of attitudes and beliefs, or perhaps in response to an exigent external or internal political threat, the same may be true of the society's attitudes towards the desirability of self-government according to the current American form. To say that such a change would require a revolution is too dramatic; all it would mean is that the necessary constitutional amendments would reflect a significant change in social attitudes and expectations. You may call that a 'revolution', but if it is

[35] Tribe, *Invisible Constitution* (n 24) 33.

effected through the super-majoritarian process of Article V, then it is a revolution that is faithful to the evolution of the unwritten constitution, which is to say not a revolution at all.

There is an underlying ambivalence in Tribe's account when it comes to the relationship between the people's views and values and their codified Constitution that reflects an unwillingness to grapple with the necessity of congruence between them over time. When Tribe says that certain features of the Constitution are more 'deeply embedded' than others, the question he should ask is, where are these features embedded or entrenched? And if the answer is in the longstanding expectations of the people and their understanding of their own society such that these features are now, as he says, 'indispensable to its legitimacy', then it is circular to read those expectations and understandings into the codified Constitution and then apply them against the evolving expectations and understandings of the people. If the legitimating conditions of the Constitution are located outside the Constitution—if the 'spirit' of the Constitution is in fact a specialised emanation of the 'spirit' of a people, as Jefferson believed—then those conditions may change and evolve as the society changes and evolves, and the way we know that this has occurred is that the society amends its laws and, when necessary, its Constitution in ways that would have been surprising and possibly even repugnant to the generation that drafted it. Or to put it another way, if the bedrock conditions of the American Constitution are, like the basic conditions of any codified Constitution, 'historically contingent',[36] as Tribe claims, and fit specifically for the people and the state to which the Constitution belongs, then we should expect that, as history continues over time (which is the one thing we can count on history to do), those contingent conditions may change too. When that happens, the codified Constitution must be allowed to shift along with it. If it does not, then the claim that some provisions should be deemed unamendable except through revolution becomes an eventual invitation to revolution. For the reasons described in the previous chapter's consideration of eternity clauses and basic structure doctrine, imposing an anachronistic

[36] ibid 30.

constitutional identity onto the people and forcing them to comply with that textual identity gets the order of entrenchment backwards and risks provoking the civil unrest that a Constitution is supposed to contain, or at least channel into continuous and stabilising change.

One senses this tension in Tribe's account of the invisible constitution as he appeals to long-established convention to define and fix an unamendable constitutional identity but then struggles to account for the fact that attempts to change the fixed constitutional identity may reflect changing social conventions. What we mean by a constitution's particular identity, ie, the way in which a constitution is particular to a state, is inevitably so intertwined with every other important and distinguishing characteristic of the state that talk of a distinct constitutional identity inevitably becomes an echo of a wider conversation about state identity. And what we mean is often even less than that. As Tribe has observed elsewhere, it is easy 'to ignore the character of the Constitution as a series of complex compromises loosely knit, and only precariously held together over time'.[37] And as he has warned elsewhere, attempts to fix an unchanging constitutional identity above politics are often just attempts by political factions to impose a preferred identity on the Constitution to frustrate social change.[38] Underlying this tension are the fundamental questions about the nature of a constitution and of a Constitution that were raised in the last chapter by the idea of unamendable Constitutional provisions, including whether the function of a Constitution is to reflect the identity of a state's polity or to direct it, and whether fundamental changes to socially entrenched attitudes and beliefs that conflict with the original assumptions of a codified Constitution can (and should) be worked out through codified Constitutional processes or whether, in those circumstances, a constitutional revolution against the codified Constitution is necessary, or at least preferable.

[37] Laurence H Tribe, 'The Idea of the Constitution: A Metaphor-morphosis' (1987) 37 J of Legal Education 172.

[38] Laurence Tribe, 'A Constitution We Are Amending: In Defense of a Restrained Judicial Role' (1983) 97 Harvard Law Review 433, 438-440.

4.2 Degrees of Entrenchment in the Canadian Constitution

The current Canadian Constitution entrenches a hierarchy of provisions that are subject to one of five different amending processes.[39] This was not always the case, or at least not entirely so. Between 1867, when the British North America Act was adopted by the Westminster Parliament as Canada's first 'Constitution' and the patriation of the current Constitution through the *Constitution Act, 1982*, the Canadian Constitution was sometimes described as 'unamendable'.[40] It would be more accurate to say that the codified provisions of the Constitution were not amendable by Canadians acting alone. Unlike the statutes establishing the constitutional frameworks of Australia[41] and South Africa,[42] the British North America Act 1867[43] did not provide a means for domestic amendment. However, this did not stop Canadians from amending their Constitution more than 30 times during that period, each time by requesting an amendment by statute in the Westminster Parliament.[44] After 1949, the Westminster Parliament devolved to the Canadian Parliament a limited amendment power with respect to matters 'that exclusively concerned the internal management of federal institutions'.[45] Still, for more than three decades, the Westminster government continued to play the role of constitutional amanuensis to the Dominion government, dutifully passing constitutional amendments when requested—a responsibility that Dennis Healey, speaking at second reading of the Canada Act 1982 described as one 'that we have carried for so

[39] Richard Albert, 'The Three Varieties of Unamendability' in Richard Albert, *Constitutional Amendments: Making, Breaking, and Changing Constitutions* (OUP 2019) 157.

[40] Richard Albert, 'The Architecture of Constitutional Amendment' in Richard Albert, *Constitutional Amendments: Making, Breaking, and Changing Constitutions* (OUP 2019) 175. I will use the Canadian citation form for Canadian statutes, including the *Constitution Act, 1982*, and the British citation form for British statutes.

[41] Chapter 7, s 128, *Commonwealth of Australia Constitution Act*, 63 & 64 Vict, c 12, s 9.

[42] Part X, s 152, *An Act to constitute the Union of South Africa*, 9 Edw 7, c 9.

[43] 30 & 31 Vict c 3.

[44] For a list of some of these amendments, see the Schedule to the *Constitution Act, 1982*.

[45] Benoît Pelletier, 'Amending the Constitution of Canada' in Peter C Oliver et al (eds), *The Oxford Handbook of the Canadian Constitution* (OUP 2017) 256. See An Act to amend the British North America Act, 1867 as respects the amendment of the Constitution of Canada (1949), 13 Geo VI, c 81.

long and so reluctantly'.[46] Full devolution of constitutional amendment powers came on April 17, 1982, when Queen Elizabeth II gave her assent to the Canada Act 1982, schedule B of which enacted *The Constitution Act, 1982* as a new and domesticated Canadian Constitution.[47]

As noted above, the new Constitution Act, 1982 provided for five distinct ways of amending the Canadian Constitution.[48] Together, these processes form 'a complex structure of escalating amendment rules', which Richard Albert says (no doubt correctly) was chosen based on 'evidence both of the intricacies involved in governing a multinational, multicultural, and multiregional country like Canada and also of the failures of existing amendment models abroad to balance change with stability in the way Canada imagined for itself'.[49] The idea of tiers of amendability for different provisions of the Canadian Constitution goes back at least to a federal-provincial conference held in Ottawa in November 1927, where then-Minister of Justice, Ernest Lapointe, proposed a distinction between 'ordinary' amendments, which could be ratified by a majority of the provinces, and 'vital and fundamental' amendments, including 'those affecting the rights of provinces, the rights of minorities or rights of nationality, language or religion', which should require unanimous agreement.[50] The current formulae are based largely on a 1964 proposal known as the Fulton-Favreau formula (so-named for the two federal Ministers of Justice who

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[46] HC Deb 17 February 1982, vol 18, col 299.

[47] Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982*, being Schedule B to An Act to give effect to a request by the Senate and House of Commons of Canada (The Canada Act 1982) (UK), 1982, c 11.

[48] See *Constitution Act, 1982*, ss 38–48. The theoretical question of how the Westminster Parliament could devolve to another government (Australia, South Africa, or Canada) the power to amend a constitution that was set out in an Act of Parliament poses an interesting question of delegated authority and a challenge to the continuity of legal systems that is touched on in chapter 8. See Joseph Raz, 'The Identity of Legal Systems' in Joseph Raz, *The Authority of Law* (OUP 1979); John Finnis, 'Revolutions and Continuity of Law' in *Philosophy of Law: Collected Essays, Vol IV* (OUP 2011); Roznai (n 29) 121; Li-kung Chen, 'The Continuity of a Legal System' (2022) 86 MLR 364. See also the speech of Enoch Powell MP at second reading of the Canada Act 1982: 'When legislative power passes from this House, as it did formally for all but Canada through the Statute of Westminster, it does not evaporate into thin air. It remains unimpaired, but only migrates, when, in modern phrase, it is patriated'. HC Deb 17 February 1982, vol 18, col 320.

[49] Albert, 'The Architecture of Constitutional Amendment' (n 40) 176.

[50] Pelletier (n 45) 255-56. See also Daniel Dupras, 'The 1927 Conference' in *The Constitution of Canada: A Brief History of Amending Procedure Discussions* (Canadian Department of Justice, Law and Government Division 1992) <https://publications.gc.ca/Collection-R/LoPBdP/BP/bp283-e.htm> accessed 18 March 2024.

developed it), which was agreed at the time by the federal government and nine of the ten provinces, but never implemented.[51] In a foreshadowing of 1982, Quebec's desire for greater provincial autonomy defeated unanimity.

As Albert has described the arrangement, the different degrees of political approval required for each of the five methods of constitutional amendment 'reflects a hierarchy of constitutional importance' with '[t]he quantum of political agreement ris[ing] according to the importance assigned to the matter to be amended'.[52] The methods 'range from the relatively easy method of unilateral provincial amendment for provincial constitutions'[53] and 'unilateral federal amendment for narrow matters of federal constitution law'[54] to 'a regional amendment procedure'[55] (which is used for matters affecting one or more, but not all, provinces, such as a boundary dispute between provinces or the use of French or English within a province), 'a multilateral amendment procedure' known as the general amending procedure,[56] and 'a final procedure requiring the unanimous agreement of federal and provincial actors'.[57] Of these, the two most commonly considered are those that apply to constitutional amendments of national scope. The first of these is the general amending procedure, known colloquially as the '7/50 rule' because it requires the approval of seven of the ten provinces that between them account for 50% of the population of the country. This is the default process for amending the Constitution, which applies to all matters not expressly allocated to one of the other four amending procedures. The second is section 41,

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[51] Daniel Dupras, 'The Fulton Formulae (1961) and the Fulton-Favreau Formula (1964)' in *The Constitution of Canada: A Brief History of Amending Procedure Discussions* (Canadian Department of Justice, Law and Government Division 1992) <https://publications.gc.ca/Collection-R/LoPBdP/BP/bp283-e.htm> accessed 18 March 2024.

[52] Richard Albert, 'The Conventions of Constitutional Amendment in Canada' (2016) 53 Osgoode Hall LJ 412.

[53] ibid 181; *Constitution Act, 1982*, s 45.

[54] ibid; *Constitution Act, 1982*, s 44.

[55] ibid; *Constitution Act, 1982*, s 43.

[56] ibid; *Constitution Act, 1982*, ss 38, 42.

[57] ibid; *Constitution Act, 1982*, s 41.

which requires the unanimous consent of the federal Parliament and all ten provinces and applies to just five matters:

> (a) the office of the Queen, the Governor General and the Lieutenant Governor of a province;
> (b) the right of a province to a number of members in the House of Commons not less than the number of Senators by which the province is entitled to be represented at the time this Part comes into force;
> (c) subject to section 43, the use of the English or the French language;
> (d) the composition of the Supreme Court of Canada; and
> (e) an amendment to this Part.[58]

It is worth pausing briefly to reflect on this list, which contains what the drafters themselves referred to as 'matters ... of such fundamental importance that amendments in relation to them should require the consent of all the provincial Legislatures and Parliament'.[59] The first thing to note is that the inclusion of clause (e) means these provisions are 'double-entrenched',[60] so they are not vulnerable to an end-run using the lower threshold of the general amending procedure.[61] This double-entrenchment is further evidence of the importance of the substantive matters shielded by the requirement of unanimity.[62]

The second thing to note is that, although the Canadian Constitution does not contain any expressly unamendable provisions, section 41's requirement to secure the unanimous consent of all political authorities at both the federal and provincial levels to amend the 'fundamental provisions' at the core of the Constitution comes close. In fact, unanimity is a higher bar for the exercise of this secondary constituent power than was used to create it in the first place, over

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[58] *Constitution Act, 1982*, s 41.

[59] *Constitutional Accord: Canadian Patriation Plan* (1981)) 9 (n 9) quoted in *Reference re Supreme Court Act, ss 5 and 6*, 2014 SCC 21, [92].

[60] Jerome B Elkind, 'A New Look at Entrenchment' (1987) 50 MLR 158, 159.

[61] Albert, 'The Architecture of Constitutional Amendment' (n 40) 202. See also Roznai (n 29) 140-41.

[62] Roznai (n 29) 144-46. See also Walter F Murphy, 'An Ordering of Constitutional Values' (1979–80) 53 S Cal L Rev 703, 756–7; Peter W Hogg and Wade K Wright, *Constitutional Law of Canada* (Thomson Reuters 2023) at 4–25. While this inference has been drawn with respect to the Canadian constitution, it is not necessarily true of all constitutions. They may also be, as Albert notes, 'the result of a political bargain or a defense against self-interest'. Richard Albert, 'The Expressive Function of Constitutional Amendment Rules' (2013) 59 McGill LJ 225, 251.

Quebec's objection.[63] This means that, if the standard for amending section 41 had been required to enact it, section 41 would not exist.[64]

The third thing to note is that the most deeply entrenched provisions of the Canadian constitution include what to an outsider must appear to be a curious mix of subjects. Three of the four provisions touch on the three institutional elements of the constitution—the executive (the role of the Crown); the legislature (the make-up of the House of Commons); and the judiciary (the composition of the Supreme Court of Canada)—while the fourth concerns the use of Canada's two official languages. This selection is revealing. If you knew nothing about Canada other than the fact that these are the four most deeply entrenched provisions of its codified Constitution, you could deduce a lot about the history and character of the country. You would know, for example, that it is a federation of provinces with a national legislature; you might guess from the reference to a Governor General and to Lieutenant Governors that it is a former colony, and specifically a former British colony; and you would probably guess that it has substantial populations of both English and French speakers, from which you could infer something about its history of colonial rivalry and conquest leading to a bicultural settlement.

The fourth thing to note is what section 41 does *not* apply to. Most strikingly, it does not apply to any of the provisions of the Charter of Rights and Freedoms, not even to those that the Charter itself refers to as the 'Fundamental freedoms': '(a) freedom of conscience and religion; (b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication; (c) freedom of peaceful assembly; and (d) freedom of association'.[65] This decision to make the Charter subject only to the general amending procedure may reflect a lingering

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[63] Andrée Lajoie, 'The Implied Bill of Rights, the Charter and the Role of the Judiciary' (1995) 44 U New Brunswick LJ 337, 341-42.

[64] This inversion of the levels of approval for, respectively, making and amending a constitution is not unique to Canada. Joel Colon-Rios, 'The Legitimacy of the Juridical: Constituent Power, Democracy, and the Limits of Constitutional Reform' (2010) 48 Osgoode Hall LJ 199, 213.

[65] *Constitution Act, 1982*, s 2.

political uncertainty about the compatibility of an entrenched bill of rights with a Westminster system,[66] or it may reveal a lack of imagination among the drafters in failing to anticipate how quickly the new Constitution would come to be defined in the popular imagination by the fact of the Charter. John Rawls, who considered the Bill of Rights to be the entrenched heart and soul of the American Constitution would have been surprised and no doubt puzzled by this omission.[67] Most Canadians too would likely be surprised to learn that their Charter rights to speech, religion, life and liberty, as well as the Charter's provisions governing the workings of Canadian democracy and criminal procedure, are not among the most deeply entrenched provisions of their Constitution.[68] Other anachronistic omissions from section 41 are Indigenous rights, multiculturalism, and equality of the sexes. While each of these subjects is addressed in the Charter,[69] their cultural prominence has increased significantly over the last four decades to become defining features Canada's legal, political, and social identity such that they almost certainly now rank above the status of the monarchy, which is protected by section 41's unanimity requirement. I would go further and suggest that, assuming they were all subject to the default amending process, it would be at least as hard, and likely harder, to muster the political and social support required to remove the Charter from the Constitution as it would be to remove some of the provisions identified by section 41. And if other provisions of the Canadian Constitution are at least as deeply entrenched in practice, it is reasonable to ask whether all of the matters in section 41 are still (or, indeed, ever were) of the most 'fundamental importance' to the Canadian Constitution. The Constitution's vault may not, in fact, hold its crown jewels.

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[66] This was a concern of some members of the British Cabinet. Margaret Polk, 'The Politics of Patriation: The Canada Act of March 1982' (2019) 34 London J of Canadian Studies 1, 9-10.

[67] Rawls (n 26) 239.

[68] Mark Tushnet has observed that 'we rarely find rule-like counter-majoritarian human-rights related provisions made unamendable' in constitutions, though he confessed that '[i]t is not clear to me why this is so'. Mark Tushnet, 'Comment on Doyle's Constraints on Constitutional Amendment Powers' in Richard Albert, Xenophon Contiades, and Alkmene Fotiadou (eds), *The Foundations and Traditions of Constitutional Amendment* (Hart 2017) 97, 102.

[69] See *Constitution Act, 1982*, ss 25, 27, 28, and 35.

The final thing to note about section 41 is its vagueness. How, for example, do we determine which amendments would impermissibly alter 'the office of the Queen, the Governor General and the Lieutenant Governor of a province'? Does the provision only apply to proposals to abolish the monarchy? Or would it also apply to a reform that transferred a duty of the regal or viceregal office to another body (eg, the power to dissolve Parliament to the Speaker of the House) or changed the method of appointment of the provincial lieutenant governors (eg, from a federal appointment process to a provincial appointment process) but left the Crown in place? Similarly, what does 'the composition of the Supreme Court of Canada' encompass? The *Supreme Court Act, 1985*,[70] for example, allocates three of the nine seats on the Court to justices from Quebec. In 2014, the Supreme Court of Canada held that not only is this statutory provision an essential part of the 'composition' of the Court, despite only being set out in an ordinary statute, but Parliament cannot even amend the Act to remove an ambiguity between the French and English translations of the statute to clarify who qualifies as a justice from Quebec.[71] All of this was far from obvious before the Court decided it,[72] but since it has, the qualifications set out in statute as interpreted by the Court are now shielded by the highest degree of formal constitutional entrenchment.

Section 41 is not unique in its ambiguity. Section 42, which specifies the matters to which the general amending procedure applies is similarly imprecise when it refers to 'the powers of the Senate and the method of selecting Senators'.[73] When the Supreme Court of Canada was called on to advise what these clauses meant, it introduced further uncertainty by answering that what constitutes an amendment to the Constitution should be determined with reference to its unwritten but implicit 'architecture' and 'basic structure'.[74] As Emmett Macfarlane has rightly objected, this

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[70] RSC 1985, c S-26.

[71] *Reference re Supreme Court Act, ss 5 and 6*, 2014 SCC 21.

[72] ibid 108-154 (Moldaver, J dissenting).

[73] *Constitution Act, 1982*, ss 42(b).

[74] *Reference re Senate Reform*, 2014 SCC 32, 27.

'ultimately obscures rather than clarifies the dividing line between the various amending procedures [and] may have the effect of chilling future attempts at constitutional change'.[75]

The Supreme Court of Canada's reference to 'constitutional architecture' in the *Senate Reform* judgment raises the question of the role of the courts in entrenching new provisions of the Canadian Constitution or interpreting existing provisions in novel and unexpected ways, and whether the courts understanding of the 'constitutional architecture' might in time evolve into something like the enforceable basic structure doctrine in India. To date, unwritten principles have played an uncertain role in Canadian constitutional law because the Supreme Court of Canada has described and deployed them inconsistently. The Court has no set vocabulary for naming, let alone explaining, the unwritten principles it has identified: they have been described as "'unwritten" laws, rights, powers, rules, norms, and principles; "organizing," "supporting," "fundamental," "underlying," "unstated," and "implicit" principles, rules, and assumptions; and (less frequently) "common law"' principles'.[76] And the ways in which the Court has deployed them appear to be more strategic than principled.[77] Caution presenting as ambiguity may be understandable on occasions when the Court has waded in parlous political waters, as in the *Reference re Secession of Quebec*,[78] where the future of the country seemed to be at stake, but in less existential cases such as the *Reference re Remuneration of Judges of the Provincial Court (PEI)*,[79] where the Court dressed up a provincial budget fight in the unwritten constitutional habiliments of the 'principle of judicial independence', it looks more like laziness or opportunism.[80]

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[75] See Emmet Macfarlane, "Unsteady Architecture: Ambiguity, the Senate Reference, and the Future of Constitutional Amendment in Canada" (2015) 60 McGill LJ 883, 903.

[76] Mark D Walters, 'Common Law Constitution in Canada: Return of *Lex Non Scripta* as Fundamental Law' (2001) 51 U Toronto LJ 91, 92 (citations omitted).

[77] David Schneiderman, 'Unwritten Constitutional Principles in Canada: Genuine or Strategic?' in Rosalind Dixon and Adrienne Stone (eds), *The Invisible Constitution in Comparative Perspective* (CUP 2018) 517, 539-40.

[78] [1998] 2 SCR 217.

[79] [1997] 3 SCR 3.

[80] Jeffrey Goldsworthy, 'The Preamble, Judicial Independence and Judicial Integrity' (2000) 11 Constitutional Forum 60.

This supports David Schneiderman's charge that unwritten principles provide 'easy cover for contestable constitutional manoeuvres, imposing a rule of political morality where there may be little consensus'.[81] Could this cover extend to a judicial coup, in which the court introduced a doctrine of unamendability by making unwritten principles judicially enforceable? The concern (or hope, depending on your perspective) is not so far-fetched. The inconsistent treatment of unwritten constitutional principles by Canadian courts makes them difficult to analyse as an exercise of entrenchment, let alone to predict how they might be used in the future. However, there are similarities between the way Canadian courts have treated unwritten constitutional principles and the basic structure doctrine as it has been developed in India, which suggest they could someday be used to 'discover' a judicially-enforceable basic constitutional structure. Vivek Krishamurthy has identified 'at least a trio of similarities'.[82] These are: 'methodological similarities in how each court has developed its unwritten constitutional jurisprudence'; 'similarities between the principles themselves'; and 'similarities in the way that the Supreme Courts of India and Canada have applied the unwritten principles'.[83]

With respect to the first similarity, Krishamurthy concludes that 'the two courts have divined unwritten principles from the structure of the written constitution, though both courts are sufficiently catholic to use other interpretive methods as well'. With respect to the second similarity, a comparison of the unwritten constitutional principles identified by the Supreme Court of Canada and the elements of the basic structure of the Indian constitution identified by the Supreme Court of India shows considerable overlap. The former include '(1) the rule of law, (2) federalism, (3) democracy, (4) respect for minorities, (5) judicial independence, and (6) the separation of powers'

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[81] Schneiderman (n 77) 517, 540.

[82] Vivek Krishamurthy, 'Colonial Cousins: Explaining India and Canada's Unwritten Constitutional Principles' (2009) Yale J Int'l L 207, 207.

[83] ibid 208.

while the latter include '(1) the rule of law, (2) federalism, (3) democracy, (4) secularism, and (5) judicial independence'.[84] Krishamurthy hypothesises that this similarity can be attributed to several factors. First, the principles themselves are 'fairly anodyne'—the sort of principles that almost any politician, judge, or informed citizen would cite as among the core values of a modern society.[85] Krishamurthy calls this an 'unsatisfying' answer, but that is only true if we expect legal questions of this kind to be answered by something more transcendent than the congruence of political contingencies. It should not be unsurprising, and is in fact rather satisfying, to see that two states with so much in common have come to a common understanding about what is necessary to preserve peace and order among their respective polities.[86] Second, the two countries' Constitutions are structurally similar, with each featuring provisions governing the federal nature their countries and protecting fundamental rights.[87] Third, although the 'the Indian and Canadian courts each came up with their principles independently', the respective constitutions they are interpreting are 'texts that are of a similar vintage and design'.[88]

The main difference is how the two Supreme Courts have deployed 'unwritten principles' and the 'basic structure doctrine' in their respective jurisprudence. While the Supreme Court of India has used the basic structure doctrine to invalidate formally valid constitutional amendments, the Supreme Court of Canada has not yet been called on to adjudicate a challenge to the validity of a constitutional amendment. Nor (despite significant uncertainty on the point) does the Supreme Court of Canada (currently) consider the unwritten principles to be independently justiciable. The

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[84] ibid.

[85] ibid 209. See also ibid 235.

[86] The political similarities Krishamurthy cites are: the Westminster parliamentary system; a commitment to constitutionalism, the rule of law, judicial review, and minority rights; federalism; and 'significant national minorities whose aspirations require accommodation'. ibid 235.

[87] ibid 220-21.

[88] ibid 235. See also Lorraine E Weinrib, 'The Postwar Paradigm and American Exceptionalism' in Sujit Choudhry (ed), *The Migration of Constitutional Ideas* (CUP 2007) 84, 90.

parenthetical caveats are important. In his article, Krishamurthy claims that Canada's unwritten constitutional principles are justiciable, which to be fair appeared to be true at the time he was writing (and may still be true in some sense).[89] More recently, faced with a case in which it was asked 'to use the democratic principle as a basis for invalidating otherwise valid provincial legislation',[90] the Court, by a narrow 5:4 majority, clarified that unwritten principles are powerful interpretive aids rather than justiciable principles.[91] For now at least, unwritten principles may be used to colour between the lines of the Canadian Constitution, but not to shift them. To the extent they are entrenched, they are entrenched as aids available to courts interpreting and applying the text of the Constitution, but not as deep as the level of the text itself. This, however, remains at the whim of a divided Court. Like the Court's 'judicial usurpation'[92] of the content of sections 41 and 42, this uncertainty is a double threat to orderly constitutional entrenchment: it raises the possibility of an undemocratic process of constitutional entrenchment, which in turn may inhibit or outright frustrate deliberate changes by democratically accountable political actors.

4.3 The 'Rock Bottom' of the British Constitution

Before discussing the British constitution, it is necessary to offer the usual throat-clearing assurance that the United Kingdom does, in fact, have a constitution. I share John Gardner's view that 'there is no room for doubt on this point' as '[a] constitution is a conceptual necessity of every legal system'[93]—and, I would add, 'of every state'. The contrary case was taken up early and ferociously by Thomas Paine, even before modern constitutionalists expounded their theoretical

[89] See *Reference re Secession of Quebec* (n 78), 51.

[90] *Toronto (City) v Ontario (Attorney General)* 2021 SCC 34, 48.

[91] 2021 SCC 34, 49-63.

[92] Emmett Macfarlane, 'The Unconstitutionality of Unconstitutional Constitutional Amendments' (2022) 45 Manitoba LJ 198, 214-15.

[93] John Gardner, 'Can there be a Written Constitution?' in John Gardner, *Law as a Leap of Faith* (OUP 2012) 89, 89.

objections.[94] Against Burke's case for the evolving constitutional rule of parliamentary government, Paine proclaimed that the only constitutions worthy of the name were those that entrenched the rights of man and the powers of government in a written charter.[95] 'A constitution is not a thing in name only', he wrote, 'but in fact. It has not an ideal, but a real existence; and wherever it cannot be produced in a visible form, there is none'.[96] He ended his case with a challenge: 'Can then Mr. Burke produce the English Constitution?'[97] Paine's prescriptive constitutionalism was so blinding that he could not see the English constitution even after he had all but described it. After correctly insisting that a constitution 'is not a thing in name only' and 'not an idea, but a real existence', instead of looking for its 'real existence' in the real world he demanded to be shown 'an idea' scrawled on a piece of paper—the constitution 'in name only' that he has just decried. One wants to take Paine by the hand and guide him through the streets of his own London, pointing out the constitution 'in fact', bidding him observe the regulated commerce of its markets; the orderly commotion of the great maritime basin of the Thames dockyards; the wet ink and hot presses of Paternoster Row where his own pamphlet was printed; the clamour of the Commons and the languor of the Lords; the official and dissenting religions preached from a hundred church pulpits and the fervour of the new Wesleyan preachers outside; to show him all this and then admonish, in an echo of the words inscribed on the floor of the city's Cathedral: 'if you seek the English constitution, *look around you*'.[98]

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[94] See, eg Dawn Oliver, *Constitutional Reform in the UK* (OUP 2003) 4-7); Dieter Grimm, *Constitutionalism: Past, Present, and Future* (OUP 2016) 3; NW Barber, *The United Kingdom Constitution: An Introduction* (OUP 2021) 9. Viscount Radcliffe's Solomonic judgment was that the British Constitution was 'partly unwritten'. *Adegbenro v Akintola* [1963] AC 614, 628.

[95] Thomas Paine, *Rights of Man* [1791, 1792] in Mark Philp (ed), *Rights of Man, Common Sense and other Political Writings* (OUP 2008) 83, 239-40, 260; Thomas Paine, *Dissertation on First Principles* [1795] in Mark Philp (ed), *Rights of Man, Common Sense and other Political Writings* (OUP 2008) 386, 408.

[96] ibid 122. That this view was alive in contemporary American jurisprudence can be seen from the similarly sceptical treatment of the English constitution in *Vanhorne's Lessee v Dorrance* 2 US (2 Dall) 304 (CCD Pa 1795) at 307–9 (Patterson J).

[97] ibid 123.

[98] 'Lector, si monumentum requiris, circumspice'. Arthur Dimock, *The Cathedral Church of Saint Paul: An Account of the Old and New Buildings, with a Short Historical Sketch*, vol 34 (G Bell & Sons 1901).

Alas for Paine, 230 years later the British constitution remains defiantly uncodified, in the sense of not having 'a canonical constitutional master-text',[99] though not entirely unwritten.[100] The written parts consist, at least, of the current corpus of constitutional statutes of Parliament (some of which, as will be discussed in the next chapter, may be 'more constitutional' than others);[101] the major precedents and overall structure of the common law;[102] and the key organisational standing orders of the House of Commons and the House of Lords. Even some conventions are now written down.[103] In contrast to how we typically think about the virtues of a written Constitution, however, in the United Kingdom the orthodox view is that it is the written parts of the constitution that are the most changeable. This is because, for all the changes to the British constitution over the last three centuries, its fundamental constitutional principle remains the legal supremacy of parliament: 'Whatever the [Crown] in Parliament enacts is law'.[104]

Barber has argued that the old doctrine of parliamentary supremacy was fatally undermined by the *Factortame* cases[105] in the early 1990s, when for the first time British courts, contra AV Dicey's dictum, did 'override or set aside the legislation of Parliament'.[106] 'After *Factortame*', Barber

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[99] Gardner (n 93) 89, 91-92. cf Vernon Bogdanor's view that judges may be codifying an English constitution 'piecemeal'. Vernon Bogdanor, 'Conclusion' in Vernon Bogdanor (ed), *The British Constitution in the Twentieth Century* (OUP 2003) 719.

[100] Gardner (n 93) 89, 90-91; Barber, *The United Kingdom Constitution* (n 94) 11-12. cf NW Barber, 'Against a written constitution' (2009) PL 11, 18.

[101] Farrah Ahmed and Adam Perry, 'Constitutional Statutes' (2016) 37 OJLS 461.

[102] Barber, *The United Kingdom Constitution* (n 94) 12-13. It would not be a stretch to include the decisions of the European Court of Human Rights, to the extent that British judges shape the common law to accommodate them.

[103] ibid 12, 94-96.

[104] HLA Hart, *The Concept of Law* (3rd edn, OUP 2012) 107, 148. That this rule is subject to the 'limitation' that Parliament may not bind its successors only enhances the sovereignty of Parliament. Jeffrey Goldsworthy, *The Sovereignty of Parliament: History and Philosophy* (OUP 1999) 15; Richard Ekins and Graham Gee, 'Ten Myths about Parliamentary Sovereignty' in Alexander Horne, Louise Thompson, and Ben Yong (eds) *Parliament and the Law* (Hart 2022) 299, 303.

[105] *R v Secretary of State for Transport, ex p Factortame (No 1)* [1990] 2 AC 85 (HL); *R v Secretary of State for Transport, ex p Factortame (No 2)* [1991] 1 AC 603 (HL).

[106] AV Dicey, *Introduction to the Study of the Law of the Constitution* (8th edn [1915] Liberty Classics 1982) 3-4, 36.

wrote, 'the old rule of parliamentary sovereignty ceased to be part of the UK constitution' as 'some statutes were born with limited effect'.[107] This exception (if it was ever an exception[108]) need not detain us, as Barber quickly added: '[t]he significance of the death of parliamentary sovereignty should not be overstated' and '[i]t remains the case that, almost invariably, statutes enacted by Parliament are loyally applied by the courts'.[109] So, with three possible exceptions—the role of European law (now largely moot); the relative precedence of certain 'constitutional' statutes[110]; and the suggestion that courts might, in some extraordinary cases, refuse to follow parliament's clear intent[111]—the constitution of the United Kingdom remains substantially in the form to which Paine objected: alive in the streets of the nation and inscribed in the laws and conventions that govern its major institutions and order its political arrangements.

So much, for now,[112] for the written parts of the British constitution. I said earlier that according to a common view of the British constitution it is the written parts of the constitution that are the most changeable and the unwritten parts that are most deeply entrenched. This view is at least as old as Edward Coke's belief in the unchanging and unchangeable nature of fundamental principles of English law when he compared his own unwillingness to alter the provisions of Magna Carta to satisfy the king to the barons' intransigence in the face of the proposed Statute of Merton (1236).[113] Indeed, it is to Coke, and in particular to his reasons in

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[107] Barber, *The United Kingdom Constitution* (n 94) 71. For a dissenting view, see Ekins and Gee (n 104) 299, 308-9. For a range of dissenting views, see also 'Written evidence from the Foreign and Commonwealth Office on Clause 18 of the EU Bill' in House of Commons European Scrutiny Committee, *The EU Bill and Parliamentary sovereignty: Tenth Report of Session* 2010–11, vol II (The Stationery Office Limited 2010) 40-43, <https://publications.parliament.uk/pa/cm201011/cmselect/cmeuleg/633ii/633.pdf> accessed 26 March 2024.

[108] Richard Ekins, 'Legislative freedom in the United Kingdom' (2017) 133 LQR 582, 586-90.

[109] Barber, *The United Kingdom Constitution* (n 94) 73. See also Ekins, 'Legislative freedom' (n 108) 604.

[110] I consider constitutional statutes in chapter 5.

[111] ibid 74.

[112] Until chapter 5.

[113] From a speech in parliament, April 26, 1628. Sir Edward Coke, *The Selected Writings and Speeches of Sir Edward Coke* vol 3 (Steve Sheppard ed, Liberty Fund 2003) <https://oll.libertyfund.org/titles/shepherd-selected-writings-of-sir-edward-coke-vol-iii> accessed 26 March 2024. The barons' reply to the Statute of Merton (1236), '*Nolumus leges*

Bonham's Case[114] and the *Prohibitions del Roy*[115] that we owe the still-current idea that the evolution of the British constitution is constrained by, and at the margins may be compelled by the courts to conform to, the umbrous spirit of an ancient constitution lurking below it.[116]

This idea implicates the longstanding debate over the scope of parliamentary supremacy, the most entrenched principle of the British constitution.[117] If you were to ask 100 constitutional scholars to codify the existing UK constitution with the proviso that they could include just one unamendable eternity clause, the most common choice would likely be to enshrine the sovereignty of Parliament in one form or other. The consensus might not be as strong as would have been 50 years ago,[118] but the 'long-standing and well-settled understanding of parliamentary sovereignty' as the power of the Crown in Parliament to make and unmake laws at will is still the 'defining feature' of the British legal system and its ultimate rule of recognition.[119] Even if you believe that this power may be circumscribed by other constitutional principles in rare limit cases, it is still the default presumption in every case.[120] A state simply cannot be without the means of legal change, and if the British constitution lacked the principle of Parliamentary supremacy it would have to invent

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Angliae mutare'—we are unwilling to change the laws of England—has been interpreted as not simply an unwillingness to change the laws, but as a commitment to the laws of England as unchanging. FW Maitland, *The Constitutional History of England* (CUP 1908) 16.

[114] 8 Co Rep 107 (1610).

[115] 12 Co Rep 63 (1607).

[116] See the discussion of 'common law constitutionalism' in chapter 5. For a robust counterargument, see Jeffrey Goldsworthy, *Parliamentary Sovereignty* (CUP 2010) ch 10.

[117] By 'Parliamentary supremacy' I mean the 'continuing plenary power of parliament'. Goldsworthy, *Parliamentary Sovereignty* (n 115) 192. For a good explanation and resolution of the 'manner and form' controversy, which is relevant but beyond the scope of this chapter, see ibid ch 7.

[118] Ie, the year George Winterton wrote: 'There has been no important development of the doctrine in Britain since Dicey's formulation'. George Winterton, 'The British Grundnorm: Parliamentary Supremacy Re-Examined' (1976) 92 LQR 591, 596.

[119] Hart, *The Concept of Law* (n 104) 111. But see, NW Barber, 'The Afterlife of Parliamentary Sovereignty' (2011) 9 ICON 144.

[120] Ekins and Gee (n 104) 299, 299-301, 316. See also Dicey, *Law of the Constitution* (n 106) 37-38; Ivor Jennings, *The Law and the Constitution* (3rd edn, U of London P 1959) 144.

something like it. As George Winterton said of Dicey's claim that 'Parliament could extinguish itself' if it chose to,[121] 'it is obvious that if the British Parliament decided to disband, the British people would simply substitute some other legislature in its place ... thereby avoiding any legislative vacuum'.[122] Government, like nature, abhors a vacuum. Even Francis Bacon, who once claimed that Parliament possessed the power to abolish itself, did so only as an extreme thought experiment illustrating Parliament's theoretical legal omnipotence.[123] It is no exaggeration to say that to abolish or replace Parliament and its powers would be to abolish or replace the British constitution.[124]

While there is still a general consensus about the centrality of Parliament's power to the constitution, the same cannot be said of the source of that power. Is it statutory? That would be contradictory, for if Parliamentary supremacy were the creation of statute, it could be unmade by Parliament, and we're back to the quandary of the Statute of 1369, which purported to put the terms of Magna Carta beyond amendment by Parliament—on the authority of Parliament.[125] Even more problematic, there is no statute that purports to authorise Parliamentary authority. Is it judicial? Perhaps a common law doctrine created and maintained by the courts?[126] That would also be contradictory, as the scope (and thus the fact) of Parliament's supremacy would then rest in the hands, and subject to the power, of another body. Parliamentary supremacy would, paradoxically,

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[121] Dicey, *Law of the Constitution* (n 106) 99 (n 48).

[122] Winterton (n 118) 600. On why 'the principle of parliamentary sovereignty presupposes Parliament as a permanently continuing entity [which] does not allow Parliament to end its legal existence', see Ilmar Tammelo, 'The Antinomy of Parliamentary Sovereignty' (1958) 44 Archiv für Rechts- und Sozialphilosophie 495, 507; Goldsworthy, *Parliamentary Sovereignty* (n 116) 192-96.

[123] Francis Bacon, 'To Her Sacred Majesty' in *The Works of Francis Bacon vol VII* (first published 1630, James Spedding et al eds, CUP 2011) 313, 370-71. See also 'The History of the Reign of King Henry the Seventh' in *The Works of Francis Bacon vol VI* (first published 1622, James Spedding et al eds, CUP 2011) 27, 160; Richard Ekins, 'How to Be a Free People' AmJJur 58 (2013) 163, 181.

[124] Goldsworthy, *Parliamentary Sovereignty* (n 116) 199.

[125] 42 Edward III c 1. See William Sharp McKechnie, *Magna Carta: A Commentary on the Great Charter of King John* (James Maclehose and Sons 1914) 159.

[126] HWR Wade, 'The Basis of Legal Sovereignty' (1955) CLJ 172.

depend on judicial supremacy.[127] But if Parliamentary supremacy does not require (or have) a statutory footing and, is recognised by the common law ('in the limited sense that the common law includes the ancient customs of the realm'[128]) but not a creation of it, what exactly is the principle and how can it be explained? It has been described simply as the ultimate rule of recognition of the British constitution,[129] but even this description undersells its importance. It also leaves unanswered the question of the rule's source—or, in the terms of this thesis, the form of its entrenchment.

Hart believed that, as a rule of recognition and change, Parliamentary supremacy did not need a theoretical source and could rely for its authority on a habit of obedience by legal officials. In his schema, judges, law enforcement officers, civil servants, ministers and anyone else whose job involves knowing and working with the law needs no more than to be able to identify a law as valid to apply it. Having identified a valid law, they then apply and enforce it, presumably, simply because it is a valid law and because applying and enforcing valid laws is what legal officials do. The question of why they should do so is beyond his theory, or beneath it. From the internal point of view of the law, this makes sense. Hart's account of the internal life of the law is mechanistic: officials play their parts in the legal system as cogs in a machine, as unlikely to question their respective roles as an axle is to question why it should rotate when force is applied, let alone ponder the point of the machine.[130] Hart's account is correct and even useful, if one is content with the self-contained terms of a theory that starts with the assumption that the rule of recognition 'is the

[127] Richard Ekins, 'Judicial Supremacy and the Rule of Law' (2003) 119 LQR 127, 131.

[128] Ekins and Gee (n 104) 299, 306.

[129] Hart, *The Concept of Law* (n 104) 148.

[130] ibid 293. See also Joseph Raz's 'legal point of view', which assumes that '[j]udges, acting as judges, act on the belief that laws are valid reasons for action [and] hold laws to be exclusionary reasons in that they disregard all non-legal reasons except where allowed by law to act on non-legal reasons'. Joseph Raz, *Practical Reason and Norms* (OUP 1999) 177. For a critique of these accounts that imputes moral reasoning to legal officials acting from the internal point of view, see John Finnis, *Natural Law and Natural Rights* (2nd edn, OUP 2011) 27-29.

accepted rule' and 'the constitution is to be obeyed'.[131] But when one hears a British judge—an eminent Hartian 'official'—question whether there might, in fact, be limits to Parliamentary supremacy, as Lord Steyn and Lady Hale did in *Jackson*,[132] Lord Carnwath did in *Privacy International*,[133] and Sir John Laws did in his extra-judicial writing,[134] the application of the rule suddenly does not seem quite so automatic or self-evident. Nor does objecting that the judges are violating a social understanding among officials suffice to characterise what they are doing. After all, if a rule of recognition is an understanding among legal officials, their understanding of what is required to validate a law may change, and with it the rule of recognition.[135] But Parliamentary supremacy is more deeply entrenched than that, and we have to break out of Hart's machine to understand the form of its entrenchment in the British constitution.

Parliamentary supremacy is a not merely a rule; it is also an entrenched constitutional norm. Going beyond Hart, however, does not mean that we must agree with Hans Kelsen that the most basic norm of a constitution rests on an actual or imagined historical *Grundnorm*. Kelsen believed that in a legal order every norm must be authorised by a preceding norm and so on down to a Basic Norm, which 'must be presupposed in order to make sense of the hypothesis of the unity of legal order and to explain why, from the perspective of the legal official and subject, the order must be understood as legitimate'.[136] This poses a problem in the case of a customary or historic constitution (in all constitutions, really, but I am concerned here with a customary constitution), where the chain of legal authority has no identifiable and definitive beginning. Kelsen's answer to this problem was

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[131] ibid.

[132] [2005] UKHL 56, [2006] 1 AC 262, 9.

[133] [2019] UKSC 22, [2019] 2 WLR 1219, 119, 131-132, 141-144. See discussion in Ekins and Gee (n 109) 299, 317-19.

[134] Sir John Laws, 'Law and Democracy' [1995] PL 72, 81.

[135] See Goldsworthy, *Parliamentary Sovereignty* (n 116) 199.

[136] David Dyzenhaus, *The Long Arc of Legality* (CUP 2022) 212.

that 'if the historically first constitution arose by way of custom, then it is this custom, or to be more exact, it is the individuals whose behaviour forms the custom creating the historically first constitution, who are empowered by the Basic Norm'.[137] But the principle of Parliamentary supremacy does not need a *Grundnorm*, and not (only) for the reason that Hart thought. A *Grundnorm* is a conceptual necessity only if, like Kelsen, you believe that a legal system is law all the way down.[138] If that is your project, and an original norm cannot be found in history (and in a customary constitution it won't be), then naturally you must posit one. But then the *Grundnorm* is not a grounded norm but conjecture, which may be a fine theoretical foundation but is a practical void.

The place and role of Parliamentary supremacy in the British constitution is not captured (or not merely captured) by calling it the ultimate rule of recognition and change or the *Grundnorm* of the constitution.[139] Though it functions as the former and shares aspects of the latter, it yokes together popular political and legal concepts of legitimacy *in practice* better than either, which do so only theoretically. It does so as a socially entrenched practice maintained not only by the habits of officials but by the entire political system from the ground up and from the top down. This social and political entrenchment should not be surprising; the British constitution is, after all, a *political* constitution,[140] and the political is a subset of the social. It is entrenched in the way political conventions are entrenched, and it is tempting to think of it as a political convention, but once again that does not adequately capture the depth of its entrenchment. If it is a convention, it is a special type of convention insofar as it does not function outside the legal system and is, in fact, the ground of legal actions and legal argument. In the end, describing its place in the constitution using other terms and concepts falls short for the simple fact that its place is *sui generis*.

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[137] Hans Kelsen, *General Theory of Norms* (Clarendon 1991) 225. See also Hans Kelsen, *What Is Justice* (U of California P 1957) 261–3; Hans Kelsen, 'The Function of a Constitution' in Richard Tur and William L Twining (eds), *Essays on Kelsen* (first published 1967, Clarendon Press 1986) 110, 119.

[138] Dyzenhaus (n 136) 154.

[139] Winterton (n 118).

[140] Ekins and Gee (n 104) 299, 301. See also JAG Griffith, 'The political constitution' (1979) 42 MLR 1.

The entrenchment of Parliamentary supremacy is a social and political reality with legal effects. While this may make it sound more contingent than the terms of a codified Constitution, that would be to misunderstand the potential depth and force of social and political entrenchment. A social practice may be as deeply entrenched as any codified Constitutional provision or legal norm: as described above, Kelsen's foundational *Grundnorm* is just an attempt to explain the power of social practice and Hart's rule of recognition rests on the social practices of legal officials. Of the two, Hart's approach, with modifications, comes closer to describing reality. Supplementing Hart's account, Richard Ekins has written that the rule of recognition is 'a disposition of the political community, *especially* the officials who represent the community ... that follows from the reasonableness of ordering public life this way'.[141] The officials are '*especially*' important because their day-to-day work is required to give effect to the rule, but they only have this role because the political community recognises their authority in the first place. The legitimators must themselves be legitimated, and in a democracy that is a primarily a popular and social function.[142] This is true of every constitution in a democratic society, but it is particularly true when describing the role of Parliamentary supremacy in the British constitution, where the practice of the principle reaches through the government and Parliament down to the people and carries their imprimatur back up through the legislative process and to any regulatory or adjudicative process that follows from legislation.[143] It is the constitutional through line, anchored in social morality and popular attitudes

[141] Richard Ekins, 'Constitutional Principle in the Laws of the Commonwealth' in John Keown and Robert P George (eds), *Reason, Morality, and Law: The Philosophy of John Finnis* (OUP 2013) 399 (emphasis added). By 'this way,' Ekins means 'to make possible a stable, fair form of social life, in which persons (and communities) have the capacity by acting now to settle what will be done in the future'. That is, in the terms of this thesis, forms of legal and non-legal entrenchment that reflect the will of the community and order it accordingly over time.

[142] See further discussion in chapter 6.

[143] HLA Hart, 'Sovereignty and Legally Limited Government' in HLA Hart, *Essays on Bentham* OUP 1982) 228-29; Barber 'The Afterlife of Parliamentary Sovereignty' (n 119) 148. This is also why one of the inherent limits on Parliamentary supremacy is the inability to declare itself a permanent body without further elections. Regular renewal is an essential element of continuing legitimacy in a democratic body.

and running straight through the habits and practices of political actors, providing stability and resilience for the constitutional structure built around it, like the *shinbashira* in a Japanese pagoda.[144]

Charles Taylor has used the term 'a social imaginary' to describe the 'common understanding that makes possible common practices and a widely shared sense of legitimacy' among a social collective.[145] This is similar to Raz's description of law in general, which is 'part of our culture and of our cultural traditions. ... part of the way [in which ordinary people as well as the legal profession] 'conceptualize' social reality'. [146] This is true, he says, even if 'the culture and tradition of which the concept is a part provide it with neither sharply defined contours nor a clearly identifiable focus'.[147] In the case of Parliamentary supremacy, its contours are more sharply defined than the concept of law in general. This clarity makes it easy for officials and the broader society to conceptualise and enforce it and is likely also why the potential reach of Parliamentary supremacy has always exceeded its actual grasp. Ivor Jennings was agnostic about whether there were limits to Parliament's legal sovereignty: 'We have not had the extreme cases', he said, 'because Parliament has not been extreme'.[148] As an explanation, this is incomplete. I would suggest that Parliament has not been extreme because the principle of continuing Parliamentary supremacy, reinforced by social understanding and the expectation that engenders, is a powerful deterrence against abuse. The simplicity of the principle is part of its power and one explanation for the fact

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[144] Parul Dubey, 'Ancient Construction Serves as a Model for Today's Earthquake-Safe Buildings' in Informed Infrastructure (2 October 2017) <https://informedinfrastructure.com/34343/ancient-construction-serves-as-a-model-for-todays-earthquake-safe-buildings/> accessed 25 July 2025.

[145] Charles Taylor, *Modern Social Imaginaries* (Duke UP 2004) 23. See also Alexander Latham-Gambi, 'Political Constitutionalism and Legal Constitutionalism—an Imaginary Opposition?' (2020) 40 OJLS 737, 738, 740-42.

[146] Joseph Raz, 'Authority, Law, and Morality' in Joseph Raz, *Ethics in the Public Domain: Essays in the Morality of Law and Politics* (OUP 1995) 237.

[147] ibid; cf Mark Walters on how, according to Dicey, the twin principles of parliamentary supremacy and the rule of law merge in the active life of British society, including that subset of it that is made up of the legal and political officials whose role it is to apply and interpret them. The substantive limitations of the common law 'are effectively woven into the legal life or identity of the people, forming an integral part of the bonds that hold the community together'. Mark D Walters, *A.V. Dicey and the Common Law Constitutional Tradition: A Legal Turn of Mind* (CUP 2020) 253. See also RWM Dias, 'Legal Politics: Norms Behind the Grundnorm' [1968] CLJ 233, 255-56.

[148] Jennings (n 120) 160.

that, although the full power of Parliament is held at any moment in the hands of the current members, they have so rarely even attempted the sort of self-embracing eclipse of its power that is sometimes postulated by constitutional theorists.[149] And it is why there is good reason to believe that, if they ever did, the courts and other legal and political officials would not hold Parliament to its self-binding for longer than Parliament willed itself to be bound.[150]

The most fundamental principles of a constitution do not have to be entrenched permanently by design. It is because they are so essential to the continued orderly functioning of the constitutional system that they are secure in themselves without needing to be being secured: to remove them or to shift them significantly would not merely change the constitution, it would defeat it. The constitutional order rests on these foundations and the foundations make sense for the constitutional order. As Wittgenstein said of the 'rock bottom' of his philosophical convictions: 'These foundation-walls are carried by the whole house'.[151] In the British case, the constitution rests on the politically and socially entrenched principle of parliamentary sovereignty, but in an equally important sense the principle of parliamentary sovereignty is carried by the rest of the constitution. It is held in place by everything that relies on it. It is the British constitution's legal and political 'rock bottom'.

4.4 Conclusion

In conclusion, while none of the three constitutional orders that are the focus of this thesis have deliberately entrenched any permanent, codified provisions, the pull of the idea of permanence is strong. In the United States, the Constitution itself provides an entrenched guarantee of state power that secures the federal nature of the country and is held by each state

[149] Tammelo (n 122) 512.

[150] The failure of the Statute of 1369 was the just first such failure. ibid 505.

[151] Ludwig Wittgenstein, *On Certainty* (first published 1969, GEM Anscombe and GH von Wright, eds, Denis Paul and GEM Anscombe, trs, Blackwell Publishing 1975) para 248.

individually, making it effectively unamendable, while leading commentators have posited an unamendable constitutional core consisting of the guarantee of self-government and, perhaps, the First Amendment. In Canada, the Supreme Court's appeal to an invisible constitutional architecture and unwritten constitutional principles responds to the theoretical desire to fix a constitutional foundation and lays the groundwork for the future invocation of something like the Indian 'basic structure doctrine'. And in the United Kingdom, the principle of Parliamentary supremacy performs the theoretical grounding function of a *Grundnorm* and offers a practical foundation and active source of authority for the legal and political superstructure that is built on it.

If a state is to have a secure constitutional order capable of weathering the challenges of change over time, it must rest on something solid, but that base need not be codified. And if a Constitution is codified, its provisions may ube codified to different degrees, with no provision, no matter how important or fundamental, intentionally made permanent. In a healthy state, the constitutional bedrock can just as easily be a historical practice affirmed by political practice and reinforced by social expectation. In the next chapter, I turn to the legal orders that rests on those foundations and show that they too are, for good reason, entrenched to different degrees in different ways in different states.

Chapter 5: LEGAL ENTRENCHMENT

Although I have divided the consideration of constitutional and non-constitutional forms of legal entrenchment into separate chapters, in practice the division is often an arbitrary and formalist distinction. I have already shown how even within a codified Constitution there may be degrees of intentional entrenchment, including provisions that may be amended by regular legislation.[1] Where a provision of a codified Constitution is easier to change in practice than some constitutional statutes or conventions—that is, where depth of entrenchment *in fact* diverges from purported depth of entrenchment *in form*—the distinction between what is more or less 'constitutional' becomes obscure. This is especially clear when it comes to the British constitution, where the constitution is comprised of statutes, conventions, and even elements of the common law,[2] but, as I will show, the distinction is also fuzzy in the American and Canadian cases, where certain laws and political conventions fall uneasily between the categories of 'constitutional' and 'non-constitutional' or even, in the case of conventions, 'legal' and 'non-legal'.[3]

In this chapter, I will analyse the forms of legal entrenchment that lie, like examples above, in the marches of the constitutional order, as well as those often considered to be outside the constitution proper. Specifically. I consider three forms of legal entrenchment. In section 5.1, I discuss the entrenchment of ordinary legislation and the common law, respectively, as important and often tenaciously enduring forms of entrenchment. In section 5.2, I examine more closely the idea of common law constitutionalism, a theory whose name gives the game away by yoking a minimal degree of formal entrenchment (the common law) with a notionally deeper form of entrenchment (the constitution). I focus in particular on the maximalist form of common law

[1] See eg, *Constitution Act, 1982*, s 44, ('Parliament may exclusively make laws amending the Constitution of Canada in relation to the executive government of Canada or the Senate and House of Commons').

[2] NW Barber, *The United Kingdom Constitution: An Introduction* (OUP 2021) ch 4.

[3] Although part of a state's constitution, 'nonjusticiable constitutional conventions ... are not regarded as "law" at all'. Jeffrey Goldsworthy, 'The Myth of the Common Law Constitution' in Douglas E Edlin (ed), *Common Law Theory.* (CUP 2007) 204, 208. See also Adrian Vermeule, 'Conventions of Agency Independence' (2013) 113 Columbia L Rev 1163. Non-legal entrenchment, including via conventions, is the subject of chapter 6.

constitutionalism, which has more in common with the idea of permanent entrenchment under the basic structure doctrine than with ordinary law. Finally, in section 5.3, I turn to those deeply entrenched ordinary laws that in the United Kingdom are now called 'constitutional statutes' (though the phenomenon is much older than the name), in Canada are called 'quasi-constitutional' statutes, and in the United States are not usually recognised as having any special legal status, though they occupy a similar place in the entrenched legal-constitutional order. As in the previous chapter, I draw on examples from the United States, Canada, and the United Kingdom throughout; unlike that chapter, however, where I discussed each jurisdiction in turn, in this chapter I discuss the three constitutions together in each section.

5.1 Degrees of ordinary law

Every ordinary law is a little act of intentional entrenchment,[4] and taken as a whole the corpus of ordinary law encloses the socio-legal landscape within a patchwork of entrenched intentions, like the maze of hedges and low stone walls that cross and recross the English countryside viewed from above. Each Parliament acts within this landscape as it finds it, and the laws it enacts will shape the landscape in which future Parliaments must act. This is why each new law must be interpreted in the context of existing statutes and, where a plain reading of the new law does not compel the conclusion that it intends to supersede one or more of them, it should be interpreted to cohere with them.[5] This is true even of ordinary laws that don't 'take' and are quickly

[4] I include both statutory law and the common law with the 'ordinary' form of law because they are the oldest and most common ways of making laws in the three jurisdictions I am focusing on. They are also 'ordinary' because they are subject to amendment or repeal by the same methods by which they are made (and, in the case of the common law, also by legislation). As I used it, 'ordinary' is not a term of diminishment, much less disparagement. As Mark Walters has pointed out, '[i]f the rule of law is a moral value worth embracing, then surely the law that rules must be in some sense ordinary—it must in some way manifest the values that law ordinarily manifests'. Mark D Walters, *A.V. Dicey and the Common Law Constitutional Tradition: A Legal Turn of Mind.* (CUP 2020) 226.

[5] Richard Ekins, 'Legislative freedom in the United Kingdom' (2017) 133 LQR, 582, 603. See also *R (Wilkinson) v IRC* [2005] UKHL30, [2006] 1 All ER 529, [18] (Lord Hoffman) ('by the intention of Parliament ... [o]ne means the interpretation which the reasonable reader would give to the statute read against its background'); Hon Justice Kenneth Hayne, 'Statutes, Intentions and the Courts: What Place Does the Notion of Intention (Legislative or Parliamentary) Have in Statutory Construction?' (2013) 13 Oxford U Commonwealth LJ 271, 272.

repealed. In the case of every statute, regardless of its importance, Parliament must spend weeks or months debating, studying, and eventually deciding whether and how to alter the status quo. In some cases, a statute or a common law precedent may embed itself more deeply in the legal order than other laws. This deeper entrenchment may be structural, with so many other laws having been made in reliance on it that to remove or even to amend it would risk upsetting a dependent legal superstructure. Or it may simply reflect the continuing perceived effectiveness of the law. Finally, it may be that the law has, either because of its antiquity or its association with a politically-resonant event in history, taken on symbolic importance within the legal system such that Parliamentarians and legal officials take its existence for granted (or, if they have misgivings, are yet loath to change it). In all these ways and to different degrees of depths, ordinary law may be entrenched to make it harder for legislatures to effect radical change (literally: change at the root).

Because ordinary law is the most minimal form of entrenchment,[6] it is also the most common and thus, perhaps counter-intuitively, may be considered the most important. It was with good reason that Maitland began his magisterial constitutional history of England with a consideration of medieval property law. Although he acknowledged that '[i]t may seem strange that we begin our survey of public law by examining the system of landed property', he explained that the distinction between public and private law was not always quite so clear.[7] '[F]eudalism', after all, is 'a state of society in which all or a great part of public rights and duties are inextricably interwoven with the tenure of land, in which the whole governmental system—financial, military, judicial—is part of the law of private property.'[8] Similarly, one cannot understand the history of the right to vote, and thus the history of Parliamentary democracy, without understanding the

[6] Delegated legislation or regulations may be even less entrenched, but as far as this thesis is concerned there is nothing about such derivative law that is not covered in the analysis of primary legislation and thus nothing to say about them except to note their even more minimal entrenchment.

[7] FW Maitland, *The Constitutional History of England* (CUP 1908) 23.

[8] ibid 23-24.

history of the law of property—that is, of ordinary private law—on which the right to vote was based for most of English history (and still was within living memory).[9] Even today, as Kenneth Wheare pointed out, many Constitutions do not include the laws that govern the state's major political institutions and regulate the exercise of state power, such as laws that determine who can vote and how,[10] laws that establish courts and judicial jurisdiction,[11] and so on, even though these are all matters which, as Paul Yowell has observed, 'may have a significantly greater impact on how a country is governed, than certain matters in the large-C Constitution'.[12]

What are we to make of the fact that some of the most important rules governing the most important features of state government are entrenched in ordinary law rather than in the codified Constitution? Or that these ordinary laws are in some cases as old or older than the codified Constitution? At a minimum, we can say that the corelation between the form of entrenchment and the constitutional importance of entrenchment is not exact. Or, to put in another way, an ordinary law may be as 'constitutional' in its effects as a codified constitutional provision. In both the United Kingdom, with its uncodified constitution, and the United States and Canada, with their modern codified Constitutions, ordinary law is still the most common form of entrenchment and the easiest way to manage the fluid day-to-day relationship between citizens and the state and between citizens and each other.[13] However, the relative ease with which ordinary laws may be changed does not mean they are not meaningfully entrenched or intended to last for a very long time. Bentham, for instance, noted of the Act of Parliament from 1751 that provided for the

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[9] ibid. Property qualifications were still being used to suppress the Catholic vote in local elections in Northern Ireland until 1969. Marc Mulholland, *Northern Ireland: A Very Short Introduction*, (OUP 2003) 37-39; Graham Walker, *A History of the Ulster Unionist Party: Protest, Pragmatism, and Pessimism* (Manchester UP 2004) 160-78.

[10] For example, Article I, s 4 of the American Constitution provides that: 'The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators.'
[11] Article III, ss 1, 2. Compare section 101 of Canada's *Constitution Act 1867*.

[12] Paul Yowell, 'A Proposal for Defining and Classifying Systems of Constitutional Government' in Dimitrios Kyritsis and Stuart Larkin (eds) *The Methodology of Constitutional Theory* (Hart 2022) 311, 324 commenting on Kenneth Wheare, *Modern Constitutions* (OUP 1951) ch 1.

[13] On the importance of ordinary law to the British constitution, see Walters (n 4) ch 9.

adoption of the Gregorian calendar, which made specific provision 'for the concerns of the years 2[000] and 2[800]'.[14]

5.1.1 Ordinary legislation

Every act of legislation is an act of entrenchment. 'After all', as Barber has observed, 'most legal rules have a quality of stickiness: their removal will unsettle or disturb expectations, and there will be some opposition to their change'.[15] That evocative phrase—'a quality of stickiness'—is why ordinary law should be considered 'entrenched', even when the 'trench' is quite shallow. The purpose of any law is to change the legal status quo, and unless it is limited by its own terms or by reference to a finite object or arrangement, it is intended to endure indefinitely (which is not the same as forever). This is as true of an ordinary statute as it is of the adoption of a new political convention like the Salisbury-Addison convention in 1945,[16] a 'constitutional' statute, or a formal constitutional provision, because a new rule, whatever its form, creates a new status quo, which requires new effort to change. It is the legal instantiation of Newton's first law concerning inertia.[17] While Newton posited that 'Every body perseveres in its state of being at rest or of moving uniformly straight forward, except insofar as it is compelled to change its state by the forces impressed',[18] we might say of the law that it perseveres until it is changed by the force of new law. The force required to change the law equates to the degree of the law's effective entrenchment.

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[14] Jeremy Bentham, *Of Laws in General* (HLA Hart ed, The Athlone Press 1970) 92 (He added that '[i]t is curious and not unpleasing to observe this evidence of the legislator taking so large a stride').

[15] NW Barber, 'Why Entrench?' (2016) 14 ICON 325, 327. See also Julian N Eule, 'Temporal Limits on the Legislative Mandate: Entrenchment and Retroactivity' (1987) 12 American Bar Foundation Research J 379, 457 ("Getting a statute enacted is often much easier than getting it revised').

[16] Alison L Young, *British Government and the Constitution* (8th edn, CUP 2021) 227.

[17] Daniel Hoek, 'Forced Changes Only: A New Take on the Law of Inertia' (2023) 90 Philosophy of Science 60.

[18] Isaac Newton, *The Principia: The Mathematical Principles of Natural Philosophy* (I Bernard Cohen and Anne Whitman trs, U of California P 1999) 416.

Formally, this means that all ordinary legislation is equally entrenched, because the same legislative process is required to change any statute. However, because the substance of different legislation will make it harder or easier to muster and apply the amount of legal force required to change it, all ordinary legislation is not in practice equally entrenched. We may then say that all ordinary legislation is equally entrenched in a formal sense, but differently entrenched in a practical sense. There are also examples of statutes that, despite being enacted in the same way, have been accorded different degrees of interpretive precedence by courts and by subsequent legislators. These are usually called, confusingly (but, per my comments above, *appropriately* confusingly) 'constitutional statutes'. I will consider 'constitutional statutes' in more detail in section 5.3, below, but for now it is worth noting that they are simply an extraordinary form of ordinary legal entrenchment. Between the different degrees of 'stickiness' of different ordinary laws and of constitutional statutes, which are themselves of different strengths, the ordinary law should be seen not as a uniform class but as a matrix of variously entrenched layers of law.

5.1.2 The Common Law

Like ordinary legislation, the common law also consists of rules that have been entrenched as the status quo, and which may be adjusted or replaced by the courts or by the legislature. Like ordinary legislation, however, in practice some common law rules carry more weight than others both in relation to other rules of the common law and, perhaps, in relation to legislation.[19] The courts may, under the right conditions, alter a rule of the common law,[20] but some rules are so fundamental to the operation of the common law and of the legal system as a whole that they may be considered more deeply entrenched than others. In the common law, these include general or

[19] See section 5.2, below.

[20] John Gardner, 'Some Types of Law' in Douglas E Edlin (ed), *Common Law Theory* (CUP 2007) 51, 70-71.

doctrinal principles, which serve as a framework within which judges develop more narrow and specialised applications of the common law.

It is because certain principles are foundational that Oliver Wendell Holmes, Jr, could say that 'the general principles of criminal and civil liability are the same'[21] and we can understand what he means. General principles are cautiously and gradually worked on through the resolution of many similar cases over time, and then those general principles in turn 'serve as a basis for new legal rules' that are themselves deduced from the general principles 'in the sense that relatively general standards serve as the basis for relatively specific standards' even as new cases may introduce qualifications on the general principles.[22] This is also why we can speak of the 'general principles' of tort law, such as the duty of care[23] or the rule in *Rylands v Fletcher*,[24] or of criminal law, such as the principles of fault and *mens rea*.[25] These general principles can be described as more deeply entrenched than the general mass of common law precedents. Once again, entrenchment, here the entrenchment of the common law, proves to be a matter of degrees.

5.2 Common law constitutionalism

I single out common law constitutionalism for special consideration because it is the doctrine that takes most seriously the idea of entrenchment in the common law context. Whether one thinks that is a good or a bad thing is separate question. As a general matter, common law constitutionalism posits that both the common law and legislation rest on a body of more deeply

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[21] Oliver Wendell Holmes, *The Common Law* (first published 1881, Little, Brown and Company 1923) 44.

[22] Melvin A Eisenberg, *The Nature of the Common Law* (Harvard UP 1988) 79-80; Neil MacCormick, *Legal Reasoning and Legal Theory* (Clarendon Press 1994) ch II; Uwe Kischel, 'The Context of the Common Law' in Uwe Kischel, *Comparative Law* (OUP 2019) 229-30. See also Lon L Fuller, 'The Forms and Limits of Adjudication' (1978) 92 Harv L Rev 353, 377-79.

[23] Rachael Mulheron, *Principles of Tort Law* (2nd edn, CUP 2020) 43-45.

[24] ibid 915.

[25] Jeremy Horder, *Ashworth's Principles of Criminal Law* (8th edn, OUP 2016) 173-77.

entrenched norms and principles of law to which they can be presumed to conform. The 'constitutionalism' part of common law constitutionalism is the proposition that 'the common law is prior to legislative supremacy, which it defines and regulates'.[26] From this premiss, its proponents reason that all legislation is in principle subject to legal assessment by courts against the norms and principles of the common law, which should, at the very least, inform statutory interpretation.[27] According to the weak form of this theory, there is no conflict between the principle of parliamentary sovereignty and the normative constraints of the common law because courts are simply assuming that parliament would not intend to exercise its sovereignty in derogation of those norms. 'The legislative intentions' a judge 'discerns (or infers) depend' therefore, 'in part, on those principles of justice he takes to be both morally correct and widely shared' as part of the common law context in which legislators operates.[28] According to the strong form of the theory, however, a judge should not only assume that the legislature did not intend to legislate in derogation of common law norms, he is also obliged to exercise judicial power to ensure that it does not do so. In this form, the doctrine is a species of constitutional entrenchment.[29]

Trevor Allan, one of the foremost proponents of common law constitutionalism, places the strong and weak forms of the doctrine on a continuum.[30] In his account, Parliament uses ordinary legislation to adjust the law to address 'new demands' that emerge in the state over time, but it does so on the surface of the law above the level of the 'legal principles that underpin the

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[26] TRS Allan, *Constitutional Justice: A Liberal Theory of the Rule of Law* (OUP 2001) 271.

[27] TRS Allan, 'Legislative Supremacy and the Rule of Law: Democracy and Constitutionalism' (1985) 44 CLJ111, 117-25; TRS Allan, *Law, Liberty, and Justice: The Legal Foundations of British Constitutionalism* (OUP 1994) 54-55, 106-7; TRS Allan, 'Text, Context, and Constitution: The Common Law as Public Reason' in Douglas E Edlin (ed), *Common Law Theory* (CUP 2007) 185, 185; TRS Allan, *The Sovereignty of Law: Freedom, Constitution, and Common Law* (Clarendon Press 2013); Sir John Laws, *The Common Law Constitution* (CUP 2014).

[28] Allan, 'Text, Context, and Constitution' (n 27) 186. See also Allan, 'Legislative Supremacy and Legislative Intention (n 27).

[29] Goldsworthy, 'The Myth of the Common Law Constitution' (n 3) 204.

[30] ibid 186.

general body of rules', which a new law 'leaves untouched'.[31] Allan describes these deep legal principles in different ways at different times. Sometimes they are a matter of 'common reason', as when the plain meaning of Parliament's intent results in a legal or practical impossibility or absurdity. This is not new. Blackstone also advised judges to presume Parliament does not intend results that are 'absurd' or 'manifestly contradictory to common reason'.[32] In other cases, the judge is to take an active and equal role alongside the legislator in harmonising the words of a statute with 'more enduring features of the legal and constitutional landscape',[33] which include not just 'the dictates of reason',[34] but elements of 'history',[35] 'tradition',[36] 'justice',[37] 'fundamental rights',[38] 'morality'[39] and 'political values'.[40] And in still other cases, Allan believes that judges should disapply laws whose main objects conflict with the most deeply entrenched norms and principles of the common law constitution. If we were to measure the depth of Allan's common law constitutionalism at this deep end, we would find that it is as deeply entrenched as, and functionally equivalent to, the basic structure doctrine described in chapter 4.

One does not have to accept Allan's strongest view of the common law constitution to see how a more modest version of it might help a state manage the process of change in an orderly fashion over time. Two features of common law constitutionalism in particular will tend to

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[31] ibid 189.

[32] Blackstone W, *The Oxford Edition of Blackstone: Commentaries on the Laws of England, Vol 1: Of the Rights of Persons* (first published 1765, David Lemmings ed, OUP 2016) 91.

[33] Allan, 'Text, Context, and Constitution' (n 27) 190.

[34] ibid 196.

[35] ibid 198-201.

[36] ibid.

[37] ibid 200.

[38] ibid 195.

[39] ibid 194.

[40] ibid 195.

promote what I have earlier described as continuous, as opposed to disjunctive, change. First, common law constitutionalism is procedurally conservative. Because change in the common law is supposed to occur on a case-by-case basis, with each accretion and adjustment of the law limited to the facts of the specific case within a broader framework of fundamental principles, it should discourage sudden and dramatic changes to fundamental assumptions on which the legal system—and thus the broader society—relies. When change does happen, the law is kept coherent by the requirement that the novel application, limitation, or clarification of precedent must be explained in terms of pre-existing precedent and principle, and a deviation from precedent or the abandonment of a principle must be justified explicitly in terms of the same or other principles.[41] Common law reasoning is thus constantly probing and testing "whether the society has come to see new differences or similarities'" in cases applying pre-existing principle.[42] Requiring change to be justified in light of what came before ensures that change is not only incremental but continuous, as I have used that term in this thesis. But this is just the benefit of the common law system; it is the 'constitutionalism' part of common law constitutionalism that must be justified.

The second element of common law constitutionalism that, in theory, should encourage orderly change is its frequent references to social expectation. A decision, even one that alters existing precedent, is supposed to resonate with the litigants themselves within the broader context of reasonable social expectations. As Allan writes:

> '[t]he overall coherence or reasoned consistency for which the legal order strives is mainly a present, rather than historical, virtue: The rule of law means an order of just governance, according to criteria of justice that can be defended today to inhabitants of the contemporary world. Legal rules must be congruent with prevailing social and moral standards as well as meet requirements of doctrinal consistency.[43]

[41] Ronald Dworkin, *Law's Empire* (Harvard UP 1986) ch 7.

[42] Allan, 'Text, Context, and Constitution' (n 27) 202 quoting Edward H Levi, *An Introduction to Legal Reasoning* (U of Chicago P 1949) 104.

[43] ibid 190.

This, and what Allan elsewhere calls the 'close dependence of legal doctrine on evolving social morality and shifting public attitudes', mean that the common law, like the society it serves, 'is always also in a state of flux as it struggles to accommodate competing pressures and conflicting goals'.[44] If we take proponents of this view at their word and believe that judges are indeed able to discern accurately shifting public attitudes, common law constitutionalism would be expected to help the law keep pace with social change.[45] Judges could then interpret and apply laws in a way that keeps the legal system as a whole moving in step with social expectation, never falling too far behind for want of new legislation nor running too far ahead as the result of it. This intended socio-legal coherence is why Allan has said that courts can play a democracy-enhancing role in the legal system. They might do this in two ways: first, by assuming democratic legislators would not undermine those principles, including freedom of speech and freedom of conscience, that are necessary for democratic governance and interpreting the legislature's acts accordingly; and, second, by complementing the work of legislators by applying laws of general application to specific factual circumstances in ways that cohere with 'public reason'.[46] On this account, Parliament may 'do' democracy at a general level, but it falls to the courts to bind their decisions to the 'demos' in individual cases, including cases Parliament did not anticipate. As long as judges act in good faith and genuinely do try to apply the intention of the legislature (an important caveat), this weak form of the doctrine can be a useful, even necessary, corollary to deliberative democracy.

This is not the place for a full rebuttal of the strong form version of common law constitutionalism,[47] but within the terms of this thesis there is reason to doubt that it will promote

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[44] ibid 201.

[45] For reasons to doubt these assumptions, see Richard Ekins and Graham Gee, 'Ten Myths about Parliamentary Sovereignty' in Alexander Horne, Louise Thompson, and Ben Yong (eds) *Parliament and the Law* (Hart 2022) 299, 315.

[46] Allan, 'Text, Context, and Constitution' (n 27) 200.

[47] For some concerns, see Jonathan Sumption, *Trials of the State: Law and the Decline of Politics* (Profile Books 2019) 15; Ekins and Gee, 'Ten Myths' (n 45).

continuous and orderly change in the law. First, according to the strong form of the doctrine change should be gradual because it is 'case-by-case', but case-by-case change is not necessarily the same as gradual change. A single case can sow widespread uncertainty. For example, in the Supreme Court of Canada's decision in *Saskatchewan Federation of Labour v Saskatchewan*,[48] the majority explained that its novel judgement that the right to strike is protected by the section 2(d) of Charter of Rights and Freedom was the result of a natural evolution of both constitutional doctrine and social morality to a point of convergence. According to Justice Rosalie Abella, this convergence justified the majority's abrupt conclusion that '[i]t seems to me to be the time to give this conclusion constitutional benediction'.[49] Her judgment may have vindicated the hopes of one set of litigants, but it is less clear that it satisfied broader social expectations. Further, by signalling a willingness to overturn its own recent precedent (and a recent unanimous decision at that),[50] the Court settled one question (for now) at the cost of destabilising others. In a single decision, the Court upset expectations in an area of law with far-reaching political and social consequences and raised doubts about its precedents in other areas of law.

Saskatchewan Federation of Labour also illustrates a second cause for concern about the strong form of common law constitutionalism, which is evident from the majority's assumption that its legal reasoning reflected an emergent social consensus. There is no reason to credit that confidence. Neither courts as institutions nor individual judges in one-off cases are well-placed to gauge social expectations, especially when it comes to complex matters of public policy in which multiple competing interests must be reconciled—or not.[51] Nor should we be reassured by Allan's claim

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[48] [2015] 1 SCR 245.

[49] ibid, 3. See also ibid 27-61. The dissent argued vigorously against this interpretation and extension of both the common law and the constitution. ibid 111-113.

[50] Thirteen years earlier, the Court had written that '[j]udging the appropriate balance between employers and unions is a delicate and essentially political matter' and 'the sort of question better dealt with by legislatures than courts'. *RWDSU, Local 558 v Pepsi-Cola Canada Beverages (West) Ltd* 2002 SCC 8, 85.

[51] Fuller (n 22) 394-404. Paul Yowell, *Constitutional Rights and Constitutional Design* (Hart 2018) 56-72. See also JAG Griffith, 'The Common Law and the Political Constitution' (2001) 117 LQR 42, 65; Jeremy Waldron, 'The Core of the Case Against Judicial Review' (2006) 115 Yale LJ 1346; Timothy Endicott, 'Proportionality and

that, so long as 'judicial decisions are fully reasoned, and where the reasons given respond to the arguments of principle that litigants present, informed by the ethical considerations they find persuasive, the most important elements of deliberative democracy are substantially provided for'.[52] Ethical considerations may provide the terms of public debate and shape the context in which those debates take place, and it is true that governance is more effective and legitimate when decision-makers respond to arguments raised by other participants, but *pace* Allan, neither of these is 'the most important' element of deliberative democracy: that would be the *democratic* component of popular representation, for which nothing in the judicial process is an adequate substitute.[53]

The judge, as Allan concedes, has no 'clear or impartial basis for distinguishing principle from prejudice other than his own judgment of the moral and intellectual merits of the rival opinions he encounters in reviewing the public debate'.[54] And although Allan says that individual legislators suffer the same limitation, they benefit from the more open-ended and expansive processes of representative and deliberative democracy, through which social morality is more effectively transmuted into law. The 'hard truth', as JAG Griffith said, is that 'law is not and cannot be a substitute for politics,' and the corollary of this truth is that 'political decisions should be taken by politicians', which '[i]n a society like ours ... means by people who are removable'.[55] Lord Hoffman made a similar point in his unusually blunt postscript in *Secretary of State for the Home Department v Rehman*,[56] where he described the necessary link between power, responsibility, and

Incommensurability' in Grant Huscroft, Bradley Miller and Grégoire Webber (eds), *Proportionality and the Rule of Law: Rights, Justification, Reasoning* (CUP 2014) 336.

[52] ibid 294.

[53] Martin Loughlin, 'What Would John Griffith Have Made of Jonathan Sumption's Reith Lectures?' (2019) 90 PolQ 785, 785. See also Loughlin on three orders of the political and 'the primacy of the political' in in managing social conflict. Martin Loughlin, *The Idea of Public Law* (OUP 2003) ch 3, especially at 51, 790.

[54] Allan, *Constitutional Justice* (n 27) 299.

[55] JAG Griffith, 'The political constitution' (1979) 42 MLR 1, 16. See also JAG Griffith, *The Politics of the Judiciary* (Fontana Press 1977); Graham Gee and Grégoire CN Webber, 'What Is a Political Constitution?' (2010) 30 OJLS 273, 277; Loughlin, 'What Would John Griffith Have Made?' (n 53) 790; Martin Loughlin, 'The Political Constitution Revisited' (2019) 30 King's LJ 5.

[56] [2001] UKHL 47, [2003] 1 AC 15.

legitimacy. Policy decisions, he said, 'require a legitimacy which can be conferred only by entrusting them to persons responsible to the community through the democratic process. If the people are to accept the consequences of such decisions, they must be made by persons whom the people have elected, and whom they can remove'.[57] The unspoken coda is clear: *unlike judges*.

When common law constitutionalism is deployed as an interpretive technique to smooth the blunt application of laws of general application and to preserve an overall consistency and harmony it can be an effective check on unintended and unnecessary—and thus potentially destabilising—legal and social change.[58] It may even have a stabilising and 'ordering' effect.[59] Legislators and courts operate within one legal system, and it is reasonable for judges to assume that legislators act with a similar understanding of a common set entrenched precedents and principles and to interpret their enactments accordingly.[60] This is a shallower degree of entrenchment than Allan's strong form common law constitutionalism, but still a meaningful one. Such an interpretive method, however, must be alert to cases in which Parliament intended a new law to operate in derogation of, rather than in light of, more deeply entrenched statutes or precedents, and must follow Parliament's intent where intent is clear. Allan's belief that 'deliberative democracy and common law adjudication can coexist as mutually supporting pillars'[61] is possible as long as courts play a secondary and subservient role to the democratic bodies that are better

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[57] ibid 42.

[58] Richard Ekins, 'Between Authority and Usurpation? Common Good and Constitutional Government' (2024) 69 AmJJuris 45, 49; Richard Ekins, 'The Balance of the Constitution' (2022) 67 AmJJuris 199, 208. Compare Rosalind Dixon's idea of judges compensating for legislative 'blind-spots'. Rosalind Dixon, 'The Supreme Court of Canada, Charter Dialogue, and Deference' (2009) 47 Osgoode Hall LJ 235.

[59] Adrian Vermuele, *Common Good Constitutionalism: Recovering the Classical Legal Tradition* (Polity Press 2022) 122 drawing consciously on St John Henry Newman, *An Essay on the Development of Christian Doctrine* (2nd edn, James Toovey 1846).

[60] The presumption that statutory law coheres with common law rights has a long history. In the UK, this includes: *Minet v Leman* (1855) 20 Beav 269 at 278; *Cooper v Wandsworth Board of Works* 1863 14 CBNS 180 (per Byles J); *National Assistance Board v Wilkinson* [1952] 2 All ER 255, 259 (*per* Lord Goddard, CJ); *Ridge v Baldwin* [1964] AC 40 (HL), 69 (*per* Lord Reid). In Canada, *Parry Sound (District) Social Services Administration Board v OPSEU, Local 324,* 2003 SCC 42; *Heritage Capital Corp. v Equitable Trust Co* 2016 SCC 19.

[61] Allan, 'Text, Context, and Constitution' (n 27) 201.

attuned by design to the demands of social morality as well as to 'novel insights and altered social expectations'[62] in society and to its 'changing ideas and perceptions'.[63] These are all, in the first instance, socially-entrenched features of a legal system, which are expressed in law through the political process, the product of which is ordinary legislation. When judges presume to second-guess this legislative product, they displace the natural function of social and political entrenchment and effectively entrench their own private and peculiar opinions at a level deeper than either social morality or legislation.

Entrenched ordinary law, which requires deliberation to amend or repeal without raising additional barriers to amendment, is the most common means by which a state manages the process of change. It is how a healthy society ensures its laws are broadly consistent with social morality. In the case of the common law, the courts play an important role in maintaining coherence between precedent and present needs; in the case of statutory law, that job belongs to the legislature; and in the case of a conflict between the statutory law and the common law, that job also belongs the legislature. A legal order may survive tension between those who enact the law and those who apply it, as long as mis-applications of the law (ie, applications contrary to the legislature's past or current intent[64]) may be corrected by the legislature. Allan's desire to impose additional drags on legislative change risks inhibiting social and legal developments deemed necessary by the democratically-accountable and responsive organs of government. At best, it is redundant. Legislators work in the same legal landscape as the courts, a landscape hemmed in and cultivated by the same entrenched

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[62] Allan, *The Sovereignty of Law* (n 27) 290.

[63] Allan, 'Text, Context, and Constitution' (n 27) 200.

[64] When a legislature disagrees with a court's interpretation of a law it expresses its current intention with respect to the law. Whether that current intent accords with the intent of the legislature that enacted or what that earlier legislature would have intended if it had considered the facts of the case, is unknowable. This problem is philosophically interesting but politically unimportant. Parliament's continuing sovereignty means that, while it is possible to talk of it 'changing its mind' about a law without changing the law, we can only *know* Parliament's mind by its changes to the law. cf Grant Huscroft, 'Reconciling Duty and Discretion: The Attorney General in the *Charter* Era' (2009) 34 Queen's LJ 773, 804-810; Hayne (n 5) 277 ('[L]egislatures do not have thoughts').

statutes and precedents the courts must consider. They are already disciplined by the weight of this entrenched law,[65] and especially by those laws termed 'constitutional statutes', to which I now turn.

5.3 Constitutional statutes

At the beginning of section 5.1, I noted that some ordinary laws may embed themselves so deeply in the legal order that they take on a systemic, structural function. Like the provisions of a codified Constitution, over time these laws may form a framework of relatively unchanging legislation within and around which other ordinary laws operate. Their entrenchment gives stability to the legal system as a whole and predictability to the operation of other laws. If there is a difference between how ordinary laws and codified constitutional provisions perform this similar function, it is akin to the difference between the turtle's shell and the snail's shell: the turtle's shell is a living endoskeleton, part of the animal's body containing 'living cells, blood vessels and nerves' that grows and repairs itself from the inside out, while the snail's shell is an inert exoskeleton, a calcified carapace in which the animal lives, which must be constantly enlarged to accommodate the animal's development.[66] The analogy is far from exact, but the key distinction is between a structure made up of ordinary laws that grows out of and with a society through the ordinary process of lawmaking and a codified constitutional structure that a society adopts all at once at one point in time, within which it must operate until it formally changes the structure. In the first case, change in the framework happens as part of the natural process of ordinary legal growth; in the second case, social or legal change requires a separate process of constitutional change to accommodate it. Constitutional statutes are part of the first process.

Constitutional statutes are a feature of each of the three constitutional systems considered in this thesis, even if they are not treated the same way in each. This is because even in legal systems

[65] David Hume, *Essays Moral, Political and Literary* (EF Miller, ed, Liberty Fund 1985) 476-77.

[66] 'How are seashells created? Or any other shell, such as a snail's or a turtle's?' *Scientific American* (3 October 2006) <https://www.scientificamerican.com/article/how-are-seashells-created/> accessed 4 June 2024.

with codified Constitutions, the question of what is 'constitutional'—that is, what is part of the deeply entrenched arrangements and institutions that order important processes of social and legal change—cannot be limited to the codified constitutional text.[67] As described above, the degrees of relative entrenchment of codified Constitutions and the ordinary law blur the distinction between the framework of constitutional law and what is framed. Constitutional statutes exist, as it were, within the blur.[68]

Although constitutional statutes are a feature of all three constitutions, constitutional statutes are most often considered as a feature of the uncodified British constitution, where they have been part of the legal system for centuries[69] even though they have only recently been singled out as distinct from other forms of ordinary law by the courts.[70] Being a feature of the British constitution and being recognised by the courts are, of course, two different things. In the first instance, it is natural for some laws to take on greater social, political, and legal significance than other laws. These include laws that reflect a landmark change in the political order, laws that have a special importance within the social imaginary,[71] and laws that establish conditions on which subsequent laws and institutions rely. When passing new laws, a legislature must, as a matter of course, consider the relative legal entrenchment of these older statutes. Accounting for and

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[67] Graziella Romeo, 'A Material Understanding of Constitutional Changes' in Marco Goldoni and Michael A Wilkinson, *The Cambridge Handbook on the Material* Constitution (CUP 2023) 261, 273.

[68] Ernest A Young, 'The Constitution Outside the Constitution' (2007) 117 Yale L J 408, 428-30, 435, 457.

[69] Giovanni Sartori referred to these as 'solemn written documents' among which he included 'the Magna Charta, the Confirmation Acts, the 1610-1628 Petition of Rights, the Habeas Corpus Act of 1679, the Bill of Rights, the Act of Settlement, etc.' Giovanni Sartori, 'Constitutionalism: a Preliminary Discussion' (1962) 56 Am Pol Science Rev 853, 855. See also JWF Allison, *The English Historical Constitution* (CUP 2007) 2. UCL's Constitution Unit has helpfully surveyed three leading lists of 'constitutional statutes': the Constitution Unit itself; a paper written by The Centre for Political and Constitutional Studies for the Political and Constitutional Reform Committee of Parliament; and the Oxford Constitutions of the World project. See James Melton, Christine Stuart and Daniel Helen, *To Codify or Not to Codify? Lessons from Consolidating the United Kingdom's Constitutional Statutes* (The Constitution Unit, UCL 2015) 11-12, <www.ucl.ac.uk/constitution-unit/sites/constitution-unit/files/162.pdf > accessed 23 November 2023.

[70] See Vernon Bogdanor on judges codifying an English constitution 'piecemeal'. Vernon Bogdanor, 'Conclusion' in Vernon Bogdanor (ed), *The British Constitution in the Twentieth Century* (OUP 2003) 719.

[71] Charles Taylor, *Modern Social Imaginaries* (Duke UP 2004) 23.

adapting the law to these enduring statutory precedents is how a legislature develops a small-c constitutional tradition, what Loughlin has described as a 'silent communion between contemporary political actors and the regime's founders'.[72] A constitutional tradition is worked out over time as successive legislatures weave the new into the old in a process that 'conserves what continues to work while sloughing off that which is no longer of practical value'.[73]

There are two things to note about Loughlin's useful description of this process. The first is that it is first and foremost a process by and for *political* actors, rather than for courts. Here his analysis accords with Ekins's description of the way 'Parliament deliberates about how or if to change the law, including the law of the constitution, by reference to the existing law and constitution, which form the context in which it acts'.[74] The legal changes that flow from the entrenchment of constitutional statutes are thus determined both firstly and finally by the legislature. Where it is necessary for courts to determine the effect of a constitutional statute on a later law, that legal effect should flow from the most reasonable account of the legislature's intention. 'It is in this sense'—ie, the sense that follows from the legislature's presumed desire not to upset social or legal expectations created by certain deeply entrenched statutes—that those statutes 'are *constitutional* statutes, *viz.* they form part of the constitution, which forms part of the context in which successive Parliaments act'.[75]

The second thing to note is that, while Loughlin speaks of the dynamic between 'contemporary political actors and the regime's founders', the notion of 'founders' should be understood expansively to encompass not just a single founding generation but all previous generations who have presided over significant changes to the law that we wish to preserve. This

[72] Martin Loughlin, 'The Silences of Constitutions' (2019) 16 ICON 922, 929.

[73] ibid.

[74] Ekins, 'Legislative freedom' (n 5) 603.

[75] ibid (emphasis added).

is especially obvious in a country like the United Kingdom, where the origins of the constitutional order are traditional and the constitutional 'founders' include not just early codifiers such as Æthelberht, Ine, and Offa and later recorders such as Ælfred the Great and King John and the Barons at Runnymede, or the parliamentarians of the Civil War, the Restoration, and the 'Glorious' Revolution, but also the various parliaments that passed the Reform Acts, the Parliament Acts, the Devolution Acts, the Human Rights Act 1998, and the Constitutional Reform Act 2005. Even in a country with a codified Constitution like the United States, the 'founders' of the constitutional order include not just the men who participated in the Constitutional Convention of 1787, but also the men who drafted and ratified the post-Civil War amendments and the men and women who enacted the major New Deal legislation and Civil Rights-era laws. In each case, this is because the constitutional order today incorporates official recognition of the special importance to the legal system of specific statutes enacted over time to address novel and evolving problems. The structural role played by these constitutional statutes means that we can say that the British constitution was not planned but is nevertheless functional, while the American Constitution functions in ways that were not planned. This is exactly what one would expect of constitutional orders that have been entrenched neither all at once nor at a single level, but at varying codified and statutory depths over time.

Even where these degrees of statutory entrenchment are obvious in practice, they have sometimes been denied in theory. As recently as the early 20th century, Dicey could declare that all Acts of the British Parliament were of the same constitutional status. 'There is no law which Parliament cannot change', he wrote, 'or (to put the same thing somewhat differently), fundamental or so-called constitutional laws are under our constitution changed by the same body and in the same manner as other laws, namely by Parliament acting in its ordinary legislative character.'[76] So far, so true. Warming to his theme, however, Dicey went too far:

[76] AV Dicey, *Introduction to the Study of the Law of the Constitution* (8th edn, MacMillan 1915) 84.

> A Bill for reforming the House of Commons, a Bill for abolishing the House of Lords, a Bill to give London a municipality, a Bill to make valid marriages celebrated by a pretended clergyman, who is found after their celebration not to be in orders, are each equally within the competence of Parliament, they each may be passed in substantially the same manner, they none of them when passed will be, *legally speaking*, *a whit more sacred or immutable than the others*, for they each will be neither more nor less than an Act of Parliament, which can be repealed as it has been passed by Parliament, and cannot be annulled by any other power.[77]

This is a formally correct (which is the least interesting way of being correct) and accurate account of the English constitution in 1915 according to Dicey's own narrowly-stated legalistic terms ('legally speaking').[78] But, despite his nod towards the idea of 'fundamental or so-called constitutional laws' there is a reluctance here to admit the possibility of a qualitative difference between things that are formally equal. Common sense and historical practice, however, tell us that there is a meaningful distinction between (to use Dicey's examples) laws governing the composition of the House of Commons, on the one hand, and the formalisation of a handful of cases of marriage fraud, on the other.[79] Or, to take even more starkly contrasted examples, it is clear that the Habeas Corpus Act 1679 has been, in practice, 'more ... immutable' than the provision of The Highway Code setting speed limits.[80] The Habeas Corpus Act has clearly been more fundamental, more constitutional. If there is, *legally speaking*, but one class of ordinary laws, then we must look beyond legal categories to account for the obvious distinctions between them.

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[77] ibid 84-85 (emphasis added).

[78] Even then, the extent of his correctness has been questioned, though that analysis is beyond the scope of this thesis. See Pavlos Eleftheriadis, 'Parliamentary Sovereignty and the Constitution' (2009) 22 Canadian J of L and Jurisprudence 267.

[79] For a similar discussion, see Athanasios Psygkas, 'The United Kingdom's Statutory Constitution' (2020) 40 OJLS 449, 449-50.

[80] Key provisions of the former have endured for more than three centuries, while the latter has been changed roughly once a generation.

5.3.1 Three Categories of Constitutional Statutes

At the most general level, constitutional statutes are not simply statutes that remain unrepealed and substantially unamended, but statutes the repeal or substantial amendment of which has become politically unthinkable.[81] By this measure, constitutional statutes identify themselves over time as they are recognised and treated as particularly deeply entrenched by the political actors who choose to legislate around them.[82] Like archaeologists mapping an excavation site, if we prod the statute books and plant flags where we find the firmest political resistance to change, we can begin to map the relative depths of constitutional statutes in the legal order. That is the general account. It is possible, however, to distinguish between different types of constitutional statutes based the different roles they play in the legal system. They can, for example, be divided into laws that come to be viewed as especially significant sometime after their enactment (either by legislators or, increasingly, by courts) and those that were intended by the legislature to be more deeply entrenched than other laws at the time of their enactment.

I will call laws of the first kind *landmark* statutes, as they have been subsequently recognised as legal landmarks by the political or legal actors whose later work accepts and treats them as notable, fixed features of the legal landscape.[83] These are statutes that have, either as a result of their venerable age, their foundational role in the political system, or their totemic social

[81] At least, that is, until their repeal or amendment becomes thinkable. As I will show, statutes may lose their 'constitutional' status.

[82] It is what we recognise today and not what may have been intended that matters here. As Aristotle knew, the man who lives in a house knows more about the house than the man who built it. Aristotle, *The Politics* (Stephen Everson ed, CUP 1996) III.11.1282a14.

[83] Terminology here is complicated by the fact that, in the UK, the entire corpus of constitutional law is ordinary statutory law, while the Canadian and US legal systems distinguish between codified constitutional law and ordinary law. Accordingly, it makes sense in the UK to call these 'constitutional statutes' while in the Canadian context, they are usually called 'quasi-constitutional statutes'. I have adopted Bruce Ackerman's term, 'landmark statutes', because the concept that name fits my intent here and makes sense in all three jurisdictions. Bruce Ackerman, *We the People: The Civil Rights Revolution* (Harvard UP 2015) 8–9. William Eskridge has used the term 'super-statutes' in a similar way. William N Eskridge and John Ferejohn, 'Super-Statutes' (2001) 50 Duke LJ 1215, 1216, 1266-67. See generally Rivka Weill, 'Constitutional Statutes or Overriding the Court-On Bruce Ackerman's We the People: The Civil Rights Revolution' (2016) 13 Jerusalem Rev of Legal Studies 1. The concept of 'super-precedents' in the American legal system is related. See Michael J Gerhardt, 'Super Precedent' (2005) 90 Minnesota L Rev 1204.

importance, become so rooted in the legal system that their removal has become almost unthinkable. I would include in this category the Reform Acts in the United Kingdom; human rights legislation in Canada[84]; and the Civil Rights Act of 1964 and the Voting Rights Act of 1965 in the United States. This category could be expanded to include statutes that protect specific social institutions or political arrangements, such as state healthcare or pension programs, which are not formally entrenched and do not supersede other laws, but are so popular that in practice they are very difficult and perhaps impossible to change.[85] Though my definition of landmark statutes is broad, I exclude socially entrenched statutes of this kind for reasons set out in chapter 6.

I will call laws of the second kind *quasi-constitutional* statutes, following the Canadian nomenclature, because their status at the time of enactment is close to that of a codified constitutional provision—that is, they were intended at the time of their enactment to be not merely of significant political import but to be more deeply entrenched within the legal system than an ordinary law. In their strongest form, this quasi-constitutional status is explicit in the language of the statute, as it is in the *Canadian Bill of Rights* (1960), Alberta's *Bill of Rights*, and Quebec's *Charter of Human Rights and Freedoms* (1975). Each of those laws expressly claims primacy over all other laws, past and future, that do not expressly derogate from them.[86] It is a quirk of Canadian legal history that these primacy clauses were so readily accepted even though they were all enacted before the institutionalisation of substantive judicial review under the *Constitution Act, 1982*. According to the orthodox account of British law, which generally prevailed in the Canadian

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[84] *New Brunswick (Human Rights Commission) v Potash Corporation of Saskatchewan Inc* 2008 SCC 45, 19.

[85] Young (n 68) 461 (discussing the US Social Security Act).

[86] See *Canadian Bill of Rights*, RSC 1985, c 44, s 2 ('Every law of Canada shall, unless it is expressly declared by an Act of the Parliament of Canada that it shall operate notwithstanding the *Canadian Bill of Rights*, be so construed and applied as not to abrogate, abridge or infringe or to authorize the abrogation, abridgment or infringement of any of the rights or freedoms herein recognized and declared.'); *Alberta Bill of Rights,* RSA 2000, c A-14, s 2; *Quebec Charter of Human Rights and Freedoms*, RSQ, c C-12, s 52. For an example of a court applying the *Canadian Bill of Rights*, see *R v Drybones* [1970] SCR 282; for a court recognising the quasi-constitutional status of the *Canadian Bill of Rights* and the *Alberta Bill of Rights*, see *Lavallee v Alberta (Securities Commission)* 2009 ABQB 17, 166; for a court applying the *Quebec Charter of Human Rights and Freedoms* to invalidate another law, see *Chaoulli v Quebec (Attorney General)* 2005 SCC 35.

legal tradition, such clauses should be legally inert.[87] More recently, judicial recognition of a legally-superior category of 'constitutional statutes' may have partially qualified this principle in the United Kingdom.[88] I am not aware of any ordinary American laws that could be characterised as quasi-constitutional in this way, at least none that purport to quasi-constitutional status on their face.

In the case of some quasi-constitutional statutes, we may infer from the form of the laws or the occasion of their enactment that they were intended not merely to endure but to be treated as specially entrenched and to be 'legislated around' by future legislatures. Laws of this kind include Magna Carta, the UK's Bill of Rights 1689,[89] the Act of Settlement 1701, the Act of Union 1707, and perhaps the Parliament Acts 1911 and 1949.[90] The Human Rights Act 1998 also presents an interesting case of a law that is more than ordinary but less than constitutional (or quasi-constitutional). Although it preserves parliamentary supremacy, it nevertheless alters the relationship between the courts and Parliament. Section 3 of the Act, in particular, which shifts the interpretation of legislation away from legislative intent towards a meaning that 'is compatible with the Convention rights', exhibits this intermediate degree of entrenchment.

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[87] The classic statement of this principles was in *Ellen Street Estates Ltd v Minister of Health* [1934] 1 KB 590. 'The Legislature cannot, according to our constitution, bind itself as to the form of subsequent legislation, and it is impossible for Parliament to enact that in a subsequent statute dealing with the same subject-matter there can be no implied repeal'.

[88] The principle may recently have been resuscitated by the UK Supreme Court in *Allister & Peeples, Re Applications for Judicial Reviews (Northern Ireland)* [2023] UKSC 5. See Edmund Robinson, '*Re Allister* and the entrenchment 'road not taken': A rejoinder to Kacper Majewski', UK Const L Blog (1 March 2023) <https://ukconstitutionallaw.org/2023/03/01/edmund-robinson-re-allister-and-the-entrenchment-road-not-taken-a-rejoinder-to-kacper-majewski/> accessed 12 June 2024. For the case against, see Ekins, 'Legislative freedom' (n 5).

[89] Joseph Jaconelli suggested that Dicey believed there was a constitutional convention against repealing Article 4 and Article 6 of the Bill of Rights 1689, which respectively prohibit taxing and 'the raising or keeping [of] a standing army within the kingdom during time of peace' without parliamentary consent, and that this convention undergirds the convention that parliament must be recalled annually (because without renewed consent, the government would be in breach of Article 6). Joseph Jaconelli, 'Do Constitutional Conventions Bind?' (2005) 64 CLJ 149, 157-58.

[90] Note that the inclusion of Magna Carta shows that form, occasion, and intent do not guarantee permanence. Magna Carta has been considered the most constitutional of constitutional statutes since at least the seventeenth century, but only three clauses remain unrepealed. Claire Breay, *Magna Carta: Manuscripts and Myths* (The British Library 2010) 48. Eventually, the irrefragable force of change and the weight of time may wear away even the most deeply entrenched laws.

There is also a third category comprising those constitutional statutes that do not fit neatly into either of the first two categories. These are ordinary laws that frame the functioning of important parts of the legal and governmental system, so I will call them *framework* statutes. Laws of this kind include those that authorise key institutions and procedures of the judicial system. They include, in the United States, the US Judiciary Act, which 'establishes the District Courts and Circuit Courts of Appeal and regulates the jurisdiction of the Supreme Court and the number of its justices';[91] in Canada, the Federal Courts Act 1985 and the Tax Court of Canada Act 1985 (and their predecessors) and the Supreme Court Act 1985, which is the successor to the Supreme and Exchequer Courts Act 1875; and in the United Kingdom, the Courts Act 1971 and the Constitutional Reform Act 2005. In this category we might also include the UK's Acts of Union and the Devolution Acts, which perform a function similar to those provisions of the codified Constitutions of Canada and the United States that allocate powers between the federal and regional (provincial or state) governments.[92] This category also includes laws governing the procedures of judicial and administrative law and the functioning of tribunals, such as title 28 of the United States Code[93] and the Administrative Procedure Act[94] in the United States, and the Tribunals, Courts and Enforcement Act 2007 in the United Kingdom. What distinguishes these laws from other categories of constitutional statute is that they do not necessarily attract significant popular social or political reverence, nor do they claim precedence over other statutes. They are, however, more deeply entrenched than other laws because they are central beams of the legal system; they have been entrenched in practice by the laws, procedures, and expectations that have

[91] Yowell, 'A Proposal' (n 12) 321.

[92] *Jackson v Attorney General* [2005] UKHL 56, [2006] 1 AC 262, 102 ('The settlement contained in the Scotland Act 1998 also points to a divided sovereignty') (Lord Steyn). On the entrenched principles of the Acts of Union 1707, see ibid 106.

[93] Successor to The Judiciary Act of 1789, 1 Stat 73.

[94] Public Law 79–404, 60 Stat 237.

been built in reliance on them.[95] Although they are ordinary laws that can be (and have been) adjusted over time, they are constitutional statutes because they could not be repealed altogether without being replaced by laws performing the same or similar functions without undermining the stability and predictable functioning of the legal system.

These three categories are not water-tight. Some statutes may reasonably be assigned to more than one category. For example, a framework statute might also be a landmark statute, and the Devolution Acts in the United Kingdom exhibit elements of all three types: they were quickly, if not immediately, recognised politically as legal landmarks; they perform the quasi-constitutional function of allocating powers between governments; and they have become part of the framework of the legal order in each devolved jurisdiction, where laws have been enacted in reliance on them. In the rest of my analysis of constitutional statutes, I will focus on the doctrine as it has developed in the United Kingdom, where it has been more fully discussed and more controversial, but the principles I discuss and conclusions I reach apply, *mutatis mutandis*, to the other jurisdictions.

5.3.2 Another Way to Categorise Constitutional Statutes

Another way to categorise constitutional statutes would be to divide them between laws that define the power of political institutions or allocate power between them and laws that secure rights for the people or against the state. Examples of the first kind in the United Kingdom would include the framework statutes described above, the Act of Settlement 1701, the Acts of Union 1707, the Treaty of Union with Ireland Act 1800, the Parliament Acts, the Devolution Acts, the Constitutional Reform Act 2005, while examples of the second kind would include the Petition of Right 1628, Habeas Corpus Act 1679, the Bill of Rights 1689, the Reform Acts and the Human Rights Act 1998. In Canada and the United States, most (but not all) constitutional statutes are of the rights-securing kind, including, in Canada, federal and provincial human rights statutes, the

[95] Young (n 68) 458 n247.

Canadian Bill of Rights, and the *Official Languages Act*, and, in the United States, the Civil Rights Act of 1964 and the Voting Rights Act of 1965.

Confronted by these two apparently disparate types, Farrah Ahmed and Adam Perry, in the leading article on the topic, have attempted to define the broader phenomenon of constitutional statutes in a way that includes both. Armed with such a definition, they hope, we might be able to 'identify constitutional statutes (including newly enacted ones)' and decide whether 'the special treatment accorded to [them] is justified'.[96]

Farrah Ahmed and Adam Perry begin their investigation of 'constitutional statutes' with a conventional nod to the unique nature of the British constitution: 'It matters', they write 'in most other jurisdictions, whether a law is part of the constitution,'[97] but until recently, in the United Kingdom the 'precise definition of the constitution' was an academic exercise and 'not something judges and lawyers needed to worry about'.[98] This all changed, they say, in 1972 when Parliament voluntarily subordinated its sovereignty to the law-making bodies of the three then-existing European 'communities'. Even this subordination, however, was done in a typically British way, through a statute enacted by Parliament that could (and eventually would) be repealed by the same authority. The European Communities Act 1972 thus preserved a residual parliamentary sovereignty, even if for almost half a century that power was merely notional or symbolic.[99] The novel constitutional effect of the European Communities Act 1972 was brought into relief in the 1991 when, in *Factortame (No 2)*,[100] the House of Lords distinguished it from 'ordinary' acts of

[96] Farrah Ahmed and Adam Perry, 'Constitutional Statutes' (2016) 37 OJLS 461, 465.

[97] ibid 461.

[98] ibid 462.

[99] For an argument that legal integration with Europe contributed to the death of parliamentary sovereignty sometime around 1980, see NW Barber, *The United Kingdom Constitution: An Introduction* (OUP 2021) 4, 68-73. See also Sir John Laws, *The Constitutional Balance* (Hart 2021) 110, 112.

[100] [1991] 1 AC 603 (HL).

Parliament and declined to apply the doctrine of implied repeal to supersede its provisions.[101] More than a decade passed before Mr Justice Laws attempted to provide a principled theoretical basis for this idea. In *Thoburn v Sunderland City Council*,[102] he claimed that the European Communities Act was a 'constitutional statute' and, as such, its provisions could only be repealed by express statutory provision. This new category placed the Act somewhere between an ordinary statute and an entrenched constitutional provision. An ordinary statute could still repeal all or part of it, but it must do so using what Ahmed and Perry call 'exceptionally clear words',[103] or as Mr Justice Laws put it, 'by express words in the later statute, or by words so specific that the inference of an actual determination to effect the result contended for was irresistible'.[104]

Ahmed and Perry rightly note that Mr Justice Laws's idea of a 'hierarchy of Acts of Parliament' was not new,[105] but the idea that '*we*' (Laws, J, speaking for the judiciary) 'should recognise [the] hierarchy'[106] was. While the much earlier cases of Re Parliamentary Privileges Act 1770 and The Earl of Antrim's Petition may have 'advanced similar ideas ... *Thoburn* was the first time that a court had said that every constitutional statute is protected from implied repeal'.[107] *Thoburn* and subsequent cases confirming its judgment overturned the 'Diceyan orthodoxy' under which a statute's 'constitutionality' was of theoretical interest but had no legal effect on its application vis-à-vis other laws.[108] If not quite a 'constitutional revolution', Ahmed and Perry

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[101] But see Ekins, 'Legislative Freedom' (n 5).

[102] [2002] EWHC 195 (Admin), [2003] QB 151.

[103] Ahmed and Perry (n 96) 462.

[104] *Thoburn* (n 102) 63.

[105] ibid 62; Ahmed and Perry (n 96) 462. See also Laws, *The Constitutional Balance* (n 98) 113.

[106] *Thoburn* (n 102) 62 (emphasis added).

[107] Ahmed and Perry (n 96) 462-3.

[108] ibid 464. Ahmed and Perry reference the subsequent cases of *R (Governors of Brynmawr Foundational School) v The Welsh Ministers* [2011] EWHC 519, *H v Lord Advocate* [2012] UKSC 24, [2013] 1 AC 413 (Lady Hale and Lord Kerr agreeing), and *R (HS2 Action Alliance Ltd) v Secretary of State for Transport* [2014] UKSC 3, [2014] 1 WLR 324. For a discussion of the constitutionalising effect of this last decision, see Paul Craig, 'Constitutionalising constitutional law: HS2' (2014) PL 373.

describe these developments as 'something novel, and perhaps something more: the first steps towards a graduated legal system, where the constitutional is systematically set apart and above the non-constitutional'.[109] Translating this observation into the language of this thesis and considering the degrees of entrenchment that I have already identified in both constitutional and ordinary law, the idea that some laws should be more deeply entrenched than others is not surprising. I have already described three different ways in which some statutes may be considered more foundational, more enduring, and more important to the legal system than others. At least some of those reasons will apply to at least some laws in every legal system, which means that in every legal system some laws will always be more constitutional than others. What was truly new in *Thoburn* was the idea that the courts might establish and police the hierarchy.

The problem with courts fashioning a constitutional order out of ordinary statutes is evident from the difficulty Mr Justice Laws had in describing constitutional statutes. His initial working definition was that a statute is 'constitutional' if it: 'conditions the legal relationship between citizen and State in some general, overarching manner, or (b) enlarges or diminishes the scope of what we would now regard as fundamental constitutional rights'.[110] Ahmed and Perry rightly identify two problems with this definition: it is overinclusive in so far as most of these constitutional statutes include provisions that are not relevant to the reasons for considering other parts of the statute to be 'constitutional';[111] and it is underinclusive in that it does not account for some constitutional statutes, including those I described at the beginning of this section as politically-definitional and power-allocating statutes, which do not directly concern the relationship between the citizen and the State or fundamental constitutional rights.[112] I would add a third

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[109] ibid.

[110] *Thoburn* (n 102) 62.

[111] James Bryce made the same observation more than a century earlier. James Bryce, 'Flexible and Rigid Constitutions' in *Studies in History and Jurisprudence, vol 1* (OUP 1901) 124, 133.

[112] Ahmed and Perry (n 96) 466.

objection, which is that the second part of Mr Justice Laws's definition begs the question at the heart of the problem: what is constitutional, he said, turns on our ability to identify what '*we*' (the judges standing in for the people) 'now regard as fundamental constitutional rights'.[113] In other words, a court should treat a statute as constitutional if it affects rights that are, in the court's opinion, constitutional. The definition is circular, the promised elucidation illusory. For the reasons discussed in section 5.2 of this chapter, courts are neither designed nor well-placed to assess and track public morality as it evolves over time.[114] We have other, democratic, institutions for that.

Ahmed and Perry next consider an alternative definition of constitutional statutes offered by David Feldman, who posits that 'constitutional legislation establishes state institutions and confers functions, responsibilities and powers on them'.[115] This definition flows from his view that 'the key function of a constitution is ... to constitute the state and its institutions and confer functions, powers and duties on them'.[116] In Ahmed and Perry's view, while Mr Justice Laws had focussed too narrowly on the rights of citizens, Feldman focuses too narrowly on state institutions. His definition would exclude statutes like the Human Rights Act 1998 while at least plausibly bringing into the definition relatively insignificant statutes such as the Coroners and Justice Act 2009, which 'establishes' the office of Chief Coroner, confers certain 'functions' and 'powers', and imposes certain 'duties'.[117] 'Indeed', they despair, 'any statute that contributes to the machinery of state administration would satisfy Feldman's definition'.[118] The problem with both Laws' and Feldman's definitions, they conclude, is that they both suppose that constitutional statutes can be

[113] *Thoburn* (n 102) 62 (emphasis added).

[114] It is not a primary role of the courts to assess public morality because they are not institutionally equipped to do so, and they are not institutionally equipped to do so because it is not their primarily role.

[115] David Feldman, 'The Nature and Significance of "Constitutional" Legislation' (2013) 129 LQR 343, 350.

[116] ibid.

[117] Ahmed and Perry (n 96) 467.

[118] ibid.

identified by their subject matter alone—either individual rights or institutional functions—while ignoring the qualitative, and likely normative, components of other constitutional statutes.

The definition that Ahmed and Perry offer instead is that constitutional statutes 'make a substantial difference to, *ie* substantially *influence*, the normative positions of state institutions'.[119] This influence can be measured directly—how much does a statute itself determine our governing arrangements?—and indirectly—how much does a statute make a difference to the strength or effectiveness of other governing arrangements?[120] Notably, this definition 'suggests that it is possible for a statute to acquire or lose constitutional status over time, as its indirect importance waxes or wanes, an implication which accords well with the "historic" or incremental nature of the British constitution'.[121] This definition is an improvement on the other two because it would account for the legal demise (mostly through repeal, but also irrelevance) of much of Magna Carta over time as well as the repeals of the European Communities Act 1972 and that most briefly-constitutional of statutes, the Fixed-term Parliaments Act 2011.

Ahmed and Perry also helpfully clarify that the category of constitutional 'statutes' is a misnomer, as in many cases it is not the whole statute that we care about, but only 'the constitutional *part* (or *parts*) of a constitutional statute'.[122] This is a clear difference between constitutional statutes and codified constitutional provisions. In a codified Constitution, there is no formal distinction between its provisions; everything is constitutional to one degree or another. There may be different levels of formal entrenchment, as we have seen, but by definition there are no provisions in a codified Constitution that are not constitutional. Even to remove a superfluous comma from the American Constitution or from Canada's Charter of Rights and Freedoms would

[119] ibid 469. Later stated as 'a constitutional statute is a statute that is about state institutions and which substantially influences, directly or indirectly, what those institutions can and may do'. ibid 471. Graziella Romeo offers a similar definition. Romeo (n 67) 261, 264.

[120] ibid 469-70.

[121] ibid 473.

[122] ibid 475.

trigger the constitutional amending formula. What are we to make of this? First, a constitutional statute remains a statute. Even under the strictest application of the doctrine, an ordinary statute may still repeal part or all of a constitutional statute provided Parliament makes its intention explicit (and in the case of a law like the *Canadian Bill of Rights*, it uses the specified statutory language). Second, the idea of constitutional statutes is not as helpful or meaningful as it first appears. It is really just another way of saying that some provisions of ordinary law (not always entire statutes) are more entrenched in practice than others. The reason for this, as Ahmad and Perry explain, is that unlike the repeal of a provision of other ordinary laws, 'the repeal of a constitutional statute would be highly disruptive: it would dramatically alter what state institutions can and may do, and it would lead to the alteration or abolition of the various norms that depended on that statute'.[123] It is not obvious that we need a jurisprudential doctrine to explain this idea, and certainly there is no need for courts to invent and apply one.

5.3.3. Depth of ordinary legal entrenchment as respect for legislative intent

The degree to which a provision of ordinary law is 'constitutionally' entrenched is a matter, first, for legislators to determine in their treatment of existing legislation. Only if there is genuine uncertainty about whether legislators intended to disrupt a longstanding reliance interest that is entrenched in earlier legislation do courts need to exercise judgment about whether and to what extent later legislation should be interpreted to nullify those interests. As Bill Eskridge has evocatively described them, these 'reliance interests are the "dark matter" of our nation's law of interpretation: unseen, underappreciated, but exercising a strong gravitational force that cuts across doctrines and methodologies.'[124] It is thus reasonable for courts to presume that the legislature does not intend to destabilise the legal or social order inadvertently, which would be the

[123] ibid 477.

[124] William N Eskridge Jr, 'Reliance Interests in Statutory and Constitutional Interpretation' (2023) 76 Vanderbilt L Rev 681, 683.

consequence of undoing a law on which so much of the legal system and so many social expectations rely.[125] This means that constitutional provisions of ordinary laws should be treated as more deeply entrenched than other provisions of ordinary law not because the statute in which they are found is one of a number of constitutional statutes that have been singled out by the courts for special treatment, but because that is the result that most likely accords with legislative intent. There is no need to create a novel doctrine of 'constitutional principles'[126] to be fitted onto legislation as though it were the business of courts to bring the legislature to heel. The idea that longstanding or deeply-embedded constitutional principles should not be abrogated unless that is the legislature's intent is a courtesy extended by the courts to the legislature. It recognises that legislators' act always in the context of existing legislation and common law principles as well as relevant customs, habits, and mores and, especially in specialised areas of law, common social understandings and *modi operandi*, and it assumes that the legislature respects these reliance interests as much as the courts do.[127] Concomitant with this courtesy, however, is the recognition that, because the legislature is the institution best placed to keep law aligned with social morality and public expectations,[128] when it is clear that the legislature does in fact intend to change a deeply entrenched provision of ordinary law or to exempt a new law from the normal application of such a provision, the courts must give effect to that intention or risk the law falling out of step with public attitudes and popular approbation.[129]

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[125] Ahmed and Perry (n 96) 477. ('The presumption of consistency … is justified where continuity is given and change is noteworthy news.')

[126] Laws, *The Constitutional Balance* (n 99) 114-16.

[127] Christopher Forsyth, 'Heat and Light: A Plea for Reconciliation' in Christopher Forsyth (ed), *Judicial Review and the Constitution* (Hart 2000) 397. This assumption is as reasonable today as when St Aquinas described it almost eight centuries ago. St Thomas Aquinas, *Summa Theologiae*, II-I q96 a6; see also John Finnis, *Natural Law and Natural Rights* (2nd edn, OUP 2011) 290; Richard Hemholz, *Natural Law in Courts* (Harvard UP 2015) 74.

[128] Christopher Forsyth, 'Of Fig Leaves and Fairy Tales: The Ultra Vires Doctrine, the Sovereignty of Parliament and Judicial Review' in Christopher Forsyth (ed), *Judicial Review and the Constitution* (Hart 2000) 46.

[129] Ekins, 'Legislative freedom' (n 5) 603.

5.4 Conclusion

A healthy constitutional jurisprudence works to promote continuity in the legal system not to serve an abstract idea of legal integrity[130] (though integrity in the law may be desirable) but because this is the most likely way for a legal system to entrench the law at different levels in a way that promotes social stability over time by requiring deliberated decisions to amend or repeal laws of various degrees of importance to the legal system and the society as a whole. As with the development of the common law, judicial application of statutory law is most likely to serve the interest of constitutional stability when courts work *with* legislatures as the latter manage the challenges of change in light of existing laws and social attitudes and expectations (and change the law along with changing social attitudes and expectations). The result will be different depths of legal entrenchment which is best measured by the degree of legislative respect for its own precedent as well as common law precedent, rather than by courts conducting their own depth soundings and adapting the product of the legislature to their independent findings.

[130] Dworkin (n 41) 177-84.

Chapter 6: NON-LEGAL ENTRENCHMENT

'No constitution is exhausted by its law'.[1] Studying the institutions and arrangements by which a state orders itself without accounting for non-legal practices means ignoring much that is staring you in the face. If you only considered the written elements of the British or Canadian constitutions, for example, you would learn little about the role of the prime minister and the powers of the cabinet, which were almost entirely absent from the law until well into the twentieth century.[2] Even today, much of the relationship between the prime minister, the cabinet, and the Crown takes place between and around written parts of the constitution. In the Canadian context, you could be forgiven for assuming that the prime minister exercised only ceremonial organisational powers, as the only references to the office in the *Constitution Act, 1982* are to the requirement that the Prime Minister convene a constitutional conference within 15 years of the patriation of the constitution and that he must 'invite representatives of the aboriginal peoples of Canada to participate in the discussion' of any proposed amendment to Aboriginal rights provisions in the constitution,[3] while the *Constitution Act, 1867* does not mention the office at all. In the American context, you might assume that the President's role in legislation and domestic policy-making is limited to the veto power and that his other duties are exhausted by his work as Commander in Chief, the treaty-making and appointment powers, receiving foreign ambassadors, faithfully executing the laws, soliciting the opinions of executive office holders, and an occasional communication to Congress in unspecified form on 'the State of the Union'.[4] And you would be left wondering what it is the tens of thousands of executive branch officials do all day in all those cavernous Washington, DC office blocks, and under whose authority.

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[1] John Gardner, 'Can there be a written constitution' in Leslie Green and Brian Leiter (eds), *Oxford Studies in the Philosophy of Law, volume 1* (OUP 2011) 168.

[2] Ivor Jennings, *Cabinet Governmen*t (CUP 1959) 2.

[3] *Constitution Act, 1867* ss 35.1, 49.

[4] United States Constitution, Article II ss 2, 3.

John Gardner warned that theorists who 'decry excessive legalism about the constitution' often 'fall into a similar trap at the next level by being excessively constitutionalist about politics, or at the next level still by being excessively political about life'.[5] If there is one error I am determined to avoid in this thesis, it is that series of traps. At the same time, in insisting on the importance of non-legal entrenchment, I am not arguing for its pre-eminence. Constitutional, legal and non-legal (political and social) entrenchment are mutually reinforcing features and none of them alone is sufficient to order the institutions and arrangements of a state. This multi-layered reinforcement is the result of the overlapping and interlacing of these different forms of entrenchment, which exist on an overlapping continuum of practical depth. As I explained in chapter 3, this means that the form of entrenchment is not precisely correlated with its depth if we measure depth in terms of the practical difficulty of change. I illustrated this point in chapter 5, where I showed that some ordinary laws may be more deeply entrenched (and might therefore be described as more 'constitutional') than some provisions of a codified Constitution in the same state. Measured again in terms of relative practical entrenchment, I will show in this chapter that there is a similar overlap between the formal categories of legal and non-legal rules and that, in practice, the freedom of action of officials may be as or more constrained by non-legal considerations as they are by legal restraints—including when it comes to changing those restraints.

The chapter is divided into four parts, which reflect the diverse nature of non-legal entrenchment. The first two parts examine forms of political entrenchment, and the second two parts consider forms of social entrenchment. In making this distinction, I consider entrenchment to be *political* if the entrenchment operates on officials acting in an official context and *social* if it operates on officials within a broader social context. To illustrate the distinction (which I hope will become clearer as each type is considered more fully below), the convention that the House of

[5] Gardner (n 1) 169 n19.

Lords should not obstruct legislation that fulfils a manifesto pledge[6] is a rule about the internal workings of Parliament that impresses itself on members of the House of Lords in their official capacity. It is articulated by, directed at, and internally reinforced by political officials without appealing to the broader public. On the other hand, the reason that no government is likely to repeal the National Health Service Act 2006 is not because there is a political convention among officials against doing so but because there is a social expectation—a demand even—that governments not do so.[7] The Act is entrenched by external social pressure rather than by a rule internal to the political system. These are not, of course, water-tight compartments. There is a sense in which all political conventions are ultimately socially entrenched, as in the last resort they may be enforced by the public at the next election. The law, even the law of the constitution, ultimately rests in political hands, and what is politically entrenched depends ultimately on social conditions to endure.

I have further divided my discussion of both political and social entrenchment into two sub-parts. In the case of political entrenchment, I first consider conventions, especially those that form the non-legal rules of the constitution, before proceeding to consider the less entrenched categories of political practices, customs, and norms.[8] In the case of social entrenchment, I first consider the example described above of the National Health Service in the United Kingdom, which exemplifies what I call a 'practical' form of social entrenchment. By this I mean there is a social expectation that bears directly on political officials and effectively constrains the scope of their actions. I then discuss of the broader category of customs and habits, the social entrenchment of which provides an additional limit on the scope of political and legal action in a state. These

[6] House of Lords Library, *The Salisbury-Addison Convention* (19 June 2015) <https://lordslibrary.parliament.uk/research-briefings/lif-2015-0011/> accessed 23 October 2024.

[7] NW Barber, 'Why Entrench?' (2016) 14 ICON 325, 327.

[8] Philippe Lagassé, 'The Crown and Government Formation: Conventions, Practices, Customs, and Norms' (2019) 28 Constitutional Forum constitutionnel 1, 1.

include religion, tradition, and mores that legal and political commentators have long struggled to corral into a coherent idea that is sometimes called a state's constitutional 'identity'.[9] As with other forms of entrenchment, although the order of these categories and sub-categories may at first appear to reflect a hierarchy of entrenchment, I will show that in practice the question of which institutions and arrangements are more and less deeply entrenched is a matter of practical effect rather than form, and the two do not necessarily align. Specifically, I will show how political practices, customs, and norms may prove more restrictive and enduring than political conventions, and that social entrenchment may be more responsible for stability in the state than either.

6.1 Conventions

It is not my intent to rehearse, much less revive, debates over the precise nature of conventions.[10] Because it helps to have a definition, I will adopt Adam Perry's, which he has defended compellingly against the many alternatives: 'a constitutional convention is an important customary rule among the officials of a political community'.[11] I am not, however, concerned with the distinction between constitutional conventions and non-constitutional conventions[12] or, perforce, with the question of whether specific conventions—for example, those governing relations between the Cabinet and the Prime Minister—are, or are not, constitutional.[13] While I agree with Panagiotis Doudonis that 'not all forms of conduct of political actors are constitutional'

[9] Monika Polzin, 'Constitutional Identity as a Constructed Reality and a Restless Soul' (2017) 18 German LJ 1595, 1596 (mentioning Rousseau's idea of '*character national*', Montesquieu's idea of the"*genie d'une nation*" and Hegel's idea of a '*Volksgeist*').

[10] For a comprehensive consideration of the merits of various definitions, see Adam Perry, *The Conventional Constitution* (OUP 2025) ch 2. On the various sources of conventions, see also Geoffrey Marshall, *Constitutional Conventions* (Clarendon Press 1984) 8-9. See also Nicholas Aroney, 'Law and convention' in Brian Galligan and Scott Brenton (eds) *Constitutional Conventions in Westminster Systems: Controversies, Changes and Challenges* (CUP 2015) 24, 25.

[11] ibid 25.

[12] See Joseph Jaconelli, 'The Nature of Constitutional Convention' (1999) 19 Legal Stud 24, 35-39.

[13] Geoffrey Marshall says 'yes'; Joseph Jaconelli says 'no'. Jaconelli (n 12) 39 (disagreeing with Marshall (n 10) 4).

and that 'there exist areas of the political game that remain constitutionally unregulated',[14] the more expansive idea of a constitution I embrace in this thesis includes forms of entrenchment that would not traditionally be considered part of a state's constitution. That said, most of the examples offered in this part would be considered 'constitutional' in the narrower sense.

Because conventions are rules, they ought to be followed.[15] They 'bind' because they are understood to be binding by the people who are bound by them,[16] and they bind officials in particular, because officials constitute 'the constitutional community that contains the rule'.[17] It is within the world of officialdom that conventions are understood and accepted as binding both individually and as a class of rules.[18] There may be broader social and political consequences to violating a convention—indeed, the political enforcement of conventions is ultimately at the hands of the electorate[19]—but the popular understanding of a convention, especially the more technical conventions, is usually derivative of the official understanding. That is, the people learn about a convention and a violation of a convention because other officials are exercised about the matter and tell them. Finally, not just any reason for the rule will suffice; a conventional rule is particularly compelling because it can be connected to a fundamental principle of the political order such as 'democracy, the separation of powers, and responsible government'.[20] The convention is thus rooted in a shared understanding about what is required to preserve or further one or more core

[14] Panagiotis Doudonis, *The Normativity of Constitutional Conventions, with Special References to the UK, USA and Greece* (DPhil Thesis Oxford 2020).

[15] HLA Hart, *The Concept of Law* (3rd edn OUP 2012) 9-13; Peter W Hogg and Wade K Wright, *Constitutional Law of Canada* (Thomson Reuters 2023) 30.

[16] Jaconelli (n 12) 27-31.

[17] NW Barber,*' Can Royal Assent Be Refused on the Advice of the Prime Minister?'* UK Const L Blog (25th September 2013) <http://ukconstitutionallaw.org> accessed 17 October 2024.

[18] AV Dicey, *Introduction to the Study of the Law of the Constitution* (8th ed, [1915] Liberty Classics 1982) 23. For a discussion of why the last clause matters, see the discussion of conventions in the American context, below.

[19] ibid 439. See also Ivor Jennings, *The Law and the Constitution* (3rd ed, U of London P 1959) 134; Marshall (n 10) 6; Hogg and Wright (n 15) 39.

[20] Jaconelli (n 12) 44.

principles of the state's constitution. And because this understanding can change, conventions are both 'stable and flexible' (and stable because they are flexible).[21]

My use of the term encompasses conventions of varying clarity and strength. In some cases, a convention will be a clear and complete exclusionary reason for official action with no room for discretion and no chance of deviation.[22] The King in the United Kingdom and his viceregal representative in Canada do not think twice (or, probably, even once!) about whether to grant Royal Assent to a bill that has been passed by both houses of Parliament. Advice from the King's ministers precludes consideration of the merits of the bill and the process that brought it to his desk.[23] Other conventions have a quality of fuzziness: their contours are uncertain because, unlike the granting of Royal Assent, while the rule can be stated clearly, its application requires interpretation. This uncertainty can weaken the force of the convention on a case-by-case basis, and in particular in peripheral cases, even as the convention itself remains unquestioned. An example is the convention in Westminster parliamentary systems that a government minister must have the confidence of the House. While the convention as stated is uncontroversial, there is often controversy over its application, which will depend on a number of imprecise and changeable factors, including media attention to the minister's (mis)conduct, the prime minister's sense of loyalty or obligation, the opinion of the rest of the party in government, the strength of opposition in and out of Parliament, and the public mood.[24] While both clear and the fuzzy conventions are

[21] Perry, *The Conventional Constitution* (n 10) 201.

[22] On exclusionary reasons, see Joseph Raz, 'On Reasons for Action' in Joseph Raz, *Practical Reason and Norms* (OUP 1999) 15, 35-48. cf Kelsen's description of 'custom' (again, showing the flexibility of terms used to describe similar phenomena by different people at different times) as 'a generally observed course of conduct, during which the acting individuals do not consciously aim at creating law; but they must regard their acts as in conformity with a binding norm and not as a matter of arbitrary choice' Hans Kelsen, *General Theory of Law and State* (A Javier Treviño tr, Taylor & Francis 2017) 114.

[23] Adam Tomkins, *Public Law* (OUP 2003) 63-64. See also Rodney Brazier, 'Royal Assent to Legislation' (2013) 129 LQR 184, 198-203; Anne Twomey, *The Veiled Sceptre* (CUP 2018) 622-24, 643; Robert Craig, 'Could the Government Advise the Queen to Refuse Royal Assent to a Backbench Bill?', UK Const L Blog (22 January 2019) <https://ukconstitutionallaw.org/> accessed 17 October 2024. But see Barber, *'Can Royal Assent Be Refused?'* (n 17).

[24] Jaconelli (n 12) 31-32. See also Marshall (n 10) 61-79.

conventions, they differ in that clear rules are directly operational rules that provide a clear reason for acting without any need for evaluation, while fuzzy rules invoke principles or set standards that are sometimes subject to interpretation. In each case, however, the convention is entrenched because it is fundamental to the orderly and predictable functioning of a core institution of the state; the different ways in which they operate are simply what is required to give effect to different kinds of rules under different circumstances.

Both Royal Assent and ministerial responsibility are examples of conventions that officials in the United Kingdom or Canada understand to be fundamental to the constitution and deeply entrenched, but there are other many others in each state.[25] How many, exactly, is probably unknowable, which is further example of fuzziness: this time, not at the margins of a single convention, but at the margins of the concept. It is almost certain that no two attempts to catalogue the conventions of the same political system have ever been identical. As Andrew Heard has observed of Canadian constitutional conventions, 'a truly thorough study of [them] would involve numbers of volumes without end'.[26] Even if one were to achieve both the encyclopaedic feat of collection and the precise description of each one, the evolutionary nature of conventions would mean that the list and its contents would require constant updating. Two things can be inferred from this: first, as with other forms of entrenchment, the depth of entrenchment of conventions is a matter of degrees; and, second, in all but the clearest of cases, the degree to which a particular convention is in fact entrenched is unknowable except by observing official behaviour in real time. What Jeremy Waldron has said of constitutional history generally applies especially to the study of conventions: that it is 'often a matter of studying apparently routine political events, to discern which of them have and which of them have not acquired normative significance' over time.[27]

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[25] John P Mackintosh, *The British Cabinet* (3rd edn, Stevens and Sons 1977) 20-21.

[26] Andrew Heard, 'Preface' in Andrew Heard, *Canadian Constitutional Conventions: The Marriage of Law and Politics* (OUP 1991). See also Colin Munro, 'Laws and Conventions Distinguished' (1975) 91 LQR 218, 219.

[27] Jeremy Waldron, *Law and Disagreement* (OUP 1999) 257.

With this caveat in mind, it is nevertheless possible to differentiate classes of convention that broadly correspond to different degrees of entrenchment. In the first systematic look at the nature and role of constitutional conventions in Canada, Heard proposed a five-tier hierarchy, ranging from the most fundamental (and most entrenched) to the least certain (and least entrenched) based on the interplay of four factors: (1) 'the importance of the principle or reason that lies behind the rule'; (2) 'the degree of agreement among political actors and constitutional observers on the principle behind the rule'; (3) the level of agreement on the specific terms of the rule; and (4) 'how close the content of the rule comes to embodying the principle involved'.[28] The interplay of these factors results in a subtle hierarchy that Heard labels: fundamental conventions; meso-conventions; semi-conventions; infra-conventions; and usages.[29] Heard gives several reasons for classifying conventions as he does. He says that it is useful to know 'which conventional rule should be given precedence when several rules conflict'; that it is useful for 'discerning the sort of obligation that should be attached to certain behaviour'; and that it provides guidance for 'efforts to codify the informal constitutional rules'.[30] One does not have to accept his classification to appreciate these benefits. Indeed, putting his specific classifications to the side, both of these reasons can be expressed in terms of entrenchment. A convention that takes precedence over other conventions (of the same or another class) is the one that is perceived and treated as more entrenched by the relevant officials. Similarly, conventions that attract greater adherence are more deeply entrenched in the political culture of the state.

So far, this discussion has focussed on conventions peculiar to the Canadian and British variations of parliamentary democracy, which overlap considerably. However, the Canadian example also shows that a state may have a codified Constitution and still have—still need—

[28] Heard (n 26) 142.

[29] ibid 145-48.

[30] ibid 150-52.

political conventions. From the beginning, Canada's codified Constitution provided that the new Dominion was to have 'a Constitution similar in Principle to that of the United Kingdom',[31] which was understood to include the panoply of conventions (as well as prerogatives, privileges, and immunities) by which the mother Parliament functioned day to day and, given the success of those conventions, century to century. But what about a country like the United States, with a codified Constitution and a system of government that, by design, rejects the highly-conventional Westminster model? Does a constitutional system that does not self-consciously rely on conventions nevertheless have and need them? Or, perhaps more interesting, can officials be bound by conventions if they have no official concept of a convention?

The easy answer is that, yes, of course they can. Whether one calls a political rule a convention or not is immaterial so long as the definitional elements of a convention are present. If they are, it would seem that a convention can effectively perform its usual coordination function within the constitutional system.[32] But the easy answer is incomplete. Coordination is not all there is to a convention, and something would be missing from the way we think about the operation of conventions if there were no shared official understanding of the idea of conventions in the first place or of their functional importance for the constitutional system. It is one thing for an official to feel bound to follow a non-legal rule for political reasons, but when it comes to conventions in the Westminster system, there is an additional feeling of obligation that comes from following a rule that one recognises as one of a class of rules that is essential to the functioning of the political system as a whole. The consequences of disobeying a rule of the first type are mostly personal (though they may extend to the fortunes of one's fellow partisans), while the consequences of disobeying a rule of the second type extend to the broader constitutional

[31] *Reference re Resolution to amend the Constitution*, [1981] 1 SCR 753, 883.

[32] Keith Whittington, 'The Status of Unwritten Constitutional Conventions in the United States' (2013) 5 U of Illinois L Rev 101, 115-16.

order on which everyone in the state relies.[33] This is another way of saying that conventions are not standalone rules. Defiance of a particular convention does not simply call that rule into question but casts doubt, by extension, on the stability of the system that relies for its strength and integrity on conventions being followed.[34] There is thus an additional and independent reason for following a rule that one recognises as a convention rather than a rule one thinks of as a stand-alone political obligation. This second reason is why conventions are more deeply entrenched than other political rules and practices in a political system in which officials are aware that certain political rules are conventions and of the essential role of conventions as a class in the orderly functioning of the constitution.

This conclusion may be why, when American scholars discuss conventions in their constitutional system, they tend to use a loose definition of 'convention' that includes what Heard would call 'semi-conventions', 'infra-conventions', and mere 'usages', and what others would call practices, customs, or norms.[35] For example, in their article on constitutional 'glosses' and 'conventions', Curtis Bradley and Neil Siegel adopt Keith Whittington's definition of a convention as 'maxims, beliefs, and principles that guide officials in how they exercise political discretion', which lumps conventions in with a broader category of political practices. It is not surprising, then, that the examples Bradley and Siegel provide of American constitutional conventions also blur these categories.[36] Their examples, including conventions against court-packing and jurisdiction stripping, are better described as questions of 'constitutional propriety':[37] political restrictions on

[33] Vermeule makes a similar distinction but does not consider the additional impact on officials of understanding and valuing the fact they live in a state in which order is maintained by people generally obeying conventions. Adrian Vermeule, 'Conventions of Agency Independence' (2013) 113 Columbia L Rev 1163, 1186-91.

[34] Whittington (n 32) 101, 115-16.

[35] See eg, Charles W Tyler, 'Federalism and Constitutional Norms' (U Chicago L Rev, forthcoming 2027).

[36] Curtis A Bradley and Neil S Siegel, 'Historical Gloss, Constitutional Convention, and the Judicial Separation of Powers' (2017) 105 Georgetown LJ 255, 270-72; 287-295. See also Michael C Dorf, 'How the Written Constitution Crowds Out the Extraconstitutional Rule of Recognition' in Matthew Adler and Kenneth Einar Himma (eds), *The Rule of Recognition and the US Constitution* (OUP 2009) 69.

[37] Whittington (n 32) 108-09.

constitutionally-permitted action similar to the 'convention' in Canada that the federal government does not invoke the notwithstanding clause, which Heard classed as an 'infra-convention' and which I would not call a convention at all.

The idea that conventions may restrict authorised power, however, is similar to Dicey's view that conventions 'are all, or at any rate most of them, rules for determining the mode in which the discretionary powers of the Crown ... ought to be exercised'.[38] Although an incomplete definition, this describes a large number of political practices in any constitutional system, especially when it comes to matters that are not essential to the constitutional system. Whether the US Supreme Court has six members (as it did in 1789), five (as it did between 1801 and 1837), seven (as it did between 1866 and 1869) or nine (as it did between 1837 and 1866 and from 1869 to the present) is not material to its functioning.[39] If the German Federal Constitutional Court can function with 16 members and the Supreme Court of Israel can function with 15 members, then it does not seem to it matter that Congress keeps the number of US Supreme Court justices fixed at nine.[40] To use my earlier metaphor, the number of justices is neither a defining nor an essential feature of the American Constitution. But if we end our analysis there, we may miss not only what is unwritten but what is unspoken about a state's constitution. It may be that a 'convention' against court-packing is important not because a specific number of justices is fundamental but because the act of changing the number would be destabilising in some other way. In this case, the reason appears to be that change would exacerbate partisan distrust within the political system, which

[38] Dicey, *Law of the Constitution* (n 18) 413-14.

[39] Bradley and Siegel (n 36) 271-72.

[40] Adrian Vermeule, 'Political Constraints on Supreme Court Reform' (2006) 90 Minnesota L Rev 1154, 1163. Of note, the number of justices on the Supreme Court of Canada is among the most deeply entrenched provisions of the codified Constitution. *Constitution Act 1982*, s 41(d). I suspect, without evidence, that this was a prophylactic consideration based on the US experience of 1937 in addition to the political need for civil law representation from Quebec that is secured by three justices from that province, which also tells us something about the country's political constitution.

would be a good reason for entrenching a political practice of the Diceyan kind discouraging change.

There are also American conventions that look more like Westminster conventions. Because the United States Constitution did not anticipate the rise of political parties,[41] some of these conventions are the result of accommodating the fact of party politics within a Constitution that makes no place for them. These include the conventions governing the election of the president by the electoral college, which were noted by Dicey as part of 'certain stringent conventional rules, which, though they would not be noticed by any court, have in practice nearly the force of law'.[42] While the Constitution envisioned the indirect selection of the president and vice-president by non-partisan 'electors', the institutionalisation of the two-party system has been accompanied by the crystallisation of a convention according to which it is politically unacceptable for electors to cast their votes for a candidate other than the one endorsed by the popular vote in their state.[43] In some states, the convention has been reinforced by laws punishing deviation with fines, a practice that has been upheld by the United States Supreme Court.[44] During the oral argument in that case, more than one justice cited the potential 'chaos' and uncertainty that would result if the convention were to break down and the college of electors were to act according to its originally conceived role as a deliberative body.[45] The convention, we may say, has been

[41] In fact, the U Constitution was designed to avoid the problems posed by parties or 'factions,' which Alexander Hamilton and James Madison warned about in Federalist Papers Nos. 9 and 10, respectively. Jacob E Cooke (ed) *The Federalist* (first published 1788, Wesleyan UP 1961).

[42] Dicey, *Law of the Constitution* (n 18) 28.

[43] Neil Siegel, 'The U.S. Constitution, Constitutional Conventions, and President Trump' (OxHRH Blog, 1 March 2017) <https://ohrh.law.ox.ac.uk/the-u-s-constitution-constitutional-conventions-and-president-trump> accessed on 30 October 2024. See also the discussion of conventions in Bradley and Siegel (n 36). See also KN Llewellyn, 'The Constitution as an Institution' (1934) 34 Columbia L Rev 1, 12.

[44] *Chiafalo v Washington* 591 US 578 (2020).

[45] 'Comment on *Chiafalo v Washington'* (2020) 134 Harv L Rev 420, 429; Transcript of Oral Argument at 21, 33, *Chiafalo*, 140 S Ct 2316 (2020) (No 19-465) <www.supremecourt.gov/oral_arguments/argument_transcripts/2019/19-465_c0n2.pdf> accessed 28 October 2024. See also Keith E Whittington 'The Vexing Problem of Faithless Electors' (2020) Cato Supreme Court Rev 67, 68.

entrenched against the destabilising uncertainty the original vision would provoke in the modern era. The existence of such a convention is not just a social limitation on political choice like the 'convention' against court packing but, being an accepted convention—that is, as a limitation that is understood by the relevant political actors to be a necessary rather than simply a prudent limitation on their power—it further raises the cost of deviation from the convention, elevating the mere predictability of a practice into the certainty of a convention.[46] Here we can see how a convention may evolve to compensate for a flaw in the written Constitution and to stabilise the state by bringing predictability to its core political activities by aligning official practice with changing public expectations.

6.2 Political practices, customs, and norms

The distinction I have drawn between conventions and other practices is not arbitrary, but neither is it the only possible division among political rules. Peter Hogg, for example, drew a similar line between 'conventions' and 'usages', but made no further distinctions within either category. In fact Hogg believed that 'very little turns on the question whether a practice is a usage or a convention, because a convention is as unenforceable as a usage'.[47] 'The most that can be said', he wrote, 'is that there is a stronger moral obligation to follow a convention than a usage'.[48] Hogg's narrow understanding of the concept of 'enforcement' betrays a regrettable incuriosity about the non-legal dimensions of the Canadian constitutional order to which he devoted his long and distinguished career. If we accept that non-legal rules have their own distinct methods of non-legal enforcement, then there is scope to explore hierarchies and distinctions within and between conventions and usages, especially where they conflict. Philippe Lagassé has developed a taxonomy

[46] Peter C Ordeshook, 'Constitutional Stability' (1992) 3 Const Pol Econ 137, 149–150; see also Russell Hardin, *Liberalism, Constitutionalism, and Democracy* (OUP 1999) 98.

[47] Hogg and Wright (n 15) 35.

[48] ibid 35-36.

that does just this. He distinguishes between 'conventions', which he describes as rules with good reasons,[49] and 'practices', 'customs', and 'norms', the latter three encompassing the range non-legal limitations on political action that are part of the shared understanding of a 'specific political community' in which conventions also operate.[50]

Just below conventions in Lagassé's list are 'practices', which are supported by good reasons but do not bind political actors as strictly as conventions.[51] Although, like conventions, practices are justified with reference to fundamental principles of the political system, they do not command the general and automatic assent that conventions do, and for this reason 'the precedents that support a practice tend to be inconsistent'.[52] (Or perhaps the causality runs the other way—the question is interesting but need not distract us). Lagassé gives as examples the Canadian practice of tabling treaties before Parliament, which was consistent for forty years, abandoned for forty years, then revived again, and the 'current, inconsistently applied, practice of holding votes in the House of Commons when the government deploys the military overseas'.[53] This is an interesting example, as while it has not crystallised into a convention in Canada, the practice is now generally accepted as a convention in the UK.[54] Lagassé has addressed this difference elsewhere in an article that shows how quickly a practice can morph into a convention

[49] Lagassé, 'The Crown and Government Formation' (n 8) 2.

[50] Aroney (n 10) 24, 28 ('Individual conventions always operate in the context of a larger collection of practices, norms and laws existing in a specific political community or among a group of related communities.')

[51] Lagassé borrows this definition from Ronald Brazier. Rodney Brazier, 'The Non-Legal Constitution: Thoughts on Convention, Practice and Principle' (1992) 43 N Ireland Leg Q 262. Note, this differs from Ivor Jennings's well-known distinction between conventions and usages, according to which 'conventions are supported by some constitutional reason or principle, but usages are not'. Jennings, *The Law and the Constitution* (n 19) 134-36.

[52] Lagassé, 'The Crown and Government Formation' (n 8) 2.

[53] ibid.

[54] Cabinet Office, *The Cabinet Manual A guide to laws, conventions and rules on the operation of government* (Cabinet Office 2011) 44 <https://assets.publishing.service.gov.uk/media/5a79d5d7e5274a18ba50f2b6/cabinet-manual.pdf> accessed 5 November 2024.

under the right—or, if you prefer (as I do here) the wrong—circumstances.[55] Another common practice that illustrates the blurred line between conventions and practices is the one known in the UK informally as 'Purdah' and officially (and rather infelicitously in Whitehall bureaucratese) as the 'pre-election period of sensitivity'. In Canada it is called the 'caretaker convention', although Lagassé labels it a practice rather than a convention. The reason for the practice is clearly rooted in the principle of responsible government, and while everyone generally agrees that this is a good reason, the precise scope of the practice is not clear and governmental interpretation of it has been inconsistent.[56] If Lagassé is right and it is a practice rather than a convention, then it is a practice that is almost indistinguishable from the blurred margin of a fuzzy convention.

In the United States, the rule before the passage of the Twenty-Second Amendment in 1951 that a president should not serve more than two elected terms is often described as a convention, including by Dicey,[57] but it is better described as a practice. Although supported both by precedent—the Cincinnatian example of George Washington[58]—and good reason,[59] through most of American history the practice was observed as a result of convenience, happenstance, health, and partisanship rather than out of respect for the rule *qua* rule.[60] Even before Franklin Roosevelt broke with the practice, what appeared to be consistent precedents in fact reflected the vicissitudes of politics producing consistent results almost by accident under different

[55] Philippe Lagassé, 'Parliament and the War Prerogative in the United Kingdom and Canada: Explaining Variations in Institutional Change and Legislative Control' (2017) 70 Parliamentary Affairs 280. See also Aroney (n 10) 24, 32-34; Neil Johnston, *The Pre-election period of sensitivity* (House of Commons Library 2024) <https://researchbriefings.files. parliament.uk/documents/SN05262/SN05262.pdf> accessed 6 November 2024.

[56] Michael Plaxton, 'The Caretaker Convention and Supreme Court Appointments' (2016) 72 Supreme Court L Rev 449, 460. For a judicial discussion of the UK practice, see *R (on the application of ClientEarth) v Secretary of State for Environment, Food and Rural Affairs* [2017] EWHC B12 (Admin).

[57] Dicey, *Law of the Constitution* (n 18) 28. Dicey's identification of this convention was denied at the time by Thayer. James Bradley Thayer, *Legal Essays* (Boston Book Company 1908) 204-05.

[58] Bruce G Peabody and Scott E Gant, 'The Twice and Future President: Constitutional Interstices and the Twenty-Second Amendment' (1999) 83 Minnesota L Rev 565, 575-78.

[59] Edward Freeman, *Historical Essays: First Series* (3rd edn, MacMillan and Co 1875) 398.

[60] Herbert W Horwill, *The Usages of the American Constitution* (OUP 1925) 88-100; Peabody and Gant (n 58) 578-85.

circumstances. Furthermore, the reason for the rule, while superficially compelling[61] cuts against other principles of the American Constitution, including the principle of democracy. If a governor may be elected three times without inviting tyranny, why not a president?[62] The strongest argument for it being a convention rather than a practice is *post hoc*. Roosevelt's break with the previous rule, while perhaps necessary given the extraordinary exigencies of the Depression and the Second World War, was considered worrying enough in retrospect to convert it into a constitutionally protected provision. It thus appears to be an example of a practice overleaping the status of convention to be formally entrenched as a rule.[63] Had it been a true convention before, formal entrenchment would not have been necessary.

Below 'practices' in Lagassé's hierarchy are 'customs', which have strong precedents and are conformed to like rules but lack clear reasons.[64] Customs may be traceable to conventions or practices, but the reasons that once supported them are no longer relevant. They are part of the ritual and ceremony of the political system, done because they have always been done. This means 'that they are usually respected but can be questioned, adapted, or disregarded when required'.[65] Lagassé illustrates the point with the custom both in Canada and the United Kingdom that 'the Monarch or [in Canada] their representative will not enter the lower house of Parliament'. The 'tradition dates back to a time when the Commons needed to protect itself and its members from the Crown's interference', but that 'rationale is no longer salient'[66] Despite having only symbolic

[61] I say superficial because Horwill's observation that 'Casca's story of how Caesar thrice refused the crown comes irresistibly to mind' shows how the desire to invent a convention from principle can disregard facts. Horwill (n 60) 99. The story is not that Caesar refused the crown *for* a third time, which could be an antique precedent for refusing a third presidential term; he refused it thrice on the same occasion.

[62] Thayer (n 57) 204-05.

[63] Peabody and Gant (n 58) 571.

[64] Lagassé, 'The Crown and Government Formation' (n 8) 3.

[65] ibid.

[66] ibid.

value, the 'tradition is still followed',[67] a curious relic of a convention retained today as a custom by force of habit. An American practice that has devolved into custom is the delivery of the State of the Union address by the president in person before a joint session of Congress. The Constitution says that the president 'shall from time to time give to the Congress Information of the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient',[68] but it is silent on the medium and precise frequency. George Washington established the practice that 'from time to time' would mean annually, and it was also his practice to deliver his 'Information' and 'Measures' to Congress in person. Of these two practices, only the first has been consistently observed.[69] If the practice of presidential term limits seemed always on the cusp of crystallising into convention, the practice of in-person State of the Union addresses shaded in the other direction, becoming a custom whose original reason has been forgotten amid the modern ritualised spectacle of the imperial presidency.[70]

Other customs cannot be traced with any certainty back to a convention (ie, to a rule with a reason) or even to a practice (ie, a non-rule with a reason). In many cases, these were originally social customs among the political class and may thus be considered anachronistic habits or traditions, rather than political customs proper. Examples include the Speaker's wig in the UK, abandoned after the retirement of Lord Weatherill, the 154th Speaker of the House, and the temporary unwigging of the clerks of the House during the generally slovenly speakership of John Bercow (since restored). The tradition is rooted not in a rule but in a former custom of wearing wigs in the professions and classes from which parliamentarians were drawn in the 17th Century.

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[67] ibid.

[68] United States Constitution, Art II, s 3.

[69] For the practice until 1925, see Horwill (n 60) 198-99. For the practice before and since, see Gerhard Peters and John T Woolley, 'The State of the Union, Background and Reference Table' in John T Woolley and Gerhard Peters (eds), *The American Presidency Project* (U of California 2024) <www.presidency.ucsb.edu/node/324107/> accessed 6 November 2024.

[70] Guy Debord, *The Society of the Spectacle* (Donald Nicholson-Smith tr, Zone Books 1994) 12. On the evolution of the presidency, see Arthur M Schlesinger, *The Imperial Presidency* (Houghton Mifflin 2004).

After the wider social custom was abandoned, it remained vestigial among officers of Parliament.[71] Another example is the placement and arcane rules regarding the use of the woolsack in the UK's House of Lords and (until 1949[72]) in the Senate of Canada. Formerly a symbol of the wealth Britain derived from the wool trade,[73] it is now a signifier without a signified[74]—no longer a symbol, merely a sofa. In this case, the custom persists without reason, but even when it had an intelligible reason that reason was not rooted in a fundamental political principle of the constitution; it was a socially- rather than politically-determined custom from a time when the social and political were even harder to disentangle than today.

The persistence of wigs and woolsacks is a good illustration of what, at first glance may appear to be a paradox of entrenchment. While common sense and experience tell us that conventions are more deeply entrenched than mere customs, in many cases they are in fact more changeable. Superficially paradoxical, this is in fact exactly what we should expect. It is because customs are not constitutionally important that they do not need to be changed often or at all.[75] There are many examples of the stubborn persistence of custom across centuries during which the most fundamental constitutional conventions have undergone frequent and significant evolution, but the *ne plus ultra* must be the role of St Edward's Staff in the British Coronation service:

> Also known as the 'Long Sceptre', St Edward's Staff is traditionally thought to have been a relic associated with Edward the Confessor (St Edward). ... Like the other regalia the Staff did not survive the Commonwealth. In 1660 therefore it was recreated although its exact purpose was no longer remembered, nor its original

[71] We often find ancient tradition preserved, sometimes in garbled form, in populations cut off for centuries from a wider culture. Ann M Harrington, 'The Kakure Kirishitan and Their Place in Japan's Religious Tradition' (1980) 7 Japanese Journal of Religious Studies 318; Joesph Tobi, *The Jews of Yemen: Studies in Their History and Culture* (Brill 1999). What this says about Parliament, and whether for better or worse, is left to the reader.

[72] Senate of Canada, 'How a Venerable Senate Icon Got the Sack' (2020) SenCA+ Magazine (28 January 2020) <https://sencanada.ca/en/sencaplus/how-why/how-a-venerable-senate-icon-got-the-sack/> accessed 5 November 2024.

[73] Stephen Friar, *The Sutton Companion to Local History* (Sutton Publishing 2004) 480.

[74] Ferdinand de Saussure, *A Course in General Linguistics* (Wade Baskin tr, McGraw-Hill 1966) 68.

[75] Mackintosh (n 25) 20-21.

> appearance. The Staff has continued to be carried in coronation processions although it performs no function in the ceremony.[76]

In other words, we are pretty sure that the St Edward's Staff matters, we just don't know why. Precedent *is* the sole reason for its continued existence, which is sufficient to persist in honouring a custom that stretches back at least six centuries. By contrast, the understanding of the convention governing individual ministerial responsibility has undergone significant development over the last century alone.[77] Again, this is what we should expect. Entrenched does not mean frozen; things with an active function must be adaptable to remain functional. A convention that underpins the principle of responsible government must change with the times to continue to do its job, while a fine lady bearing an old staff is lovely pomp to little purpose.[78] Why change it? The importance of this conclusion is that absence of change is not necessarily evidence of deep entrenchment although it may look the same; to identify degrees of practical entrenchment, one must look for failure to change when there are good reasons to, and for a desire or even attempt to change that has proved unavailing.

Below 'customs' lie the 'norms' of the constitution. These, according to Lagassé, 'are morally-binding rules of proper conduct' that 'serve to define what is acceptable behaviour in a constitutional context, including which actions are necessary to uphold fundamental principles'.[79] They are 'a type of meta-rule that ensure laws and other rules are followed properly'.[80] Although each of the three states I focus on in this thesis are democracies, I expect that norms are equally important in non-democratic systems. The complex codes of conduct that held sway in the imperial Chinese bureaucracy, for example, were policed by unwritten norms the violation of which could

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[76] 'St Edward's Staff', Royal Collection Trust <www.rct.uk/collection/31717/st-edwards-staff> accessed 29 October 2024.

[77] Marshall (n 10) 61-79.

[78] At the coronation of King Charles III, the staff was borne by Lady Elizabeth Lydia Manningham-Buller, LG.

[79] Lagassé, 'The Crown and Government Formation' (n 8) 3.

[80] ibid.

end a career as quickly as in any modern democracy.[81] Even more than conventions, practices, and customs, norms are 'morally-binding' imperatives.[82] Like conventions, norms further the orderly and predictable functioning of the constitutional order and are backed by precedent, which may be contested at the margins but not in principle. In the British context, norms underpin what was once jocularly, and now usually derogatively, called the 'good chap theory of government'.[83]

I would distinguish norms from conventions in two ways: one that agrees with Lagassé, and one that differs slightly from and goes beyond his definition. First, unlike conventions, which concern *what* political actors should do, norms are more concerned with *how* or *when* they should do things.[84] Lagassé mentions, for example, the convention in Canada that 'the Governor General prorogues Parliament on the advice of the Prime Minister', which he says is supported by a norm that the Prime Minister 'act fairly and honourably' in activating the convention'.[85] When then-Prime Minister Stephen Harper asked the Governor General to prorogue parliament to avoid an imminent confidence vote in December 2008, critics alleged that he was violating an implicit norm on which the convention relied.[86] His defenders responded that the coalition that had proposed to assume government after a vote of non-confidence would have violated a norm that 'coalitions should not be formed by parties lacking a plurality of seats unless their intent to form a coalition

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[81] Hayden Windrow, 'A Short History of Law, Norms, and Social Control in Imperial China' (2006) 7 Asian-Pacific Law & Policy 244, 244-54 (discussing Confucian moral norms and implicit hierarchies) (citing Geoffrey MacCormack, 'Religion and Law in Traditional China' in Alan Watson (ed), *Law, Morality, and Religion: Global Perspectives* (U California P 1996) 14-15).

[82] Lagassé, 'The Crown and Government Formation' (n 8) 12.

[83] The phrase was coined by Clive Priestley in 1985. Andrew Blick and Peter Hennessy, *Good Chaps No More? Safeguarding the Constitution in Stressful Times* (The Constitution Society 2019) 6.

[84] My own understanding of norms has something in common with the broader Greek notion of *nomos*, which was derived from custom and determined 'the normal way of acting under given sets of circumstances or for a particular kind of individual'. Graham Maddox, 'Constitution' in Terence Ball, James Farr, and Russell L Hanson, *Political Innovation and Conceptual Change* (CUP 1989) 53.

[85] ibid 3-4.

[86] See, eg, Johannes Wheeldon, 'Prorogation as Constitutional Harm' (2011) 34 Canadian Parliamentary Rev 69.

was clearly stated during a general election'.[87] It is instructive to contrast the Canadian experience with the litigation of Boris Johnson's request to prorogue Parliament in the summer of 2019 to avoid the consequences of an ad hoc Parliamentary majority taking control of the government's agenda without assuming the rest of the powers and restraints of government.[88] Once again, competing constitutional norms and competing views of those norms were at the heart of the dispute. Was Mr Johnson exercising a conventional power to avoid an impasse created by an inversion of parliamentary norms? Or was he pulling a fast one on Parliament to avoid the norms of executive accountability?[89] Where one came down depended on one's understanding of the norms guiding the exercise of the conventions governing prorogation.

These episodes show that norms are liable to break down when they are tested by exceptional or unprecedented circumstances.[90] It is hard to enforce a norm where reasonable people cannot agree on what the norm requires—indeed, in such situations it is hard to say that there is a norm at all rather than competing extrapolations of a common constitutional principle proffered as norms. However, these exceptional circumstances should not distract us from the important role that norms play in day-to-day government, where in most cases norms are so uncontroversial and their violation is so unthinkable that they go largely unnoticed. We take for granted norms like the peaceful transfer of power after an election, the political neutrality of the Crown, and the routine enforcement of judicial decisions. Like the clearest of conventions, there is no room for deliberation or doubt in these cases, which why the exceptions, once survived, become admonitory lessons reinforcing the norm. The brief uncertainty about the certification of

[87] Lagassé, 'The Crown and Government Formation' (n 8) 4 (citing Rainer Knopff and Dave Snow, "'Harper's New Rules" for Government Formation: Fact or Fiction?' (2013) 36 Canadian Parliamentary Rev 18).

[88] For an account of the relevant events, see Mark Elliott, 'Constitutional Adjudication and Constitutional Politics in the United Kingdom: The Miller II Case in Legal and Political Context' (2020) 16 EuConst 625.

[89] ibid 631-33.

[90] Other examples include the role played behind the scenes by Edward VII and George V in the constitutional crises of 1910-11 and the very public role of the Governor General in the Australian constitutional crisis of 1975.

the results of the 2016 US presidential election, for example, was notable and destabilising because it violated a clear norm. In the academic and popular imaginations, it has joined in infamy the image of Andrew Jackson's alleged response to the Supreme Court's decision in *Worcester v Georgia*.[91] Far from undermining the norms in question, these violations serve as a standing rebuke to future presidents who would consider denying the legitimacy of an election or declining to enforce a judgment of the Supreme Court.

Where norms are clear—that is, where norms are truly norms—they are as deeply entrenched as social practice as any convention. In fact, they are so deeply entrenched that to think of them as rules would diminish their importance and their function. Norms bear the same relation to rules that honesty bears to the rules of evidence. This, then, is a second difference between norms and conventions. Unlike conventions, which are based on reasons rooted in important principles of the constitutional order, norms do not have specific reasons; they all share the same reason, which is that they are the necessary condition for everything else in the constitutional order, including conventions, to function. Norms may come last in Lagassé's hierarchy, but they are as close to complete exclusionary reasons for action as any convention, practice, or custom. And despite having the most nebulous form of any of these four categories, they are as deeply entrenched in the social practices of the relevant actors as any of the others.

6.3 Practical social entrenchment

In this part I consider institutions and arrangements whose importance to a state can be inferred from, and only from, the fact that they are extremely difficult to change. These were not deliberately entrenched, but have become entrenched in fact by a process that is social, practical, and passive. They are *socially* entrenched rather than politically entrenched because it is the fact of

[91] 31 US 515 (1832). That the infamous quote is apocryphal matters little for its place in constitutional lore. See Edwin A Miles, 'After John Marshall's Decision: Worcester v. Georgia and the Nullification Crisis' (1973) 39 The J of Southern History 519.

their social popularity that makes them so hard to change; to the extent they are politically entrenched, that fact is secondary to and derivative of the social consensus that supports them. They are *practically* entrenched because, despite being entrenched only as ordinary laws, their popularity means that in practice they are at least as hard or harder to change as laws that fall within the foundational or architectonic categories of constitutional statutes (ie, landmark, quasi-constitutional, or framework statutes). And they are *passively* entrenched because, unlike codified constitutional provisions and many constitutional statutes, there was never a specific intent to entrench them as deeply as they have become entrenched. Barber also recognised this kind of practical entrenchment in a passaged I quoted earlier. 'There is a sense', he wrote:

> in which we could talk of the rules that constitute the British National Health Service (NHS) as being politically entrenched; while the NHS is established through ordinary statute law, it enjoys strong support from the public and it is virtually impossible to imagine any political party campaigning for its removal. Taken this broadly, almost all legal rules are entrenched to some degree.'[92]

I agree with this account of the entrenchment of the NHS, except that I believe such laws and institutions are better understood as socially rather than politically entrenched for the reason explained above. And while I agree that 'all legal rules are entrenched to some degree', I am more interested in looking at *how* different legal and non-legal rules may be entrenched in different ways to different degrees. In the previous two sections, I considered how non-legal rules can be entrenched by non-legal political mechanisms; in this part, I will look at how legal rules can be entrenched by non-legal social mechanisms; and in the final section of this chapter, I will look at how non-legal rules can be entrenched by non-legal social mechanisms.

Of all the categories of non-legal entrenchment, practical social entrenchment is the most straightforward. A law or institution is entrenched in this way if it is practically difficult to change for social reasons, and the degree of entrenchment corresponds to the degree of difficulty in changing it. Often this will be a straightforward measure of the law's popularity. Whether such

[92] ibid 327.

laws and institutions are of special importance from an external sociological perspective, and whether political actors agree with the majority that the laws and institutions in question should remain unchanged, are of secondary importance.[93] The practical entrenchment of the National Health Service Act 1946,[94] which has already been mentioned, has parallels in the *Canada Health Act, 1985*[95] and in the laws governing the Medicare and Medicaid programs in the United States.[96] The popularity of these laws should not be surprising given the importance of health care, but the totemic place these different laws have come to assume in each state is remarkable, especially in the face of longstanding critiques of each system by health care policy experts. The fact that each state's respective health care laws are socially entrenched even though the laws themselves are materially different also shows the role that inertia plays in practical social entrenchment.

The first thing that stands out in these examples is that practical entrenchment can be as effective at preventing and intermediating legal change as formal types of entrenchment. As Ernest Young has observed, '[t]he Social Security Act is functionally more entrenched, at least right now, than the First Amendment's prohibition on flag burning'.[97] This prediction was based not on formal difficulty but on social fact. At the time, he believed, it was more likely that the United States would undertake the complicated process of amending its codified Constitution to prohibit flag burning than that it would repeal the Social Security Act, even though the latter is only an ordinary statute. 'The formal process for overturning a particular norm', he concluded, 'is simply one variable among many—an important one, to be sure—that bear on the difficulty of altering

[93] This has been called 'culture and practice-driven rigidity'. Xenophon Contiades and Alkmene Fotiadou, 'Models of constitutional change' in Xenophon Contiades (ed), *Engineering Constitutional Change: A Comparative Perspective on Europe, Canada and the USA* (Routledge 2013) 417, 459.

[94] Superseded but not fundamentally altered in social import since.

[95] RSC 1985, c C-6.

[96] Titles XVIII and XIX of Social Security Act, 42 USC s 1396, respectively.

[97] Ernest A Young, 'The Constitution Outside the Constitution' (2007) 117 Yale L J 408, 461.

that norm."[98] I would say the same of the health care laws in each of the three countries discussed above. In Canada, the codified *Constitution Act, 1867* and the *Constitution Act, 1982* have each been amended since the *Canada Health Act, 1985* was enacted. In the United Kingdom, until recently any list of constitutional statutes would have included the European Communities Act 1972,[99] yet it proved less enduring than the National Health Service Act 1946, which has been amended only in technical ways with its core principles remaining unquestioned by any major political party.

The role of public desire and public will in practical entrenchment is clear when it comes to something like the UK's NHS, the Canadian healthcare system, and the American Medicare and Medicaid programs, but there is another form of practical entrenchment that complicates this simple picture of social preference. The standard case of practical entrenchment is based on majority consensus, but the views of politically important minorities may also result in practical entrenchment. If the balance of political power depends on political parties winning the support of a discrete minority—be it regional, cultural, linguistic, religious or other—the social views of that minority may determine the limits of change even if they are not the views of the majority. In Canada, socially entrenched opinion in Quebec often determines federal policy even when that policy is opposed by a clear national majority. This is because Quebec fulfils three conditions: (1) it has a strong local political consensus on certain political questions (particularly those that involve the French language and the province's distinct culture); (2) it is politically significant (holding 23% of the seats in the House of Commons and the Senate, as of 2026); and (3) it is politically fickle (in the last 40 years, four different parties have won a plurality of seats in Quebec in a federal election). The combination of these factors results in outsize attention to the will of Quebec voters in national policy debates and to the interests of Quebeckers in the structure of national institutions

[98] ibid.

[99] See James Melton, Christine Stuart and Daniel Helen, *To Codify or Not to Codify? Lessons from Consolidating the United Kingdom's Constitutional Statutes* (The Constitution Unit, UCL 2015) 11-12 <www.ucl.ac.uk/constitution-unit/sites/constitution-unit/files/162.pdf > accessed 23 November 2023.

(eg, the constitutional allocation of one third of the seats on the Supreme Court of Canada to judges from Quebec).[100] Devolution has produced a similar sort of minoritarian entrenchment in the UK. Even if one day an overwhelming number of British voters came to believe that devolution was a mistake that should be reversed, support for devolution among national minorities in the devolved regions would almost certainly mean that the devolutionary laws would remain practically entrenched.[101] Practical entrenchment may thus perform the same role in entrenching barriers to constitutional change in the UK as the formal requirement to obtain provincial or state support for amendments does in the Canadian and American Constitutions.

This, then, is a practical answer to the theoretical question of whether some statutes—the Acts of Union of 1707, for example—are, as the House of Lords has said, 'so fundamental that they lie beyond Parliament's power to legislate'.[102] In *R v Jackson*, Lord Hope noted that:

> Lord President Cooper in *MacCormick v Lord Advocate* [1953] ... reserved his opinion on the question whether the provisions in article XIX of the Treaty of Union which purport to preserve the Court of Session and the laws relating to private right which are administered in Scotland are fundamental law which Parliament is not free to alter. Nevertheless by expressing himself as he did he went further than Dicey ... was prepared to go when he said simply that it would be rash of Parliament to abolish Scots law courts and assimilate the law of Scotland to that of England.[103]

Considering the question in the terms of this thesis, whether we refer to these provisions as unamendable 'fundamental law' makes little practical difference because, as Dicey noted, these provisions are placed beyond political repeal by practical social factors. They are deeply entrenched against amendment by the natural political restraint against a 'rash' acts that defy the public will. By the same token we can say that, if these provisions ever were repealed, it would almost certainly be evidence of a radical change in relevant social conditions. This is an example of formal

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[100] James A Gardner, 'Canadian Federalism in Design and Practice: The Mechanics of a Permanently Provisional Constitution' (2017) 9 Perspectives on Federalism 1.

[101] David McCrone, 'What Do We Think of it So Far? Twenty-Five Years of Devolution (2025) 34 Scottish Affairs 14.

[102] *Jackson v Attorney General* [2005] UKHL 56, [2006] 1 AC 262, 106.

[103] ibid.

entrenchment being superfluous where practical entrenchment does the same work while being open to responsive flexibility in the event of social change.

6.4 Pure social entrenchment

The last category of non-legal entrenchment, which is pure social entrenchment, is by far the largest category for the simple reason that most of life is not regulated by law. It is also the category least addressed by constitutional scholarship, which often views it as existing just beyond the horizon where law gives way to sociology. The concern is understandable but unfortunate, as where two fields touch and interact it is impossible to offer a full account of one without reference to the other. However, to avoid turning this thesis into a general sociological treatise, I will focus on two types of pure social entrenchment, one narrow and the other so wide as to effectively encompass the rest of the field. The first type is where a social rule plays a role that in another context might be played by a legal rule. The second type is more nebulous and includes all the social conditions, customs, traditions, habits, myth, and habitus[104] that obtain in a state, the effects of which are evident in what lawyers uncomfortable with constitutional concepts that cannot be found in caselaw, code, or convention call (with dismissive ethereality) the 'spirit' of the law.

Social behaviour that operates like a rule is what Hart called the 'primary rules of obligation'. '[T]here are', he explained, 'many studies of primitive communities which ... depict in detail the life of a society where the only means of social control is that general attitude of the group towards its own standard modes of behaviour in terms of which we have characterized rules

[104] Pierre Bordieu, *The Logic of Practice* (first published 1980, Richard Nice tr, Stanford UP 1990) 54. The breadth of social practices potentially encompassed here is illustrated by the connection that Giorgio Agamben draws between the monk's physical *habitus* (clothes) and the *habitus* of the monastic way of life. Giorgio Agamben, *The Highest Poverty: Monastic Rules and Form-of-Life* (Adam Kotsko tr, Stanford UP 2013) 13-16. See also de Tocqueville on '*moeurs*' and 'the habits of the mind' and 'habits of the heart' as discussed by Gertrude Himmelfarb. Gertrude Himmelfarb, *The Roads to Modernity* (Vintage 2005) 5. cf Joseph de Maistre, 'Generative Principle of Political Constitutions', in Joseph de Maistre, *Major Works vol 1* (first published 1809, Edward Maxwell III tr, Imperium Press 2021) 9 ('What is most fundamental and most essentially constitutional in the laws of a nation cannot be written … [the Salic law] was written in the hearts of the French').

of obligation'.[105] Hart is referring here to obligations that exist without reference to officials, which have strong social validity outside the world of legal validity. To the extent they are recognised by the law, the recognition is likely to be negative. That is, there will be no law because a social rule plays the role that a law otherwise would. To take an extreme example, a homogenous society that imposes strict social sanctions like shunning or exile on divorced persons may not need a law against divorce. The social sanction would be identifiable as a rule in that state's legal system through the gap in the legal code where other societies have formal divorce laws.

Social entrenchment is socially ordained and socially enforced.[106] As long as this is true, both legal and political restrictions may be unnecessary. What Raz said of a society without a codified Constitution is thus also true of a society without specific laws: '[t]he absence of a constitution (in the strong sense) may be due to a variety of factors' of which '[o]ne is that the country enjoys a level of political consensus that makes a constitution unnecessary'.[107] Similarly, a state may exhibit a degree of social consensus about a practice that makes legal or political regulation unnecessary. In such cases, socially entrenched 'primary rules of obligation' may exist alongside legal rules, but without reference to them and without being referred to by them. Social rules may be backed by social stigma or by superhuman sanction. As Hart also noted, certain motivations for obedience to the law are what Bentham calls 'the auxiliary sanction (popular opinion *or divine displeasure*)',[108] and this applies also to social rules: fear of eternal damnation may be more coercive than the risk of temporary incarceration. We usually associate social restrictions

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[105] Hart, *The Concept of Law* (n 15) 91.

[106] Hermogenian, *The Digest of Justinian, Vol 1* (Charles Henry Monro tr, CUP 1904) III.35 ('We may add that rules of law which have the sanction of long-established custom and have been kept up for a great number of years, may be treated as being the subject of a tacit agreement on the part of the citizens in general, and are as fully maintained as those which exist in writing.')

[107] Joseph Raz, 'On the Authority and Interpretation of Constitutions: Some Preliminaries' in Joseph Raz, *Between Authority and Interpretation* (OUP 2009) 326.

[108] HLA Hart, 'Commands and Authoritative Legal Reasons' in HLA Hart, *Essays on Bentham* (OUP 1982) 243, 246 (emphasis added).

of this kind with what Hart called 'primitive communities',[109] but in our modern secular states religious rules still effectively restrict the behaviour of both clergy and the faithful laity: an observant Catholic cannot remarry without an annulment and an observant Muslim may only contract a debt in accordance with Islamic law. Today, religious precepts tend to operate on the individual conscience, encouraging or enjoining actions outside the purview of the law. Where a society is religiously homogenous, however, the cumulative effect and mutual reinforcement of such self-regulation could result in the social regulation of behaviour that elsewhere would need to be legally entrenched.[110]

This brings me to the second type of social entrenchment, which is the culture in which a state's laws and politics are embedded. Without understanding a state's culture, we cannot fully apprehend its laws and its constitution, which bisect, overlap, and reflect that culture in ways that must be lived, or at least closely observed in practice, to be understood. Alexis de Tocqueville had something like this in mind when he wrote that '[i]f we would become acquainted with the legislation and the manners of a nation . . . we must begin by the study of its social condition.[111] What Tocqueville called a state's social condition is similar to what Alasdair MacIntyre has called a 'shared culture' or 'cultural tradition', from which, in a healthy state, are derived the shared 'modes of deliberation, formal and informal, and a large degree of common understanding of practices and institutions' that are necessary for the people to direct their society towards the common good.[112] Raz similarly believed that a legal system is subordinate to the broader social

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[109] ibid.

[110] The same applies to non-religious belief systems and deeply ingrained social mores of any kind. I have used religion because it is an example of a cultural condition that offers familiar and still widely observed rules.

[111] Alexis de Tocqueville, *Democracy in America* (first published 1835-40, Phillips Bradley ed, Vintage 1945) 48 quoted in Gary J Jacobsohn, *Constitutional Identity* (Harvard UP 2010) 31.

[112] Alasdair MacIntyre, 'Politics, Philosophy and the Common Good' in Kelvin Knight (ed), *The MacIntyre Reader* (U Notre Dame P 1998) 241. MacIntyre is describing a specific form of cultural tradition, that of the Aristotelian *polis*, which includes a commitment to 'communal deliberation'. See also Richard H Pildes, 'The Destruction of Social Capital Through Law' (1996) 144 U Pennsylvania L Rev 2055, 2063.

system[113] with which it is enmeshed in a relationship of mutual but asymmetric influence and dependence so that the 'identity of legal systems depends on the identity of the social forms to which they belong'.[114] In other words, social entrenchment includes not just specific socially entrenched customs but also the ways in which a state's legal and political institutions and arrangements are effectively constrained and shaped by the culture in which they are embedded.

Describing what this means and how it works risks spinning off into a free-wheeling exercise in amateur sociology. Perhaps this is unavoidable. A 'tradition of behaviour', Oakeshott warned, 'is a tricky thing to get to know' and 'it may even appear to be essentially unintelligible'.[115] Thus forewarned, I am nevertheless encouraged by the fact that so many better minds who set out to explain the idea of a constitution also believed they were feeling their way darkly in this murky realm. In an unpublished letter to his friend James Bryce, Dicey wrote that 'to give some variety to myself, rather than to my pupils, I have some idea of making the last 3 or 4 lectures ... turn upon the "spirit of constitutions," as illustrated in different countries'.[116] He confessed, however, 'I am more and more puzzled ... to define what one really means by the spirit of a constitution, which is, I take it nearly equivalent to Montesquieu's Esprit des Lois'.[117] Despite his confusion, Dicey was certain that '[o]ne certainly does mean something' by the term, but brooded that 'when you come to define what we mean it is extraordinarily difficult to give an answer'.[118] When it came the eventual lectures, Dicey still had not settled on a way to describe this 'spirit', but by then he had

[113] He sometimes called it the political system, but he included in it the social as well as the political.

[114] Joseph Raz, *The Concept of a Legal System: An Introduction to the Theory of a Legal System* (2nd edn, OUP 1980) 189. See also Joseph Raz, *Authority of Law: Essays on Law and Morality* (OUP 1979) 100. See also Li-kung Chen, 'The Continuity of a Legal System' (2022) 86 MLR 364, 378.

[115] Michael Oakeshott, 'Political Education' in Michael Oakeshott, *Rationalism in Politics and Other Essays* (first published 1962, Liberty Fund 1991) 61.

[116] AV Dicey, Letter to James Bryce, 16 March 1897, James Bryce Papers, Bodleian Library, Oxford, Bryce 2, fols 240-3.

[117] ibid.

[118] ibid.

changed his mind and distinguished his own understanding from Montesquieu's use of the term[119] in favour of a still (as he admitted) 'extremely vague' sense of 'the way in which the persons of a given time look upon their institutions' and 'the way in which they expect them to work or assume that they will work', which he believed was 'a notion as indefinite as it is important'.[120]

Dicey was too quick to dismiss Montesquieu. Limitations on constitutional action matter whether they are legal or not. Societies differ in their social limitations as much as they differ in their constitutional limitations and many of the differences in the latter are due to differences in the former.[121] A state in which bribery or kinship relations are integral to the application (*vel non*) of the law has a different social morality than one in which the rule of law is blind and neutrally enforced. We may regard bribery- or kinship-based societies as intrinsically flawed, but for those living in them the system has, very loosely speaking, its own integrity. It certainly has a different 'spirit'. An account of a state's constitution that does not include the limitations that 'culture' places on legal and constitutional change will struggle to explain the stability of states whose institutions and arrangements appear, from the external position, to be dangerously under-entrenched. This is illustrated by Carl Schmitt's (undoubtedly correct) claim that, despite Parliament's absolute legal sovereignty, '[i]t would be incorrect to claim that through a "simple majority decision of Parliament," England could be changed into a soviet republic'.[122] Charles de Gaulle, who knew something about constitution-making, believed that 'a constitution is a spirit, a set of institutions,

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[119] Or Dicey's mistaken understanding of Montesquieu's use of the term. See JWF Allison, 'The Spirits of the Constitution' in Nicholas Bamforth and Peter Leyland (eds), *Accountability in the Contemporary Constitution* (OUP 2013) 29-30.

[120] AV Dicey, 'English Constitutionalism under George III' (undated), quoted in Allison (n 119) 30.

[121] This is also true of non-legal constitutional *reinforcements*. See Aristotle on the importance of a pedagogy appropriate to a specific constitution. Aristotle, *The Politics* (Stephen Everson ed, CUP 1996) VIII.1.1337a11-14. This is why John Russell was right to say the English public school system was 'a part of the constitution of the country'. Lord John Russell, *An Essay on the History of the English Government and Constitution, from the Reign of Henry VII to the Present Time* (2nd edn, Longman 1823) 255.

[122] Carl Schmitt, *Constitutional Theory* (Jeffrey Seitzer tr, Duke UP 2008) 146. On sociological limits on constitutional change, see Silvia Suteu, *Eternity Clauses in Democratic Constitutionalism* (OUP 2021) 128.

and day-to-day practice'.[123] If it is curious that he does not mention the text, it may be because, as he said elsewhere, '[the French] know what Constitutions are worth; we have had seventeen in 150 years, and the nature of things is stronger than texts drawn up by politicians.'[124] In de Gaulle's distinction between the codified Constitution and the deeper and more powerful 'nature of things' we can hear appeal of Montesquieu, for whom a constitution was a social organism in which laws reflected the spirit of a particular society by responding to the distinct social and political forces at work in that society.[125] For Montesquieu, these forces included everything from the morality and customs of a state to the quality of its soil and its climate.[126] As a result, we should expect constitutional orders to vary as much as societies vary from each other. And it follows that, as Martin Loughlin has admonished, '*pace* the liberal conviction, there can be no such thing as an ideal best state: a constitution can only be assessed within a particular socio-political context'.[127]

The social entrenchment of the 'spirit' of a constitution has at least two practical implications for constitutional theory. The first is its inextricable relationship with 'constitutional identity', which, as Monica Polzin has shown, 'in German constitutional thought is used, at least in relation to formal constitutional amendments, more or less as a synonym for the "basic structure doctrine" applied in other jurisdictions, such as India and the United States'.[128] I would add to her list the 'unwritten principles' that Canadian judges have identified between or behind the lines of the codified Canadian constitution. When it comes to constitutional adjudication, the question of

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[123] Press conference, 31 January 1964 quoted in Andrew Knapp, *Charles De Gaulle* (Routledge 2020) 260.

[124] Quoted in Julian Jackson, *A Certain Idea of France* (Penguin Books 2019) 552.

[125] Philip A Hamburger, 'The Constitution's Accommodation of Social Change' (1989) 88 Michigan L Rev 239, 252. We may also hear echoes of Charles Maurras's less benign distinction between the 'pays légal' and the 'pays réel'. Gershon Shafir, 'Human rights under American populism' in Alison Brysk (ed), *Populism and Human Rights in a Turbulent Era* (Edward Elgar 2023) 176.

[126] Charles de Secondat, baron de Montesquieu, *The Spirit of the Laws* (first published 1758, Anne M Cohler, Basia Carolyn Miller, and Harold Samuel Stone, trs and eds, CUP 1989) 309, 308-333.

[127] Martin Loughlin, 'Constitutional Theory: A 25th Anniversary Essay' (2005) 25 OJLS 183, 188. See also Felix Frankfurter, *Mr Justice Holmes and the Supreme Court* (Harvard UP 1961) 86.

[128] Polzin, 'Constitutional Identity' (n 9) 1598.

whether the basic structure or an unwritten principle of a constitution has been compromised is thus both a legal question and a social evaluation that cannot help but take note of that ephemeral but tenacious idea of the 'spirit' of the constitution.[129]

The second way in which the socially entrenched spirit of a constitution matters is to legitimate political action. Political and legal legitimacy are at root social phenomena, with socially entrenched norms, customs, expectations, and desires holding political and legal institutions and arrangements in place as gravity holds the planets in orbit and keeps our solar system from flying apart. This deeper stratum of social entrenchment is what provides continuity in a state in those periods of constitutional disjunction that have so preoccupied constitutional theorists.[130] As Raz knew, 'the "continuity of a legal system is tied to the continuity of the political system" and the former is "fundamentally a function of" the latter'.[131] As a result, as Li-kung Chen has written (expanding on Raz's argument), 'the continuity of a legal system and the continuity of the political system ... will not diverge; and it is the legal system that is to track the political system, not vice versa'.[132] This insight confirms Dicey's intuition about the importance of social entrenchment despite his determination to explain the English constitution without it.

6.5 Conclusion

Culture is an assumed but unspoken condition in most positivist theories of law. For a theory of law that derives rules of recognition from the legitimating effects of official behaviour, we must still ask: who legitimates the legitimators? According to Chen, both Finnis and Hart

[129] Robert Post, 'The Supreme Court, 2002 Term-Forward: Establishing the Legal Constitution: Culture, Courts and Law' (2003) 117 Harvard L Rev 8 quoted in Polzin, 'Constitutional Identity' (n 9) 1599.

[130] See eg HWR Wade, 'The Basis of Legal Sovereignty' (1955) 13 CLJ 172, 196; Hans Kelsen, *The Pure Theory of Law* (Univ of California P 1967) 276; John Finnis, 'Revolutions and Continuity of Law' [1971] in John Finnis, *Philosophy of Law: Collected Essays, Vol IV* (OUP 2011) 434.

[131] Raz, *Authority of Law* (n 114) 100.

[132] Chen (n 114) 378.

believe that 'it is an official practice rather than a popular practice that constitutes a rule [of legal validity]'.[133] This is true, but it begins the account of law *in media res*. The beginning of the story is found in Tony Honoré's insight that the general population plays an essential role in legitimating the officials whose practice is determinative of the rule.[134] Like law itself, judges and courts exist within a broader social order, and the recognition by judges of what the law is presupposes a broader social recognition of what judges and courts are, and of which judges' and which courts' practices count as valid. As Honoré wrote, 'the source of [a judge's] authority [after a true revolution] is neither the old nor the new constitution, but the acquiescence of the population in submitting their disputes to him'.[135] Debates about *de jure* continuity after a revolution, a civil war, or a usurpation are theoretically interesting, but in practice the judge is legitimated as a legal official before and after a constitutional disjunction by social acceptance, which explains why he can be a source of 'inter-systemic or supra-systemic'[136] continuity independent of the laws and the constitution. The behaviour of officials may legitimate legal and political institutions and arrangements, but it is the people who legitimate the legitimators. Legitimacy cannot exist suspended in the ether; for social animals it must be grounded in a social context. The core institutions and arrangements of a state may be legally or constitutionally entrenched, but both the law and the constitution are themselves socially entrenched. Formal entrenchment and social

[133] ibid 376. See also Hart, *The Concept of Law* (n 15) 110-17; HLA Hart, 'Kelsen's Doctrine of the Unity of Law' in HLA Hart, *Essays in Jurisprudence and Philosophy* (OUP 1983) 339-42; Joseph Raz 'The Identity of Legal Systems' in Raz, *The Authority of Law* (n 114) 78, 87-89.

[134] ibid. See also Stephen Perry, 'Hart on Social Rules and the Foundations of Law: Liberating the Internal Point of View' (2006) 75 Fordham L Rev 1171, 1178 n 16, 1202-03.

[135] AM Honoré, 'Reflections on Revolutions' (1967) 2 The Irish Jurist 268, 276. On public acquiescence, see Hart, *The Concept of Law* (n 15) 59-60; Brian Galligan and Scott Brenton, 'Constitutional Conventions' in Brian Galligan and Scott Brenton (eds), *Constitutional Conventions in Westminster Systems: Controversies, Changes and Challenges* (CUP 2015) 14. On the supreme political sovereignty of the people, see Jennings, *The Law and the Constitution* (n 19) 148-49. On the importance of the continuity of the political community, see Richard Ekins, 'Constitutional Principle in the Laws of the Commonwealth' in John Keown and Robert P George (eds), *Reason, Morality, and Law: The Philosophy of John Finnis* (OUP 2013) 397.

[136] ibid.

entrenchment are complementary sources of stability in a state, but the ultimate direction of dependence is primarily from the legal and constitutional to the political and the social.

Chapter 7: PERILS OF ENTRENCHMENT, APPARENT AND REAL

In the four previous chapters, I described the ways in which different forms of entrenchment work within and on a state's constitutional order to manage the process of change to encourage stability over time. But what happens when entrenchment fails? Specifically, what happens when formal entrenchment intended to promote stability ends up preventing necessary change or is itself a destabilising act of change? And what happens if ill-considered or undesirable arrangements and institutions are entrenched and cannot be easily changed? In this chapter, I consider various potential perils of entrenchment in action. First, I consider concerns that others have raised about entrenchment, which I believe are misplaced or overstated. Second, I offer my own concerns about entrenchment, looking at problems that can arise both from process (how something is entrenched) and substance (what is entrenched). Finally, I suggest that while much attention has been paid to the importance of formal entrenchment—especially constitutional entrenchment—it also carries important and underappreciated risks. I identify the malign consequences of over-entrenchment, which include a failure to accommodate contingency and the need to invent strategies to circumvent the problem that are at best sub-optimal and at worst themselves destabilising.

7.1 Misplaced and overstated concerns about entrenchment

7.1.1 Under-entrenchment

Concerns about entrenchment are usually expressed in one of two ways: concern that too little formal entrenchment will permit frequent and destabilising change; and the contrary fear that too much formal entrenchment will prevent necessary adaptation, leading to sclerosis or, in the worst case, paralysis. The two fears are captured by Aharon Barak's warning that '[s]tability without change is degeneration. Change without stability is anarchy'.[1] The goal of a well-balanced

[1] Aharon Barak, *The Judge in a Democracy* (Princeton UP 2006) 22. cf Burke's formulation in chapter 1.

constitution is to create the conditions—constitutional, legal, political, and social—for stable processes of change or, in the terms of this thesis, for stability through change, which, in chapter 1, I identified with the concept of 'continuity'. If a state's constitution becomes unbalanced in one or the other direction, Barak suggests, the result will be either 'degeneration' (I would say stagnation, but the two ideas are related[2]) or 'anarchy': two different mechanisms that produce different forms of civil instability.

In two articles, Richard Albert has provided useful examples of these two concerns.[3] In the first, he advised making it harder to change codified constitutional commitments by entrenching the rules of constitutional amendment themselves. Without such 'double entrenchment', Albert warned, the commitments of a codified Constitution could become as easy to alter as ordinary laws, undoing the good work of constitutional entrenchment. Although Albert acknowledges that constitutional entrenchment is not necessarily and always a good thing, he assumes rightly that a state may have good reasons for wanting certain codified constitutional provisions to be (and remain) harder to change than ordinarily entrenched laws. This being so, he argues, the state should doubly insulate those provisions by entrenching the rules for amendment as or more deeply than the provisions of the codified Constitution themselves. Albert proposes that this be done using mechanisms of 'intertemporality' and 'relativity'. 'Intertemporality', as he defines it, 'counsels a commitment to respecting the considered judgment of the community as expressed over a period of years, and not only at one fixed point in time', which can be done 'by requiring sequential approval—multiple votes over multiple years—for amending amendment rules'.[4] 'Relativity', which can be used alone or alongside intertemporality, 'counsels a commitment to entrenching amendment rules under higher thresholds than other constitutional provisions'.[5] If

[2] Oscar Wilde, *The Picture of Dorian Gray* (first published 1890, Norton 2006).

[3] The first article and its solution is covered in this section; the second article is discussed in the next.

[4] Richard Albert, 'Amending Constitutional Amendment Rules' (2015) 13 ICON 655, 678.

[5] ibid.

we accept Albert's premiss, the case for relativity is straightforward: a higher threshold of social and political consensus should be required to un-entrench an entrenched Constitution as a whole than to amend any single provision. The case for intertemporality, however, remains incomplete.

While Albert's case for relativity is straightforward (though not unanswerable), the case for intertemporality requires us to accept further and less obvious assumptions about representational legitimacy.[6] Intertemporality is necessary, he says, because 'temporary supermajorities are insufficiently durable to legitimately express the considered judgment of the community'.[7] Had Albert rested his argument solely on the practical likelihood that a durable supermajority will be a stable supermajority, the case for intertemporality would have been more convincing. But because his primary concern is theoretical, he ties his defence of intertemporality to Jed Rubenfeld's theory of representation over time. As a result, his argument suffers from the deficiencies of that theory which I identified in chapter 2. Intertemporality, according to Albert/Rubenfeld, is intended to forestall the risk that the people may, in a moment of perfervid agitation, be tempted to act in ways they will later regret. The superficial appeal of this is obvious. We sometimes apply a similar logic to our own lives, as when we decide to sleep on a decision to see whether we still feel the same way in the morning. But often we don't. Not every decision can or should be judged good or bad based on whether it reflects a consistent view over a long period of time. Sometimes we stumble in our haste, but sometimes we miss opportunities by delay.[8] Entrenched intertemporality ignores the fact that there is no way of knowing in advance which circumstances it will apply to and whether, in any future case, haste or delay will pose the greater risk. Only the people at the moment the case arises can possibly be capable of that judgement, *even if their judgement in the moment may also be imperfect*, and they are the very actors who will be handicapped by the intended safeguard.

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[6] ibid. 678-79.

[7] ibid 666.

[8] William Shakespeare, *Julius Caesar* (first published 1623, Methuen 1964) Act IV, scene iii, lines 216-20.

In practice, supermajority support for a specific action may dissipate during the period of intertemporal approval for reasons unrelated to the quality of the people's judgment in the moment, including exogenous factors (war, plague, financial crisis, &c) or when support for the party in power wanes for reasons unrelated to the constitutional change they are proposing. In this second case, Albert's requirement that there be an election between initial approval and confirmatory approval of a constitutional amendment may obscure an enduring non-partisan supermajority for the amendment that is defeated by partisan differences on the question.[9] More generally, it is not clear why we should trust the judgment of the people at the time they decide to entrench intertemporality any more than we trust the hypothetical future population. The conditions of political exigency that give rise to the desire to codify a new Constitution will not necessarily be times of calm and reasoned reflection. And as a matter of philosophical consistency, why should a people only be able to make fundamental changes to their Constitution using a process that is more onerous than the one used to adopt the Constitution in the first place? At a minimum, the decision to entrench intertemporality should itself be subject to the same requirement.

Concerns about impetuous constitutional amendment also ignore the fact that it already takes significant political effort and time to amend a codified Constitution.[10] Even where codified Constitutions are more easily amended, as in Ireland or Germany, public opinion and political will must be marshalled over time to build the momentum for change. And for the same reason that those Constitutions may be relatively easily amended, if an amendment is later judged to have been unwise, they may just as easily be amended back. Contra Albert, the surest way to know that a

[9] For example, had Brexit been subject to such a requirement and the government had changed hands from the Conservative Party to the Labour Party or a Labour-Liberal Democrat coalition between the initial approval and the confirmatory approval for reasons other than the Brexit question (sleaze, incompetence, general disaffection), Brexit would likely have been impossible even if there had been enduring popular majority support for it before and after the election.

[10] In the United States, the time between proposal and ratification of a constitutional amendment has ranged from 100 days (the Twenty-Sixth Amendment) to more than 200 years (the Twenty-Seventh Amendment). The first ten amendments of the Bill of Rights took two years.

Constitutional amendment has 'sustainable' support is if the people are able to change their mind and do not. This is best achieved in a system where constitutional changes are not formally entrenched, or if formally entrenched, then only lightly.

Edward Willis has challenged the assumption of most modern constitutionalist theory that, to be stable, institutions and arrangements must be formally entrenched.[11] Although he uses the example of New Zealand's uncodified (he says 'unwritten') constitution, what he says applies equally to the British constitution and to the uncodified and unwritten parts of the Canadian Constitution. Willis begins with a useful reminder that, although 'the unwritten constitutional form has become synonymous with flexibility' and at the same time associated with a fear of unstable under-entrenchment, 'it was not always so'.[12] There was, he says, an older understanding of '[t]he unwritten constitution [as] the product of a tradition of stability and stubborn resistance to easy change.'[13] Willis posits that stability without constitutional codification is possible because 'in the absence of a constitutional master-text ... stability is nevertheless promoted through a distinctive mix of political, moral, conventional, institutional and legal pressures'.[14] More specifically, 'stability emerges from an alignment in constitutional practice and discourse recognising the value of maintaining the integrity of basic principles and values.'[15] This is consistent with my conclusions in chapters 5 and 6 that, in the absence of codified entrenchment, institutions and arrangements may be secured by constitutional statutes, politically entrenched rules, and socially entrenched laws. These rules and laws resist easy change not because of the form of their entrenchment, which is no more and sometimes much less formal than that of an ordinary law, but 'because the

[11] Edward Willis, 'Unwritten constitutionalism: stability without entrenchment' [2022] PL 386, 387, 389.

[12] ibid 392.

[13] ibid. See also Janet McLean, 'The Unwritten, Political Constitution and its Enemies' (2016) 14 IJCL 1991, 136 cited in Willis (n 11) at 393.

[14] ibid 388.

[15] ibid 399.

constitution is made up of values and principles which are deeply embedded in society and the political and institutional culture which are their direct and immediate historical expression'.[16] When these principles coincide with a rule or a law, they grip it and hold it in place regardless of the degree of their formal entrenchment. Their durability is consistent with the old assumption identified by Willis, and their informal resistance to change shows why codified constitutional entrenchment is not necessarily the most important feature of an otherwise healthy constitution, if it is part of it at all.

It is even tempting to think, as Willis hints, that the absence of a codified Constitution may strengthen other forms of entrenchment, as the inability to use one limb may reinforce the development of another.[17] Willis suggests that, while in some cases 'the absence of a constitutional master-text' may pose a risk to constitutional stability, 'it can also encourage commitment and co-ordination among plural sources of constitutional authority'.[18] No doubt reliance on non-codified forms of entrenchment means that those forms must be maintained in good working order, which keeps them active and functional, but I have also shown how non-codified forms of entrenchment can operate even in a heavily-codified system, so it is not necessary to press the point too far. It is enough to note that, as in the case of the British constitution and those parts of it inherited by the New Zealand and Canadian c/Constitutions, where a state has evolved a stable constitutional system without a codified master-text, the imposition of one would be at least superfluous, and, insofar as the consequences would be unpredictable, risky, if not reckless.

As a caveat to his defence of the uncodified constitution, Willis notes that 'it is not my intention to make generalised descriptive claims about a particular type of "unwritten" constitution' as '[i]diosyncratic features of history, culture and institutional relationships, for

[16] Carlo Fusaro and Dawn Oliver, 'Towards a Theory of Constitutional Change' in Dawn Oliver and Carlo Fusaro (eds), *How Constitutions Change: A Comparative Study* (Hart 2011), 405, 410.

[17] Christy Brown, *My Left Foot* (Simon and Schuster 1955).

[18] Willis (n 11) 388. See also ibid at 397-98.

example, would ensure that any such generalised claims would lack credibility.'[19] This is true,[20] but all it means is that under different internal and external circumstances different combinations and depths of non-codified entrenchment will interact in different ways, each of which may still be stable enough to ensure enduring continuity. This is consistent with the interactions between different forms of entrenchment described in the previous four chapters. As a result, stronger social and political entrenchment may permit less legal entrenchment in one state and weaker social and political forms of entrenchment may require more formal legal entrenchment in another. In the first case, Willis says that '[p]olitical practice, constitutional convention and the common law all supply understandings of salient constitutional principles.'[21] I would go further: where a common understanding of practice, precedent, convention and law obtains, codified constitutional entrenchment will, except in the cases described later in chapter 8, usually be redundant.[22]

These uncodified but authoritative constitutional principles are why, although it may look to an outsider that under the British constitution anything *can* happen at the whim of a temporary elected majority, not just anything does happen. What happens is conditioned (though not mechanistically determined) by what happened before. Although 'in theory' unwritten constitutions like the British constitution 'are easy to change because any political majority can change the constitution', as Carlo Fusaro and Dawn Oliver observe, 'the existence of and widespread acceptance of some "fundamental principles" can make it practically impossible to legislate for change that challenges those principles.'[23] The form of parliamentary sovereignty may

[19] ibid.

[20] Conor Casey, 'Common Good Constitutionalism and Constitutional Change' in Oran Doyle and Mariana Velasco-Rivera (eds), *Research Handbook on Comparative Constitutional Change* (Edward Elgar, forthcoming 2026) ('Some rules and forms of government structure will suit some political communities more than others, because of variables like a people's level of social cohesion and trust, economic stability, moral virtue, and so forth.')

[21] Willis (n 11) 390.

[22] ibid 388, 390, 404.

[23] Fusaro and Oliver (n 16) 410.

appear open ended, but it is only one of many mutually supporting sources of authority at play in the British constitution and those other legal, political, and social forms of entrenchment have proved sufficient over centuries to constrain what is in theory an almost limitless power. Forms of entrenchment that reflect political and social settlements worked out over time rather than once and for all in a constitutional moment, can, as Willis says, 'create a normative gravity of their own, shifting the orbital centre of the constitution towards the principles, processes and practices' that entrench and reinforce these settlements outside a codified master-text.[24]

Of course, as Willis noted in his caveat, those 'fundamental principles' that influence the degrees and forms of non-codified entrenchment will be different in different constitutions, and what is difficult to change in one uncodified constitution—ie, what is entrenched by other means—may be easier to change or even irrelevant in other constitutions where the underlying principles, assumptions, and expectations are different.[25] So, for example, it would be almost impossible to amend Canada's *Official Languages Act* because it is socially and politically entrenched for reasons that lie deep in the country's unique history, while such an Act is (so far) unnecessary in the United States or the United Kingdom.[26] The connection between which institutions and arrangements are needed and even possible today in a given state and the state's unique and contingent history can be seen in the choices made during the patriation of the Canadian constitution in 1982. The *Constitution Act, 1982* was able to leave essential features of the constitution uncodified, including the method of selecting the prime minister and the rules by which Parliament operates, because Canada's history allowed the state to continue to order these matters according to existing and politically and socially entrenched assumptions and expectations. This will not be the case when a state creates a Constitution from scratch. When the delegates to

[24] Willis (n 11) 399.

[25] ibid 411.

[26] Mariano Croce and Andrea Salvatore, *Carl Schmitt's Institutional Theory: The Political Power of Normality* (CUP 2022) 101.

the Philadelphia Convention devised a new form of federal government to govern thirteen pre-existing and constitutionally diverse states, matters such as the method of electing the president and the respective powers of the branches of the new government had to be spelled out expressly, which is why we find them codified in the first three articles of the United States Constitution.

In a state with a codified Constitution, the power of entrenched but uncodified social and political factors can still be strong enough to displace or supersede formally entrenched provisions of the Constitution. For example, the normal process for constitutional amendment in the Canadian Constitution requires the agreement of both houses of Parliament and seven provinces that together make up fifty percent of the Canadian population.[27] Because this means that the Constitution can be amended without the agreement of one of the three largest provinces, the federal government faced political pressure from those provinces to protect their interests. In 1996, Parliament passed a law requiring that a proposed amendment be approved not just according to the constitutional formula, but specifically by each of Quebec, Ontario, and British Columbia, as well by two or more of each of the Prairie provinces and the Atlantic provinces.[28] Although this statutory requirement is not part of the codified Constitution, as long as the political reason that spurred it endures, it effectively supplants the constitutionally-entrenched amendment rule. This is an example of how the fact of a political settlement is more important than the form in which it is memorialised. It also shows why, in a healthy state, concern about formal under-entrenchment is often exaggerated. A politically-entrenched ordinary law can be as stabilising as a constitutionally-entrenched rule because it rests on the surest of foundations: socio-political bedrock.

[27] Section 38, *Constitution Act 1982*.

[28] An Act Respecting Constitutional Amendments 1996, s 1(1).

7.1.2 Over-entrenchment

Seeking a solution to the perceived impossibility of amending the United States Constitution, Albert has offered a radical suggestion: that '[t]he misgivings that some have today about the Constitution could perhaps have been avoided had Jefferson won the battle of ideas early in the life of the new republic'.[29] Thomas Jefferson, Albert explains, 'proposed an ingenious solution ... to avoid the condition of constructive unamendability that persists today', namely 'periodically rewriting the Constitution to give every generation the opportunity to update it according to its own needs'.[30] '[P]erhaps', he muses, 'Jefferson had the right idea'. Perhaps:

> all constitutions ... should be preprogrammed to require their rewriting periodically—or at least to require the convening of periodic conventions of the people to consider their rewriting—in order to ensure that the text represents the current values of the time and reflects the vision the people have for themselves. Rewriting constitutions periodically could narrow the inevitable gulf that grows over time between the constitution as written and the constitution as lived … [and] would vest the people of the present with something more closely approximating an effective and practicable power of self-government.[31]

Although the goal of aligning present conditions with the popular will is sound and the plan to do that by giving the people more direct control over their present constitutional state is promising, the solution is unnecessarily complicated. If you believe that the people should be vested with 'an effective and practicable power of self-government' the answer is not to find ways to recodify the constitution periodically but to allow amendment by ordinary legislation. And if you want to retain some codified constitutional provisions without making it too difficult to amend the constitution when needed and desired, the remedy is not to force the people to reconsider their Constitution *holus bolus* at predetermined intervals that may or may not correspond to such need or desire, but simply to make amendments easier.

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[29] Richard Albert, 'The World's Most Difficult Constitution to Amend?' (2022) 110 California L Rev 2005, 2021. This proposal is not necessarily in conflict with his argument for double entrenchment, but their underlying reasoning is at least in tension.

[30] ibid.

[31] ibid.

Albert (and Jefferson) discount the politically and socially disruptive effects of constitution-making when it is necessary, let alone when no one is calling for it.[32] Change for the sake of change is an invitation to disorder, which is what codified constitutional entrenchment, and every other form of entrenchment, exists to avoid. Even when there is a good reason, the process can be perilously destabilising. That was the experience in Canada in the late 1980s and early 1990s, when then prime minister Brian Mulroney's well-intentioned attempts to secure Quebec's belated assent to the new Constitution embroiled the country in years of acrimonious negotiation culminating in the rejection of two constitutional proposals, a boost to the cause of Quebec independence, Western Canadian resentment that fractured Mulroney's own party, and a lingering reluctance across the country ever to revisit the amending process.

Nor does Albert make a convincing case that 'the condition of constructive unamendability' he diagnoses in the United States is evidence of general dissatisfaction with the current constitutional compromise or that any underlying civil discontent is more likely to be assuaged than enflamed by subjecting it to the pressures of a new constitutional convention. He offers no evidence that there is an alternative constitutional arrangement that would attract support from a majority, let alone a supermajority, of Americans. In the absence of strong agreement on specific desired changes, what Albert calls Jefferson's 'ingenious solution' looks more like institutionalised instability. And if such widespread agreement did exist, such an extreme solution would not be needed as the existing amendment provision would suffice. In a sprawling, diverse federation like the United States (or Canada or, increasingly, the modern United Kingdom), existing stability, however unsatisfying, is not something to be risked lightly on the uncertain project of regular, wholesale constitution-remaking.

[32] In the British context, Jeff King is similarly sanguine about the consequences of throwing the constitution up for grabs. Jeff King, 'The Democratic Case for a Written Constitution' (2019) 72 Current Legal Problems 1. Here the metaphor of 'authorship' unhelpfully elides the ugly passion of actual high stakes politics.

Jefferson's vision of eternally recurring revision requires a high tolerance for constitutional uncertainty. It is an open question whether any society could survive for long such permanent scepticism about its constitutional foundation. The process of revision may only come to a head once every twenty years, but its prospect would cast a shadow over present arrangements every year in between. A constitution, whether codified or not, is supposed to settle those political arrangements in a state that require certainty so the people and their government can carry on the hard work of creating the conditions for human flourishing. It should also provide the means whereby those arrangements may change over time in an orderly manner. Albert and Jefferson are right to be concerned about the possibility of constitutional sclerosis, but the remedy cannot be latent anarchy. The best way to 'vest the people of the present with something more closely approximating an effective and practicable power of self-government than what they generally enjoy',[33] is to lower the threshold for constitutional amendment and, wherever possible, rely on less formal kinds of entrenchment.

7.2 Some Genuine Concerns about Entrenchment

Having shown why some common fears about under-entrenchment and over-entrenchment are overstated, in this section, I will explore how entrenchment can fail. That is, if the value of entrenchment is its ability to moderate the process of orderly change in ways that conduce to order and continuity, then entrenchment fails when it increases the cost of change in ways that do not prevent—or, worse, increase—the potential for political disfunction or civil unrest. This can happen when the form of entrenchment is too inflexible to permit necessary or desired change (ie, there is a problem with the *process* of entrenchment) or when there is a problem with what is entrenched (ie, there is a problem with the *substance* of entrenchment), or both. I will

[33] Albert, 'The World's Most Difficult Constitution to Amend?' (n 29) 2021.

first consider problems with the process of entrenchment, and particularly with over-entrenchment, followed by problems with the substance of entrenchment.

7.2.1 Problems with the process of entrenchment

The current effectively unamendable status of the Canadian and American Constitutions show how, in an otherwise healthy state, the risks of over-entrenchment may be more pressing than the risk of under-entrenchment. The main difference between the two is that, whereas the American Constitution was not always unamendable and has become so over time, in Canada over-entrenchment was the result of a flawed constitution-making process and was evident as soon as the *Constitution Act, 1982*[34] was approved. These different histories producing a similar result illustrate two different aspects of the problem of over-entrenchment.

In the case of Canada, the basic framework of government was first provided by the British North America Act 1867 (BNA)[35], which was an imperial statute of the Westminster Parliament.[36] Still largely in effect, the BNA established the federal structure of the Dominion of Canada[37] and provided for, inter alia, the establishment of courts,[38] a federal Senate,[39] and a federal Parliament following the Westminster model.[40] Insofar as this parliamentary model incorporated the privileges, immunities, prerogatives, and conventions of the Westminster Parliament and provided scope for new domestic constitutional conventions, practices, customs, and norms to emerge over

[34] Schedule B to the Canada Act 1982 (UK), 1982, c 11. I say 'approved', because the Act itself is an annex to a British statute, which was accepted by Canada as a new entrenched codified Constitution.

[35] 30 & 31 Vict, c 3.

[36] An Act for the Union of Canada, Nova Scotia and New Brunswick, and the Government thereof; and for Purposes connected therewith, 30 & 31 Vict c 3 (1867).

[37] Constitution Act, 1867, c VI.

[38] ibid c VII.

[39] ibid ss 21-36.

[40] See ibid c III-IV.

time, it was, like the British constitution, substantially uncodified. It also anticipated that both pre-existing and future provincial constitutions would be uncodified, or at least not formally entrenched more deeply than a constitutional statute. Because the BNA was a British statute, it could only be amended by the British Parliament. Over time, a convention arose whereby the British Parliament would amend Canada's statutory Constitution when (and only when) requested to do so by the Dominion government.[41] In 1931, when other dominions were given the power to amend their constitutional statutes,[42] Canada left that power in the hands of the British Parliament because the provinces and the Dominion government could not agree on an amending formula.[43]

After a half century of failure to agree on an amending formula,[44] the Dominion government finally 'patriated' the BNA, along with the subsequent British North America Acts, as the *Constitution Act, 1867*, and supplemented it with the *Constitution Act, 1982*, which included new amending formulae. The government side-stepped the problem of the province of Quebec's continuing objection by the dubious expedient of proceeding without unanimous provincial agreement.[45] The decision to reconstitute the Constitution without Quebec's assent has confounded the project ever since. Rather than accepting the *fait accompli* and abandoning its conditions for acceding to the new Constitution, Quebec has transferred them to the process of amendment. As a matter of principle, Quebec governments will not consider new amendments

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[41] Allan C Hutchinson, 'Constitutional Change and Constitutional Amendment: A Canadian Conundrum' in Xenophon Contiades (ed) *Engineering Constitutional Change: A Comparative Perspective on Europe, Canada and the USA* (Talyor & Francis 2012) 51, 59. Between 1867 and 1975, this happened nineteen times.

[42] An Act to give effect to certain resolutions passed by Imperial Conferences held in the years 1926 and 1930, 22 & 23 Geo 5 c 4.

[43] Benoît Pelletier, 'Amending the Constitution of Canada' in Peter C Oliver et al (eds), *The Oxford Handbook of the Canadian Constitution* (OUP 2017) 253, 255. See also Paul Gérin-Lajoie, *Constitutional Amendments in Canada* (U of Toronto P 1950) ch 3; Hutchinson (n 41) 59.

[44] ibid 255-60.

[45] Guy Laforest and Rosalie Readman, 'More Distress than Enchantment: The Constitutional Negotiations of November 1981 Seen from Quebec' in Lois Harder and Steve Patten (eds), *Patriation and its Consequences: Constitution Making in Canada* (UBC P 2015) 159; Peter Russell, 'Patriation and the Law of Unintended Consequences' ibid 229; John Finnis, 'Patriation and Patrimony: The Path to the Charter' (2015) 28 Can J Law & Juris 51.

until their original demands (*les revendications traditionnelles*) are met.[46] And because, both as a matter of federal law and political imperative, Quebec's assent is required to use the Constitution's default amending process, the price for having secured a constitutional settlement without Quebec is an effectively unamendable constitution. Two lessons may be drawn from this experience. First, that the formally entrenched amending process has been superseded by practical political factors is further evidence that, when they intersect, formal entrenchment may matter less than functional entrenchment. Second, it shows that codified entrenchment is a speculative exercise. A society is likely to change (or not, as in the case of Quebec) in ways that constitutional designers cannot predict, frustrating their intended safeguards of permanence and provisions for change.[47]

The Canadian experience shows how misalignment between entrenched constitutional forms and the socially entrenched political reality can produce unintentional over-entrenchment—what Albert calls 'constructive unamendability'[48]—resulting in a Constitution that lacks the ability to adjust and evolve over time. In Canada, the misalignment was evident from the beginning, but the American experience shows that this can happen even when there is widespread social and political agreement at the time the Constitution is codified and entrenched. Although some of the state ratifications of the American Constitution were hotly contested,[49] in the end it was unanimously approved by all thirteen states. After this promising start, the amending process worked mostly as intended for almost a century, starting with the first ten amendments added shortly after ratification.[50] Over time, however, that changed. Other than the anomalous Twenty-Seventh Amendment, the American Constitution has not been amended in more than half a

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[46] Patrick Taillon, *Les obstacles juridiques à une réforme du fédéralisme* (Institut de recherche sur le Québec 2007) <https://irq.quebec/wp-content/uploads/2015/03/Obstaclesjuridiques.pdf> accessed 26 June 2026 15-16.

[47] I discuss this further in section 7.3.1.

[48] Albert, 'The World's Most Difficult Constitution to Amend?' (n 29) 2013-14.

[49] Pauline Maier, *Ratification: The People Debate the Constitution, 1787-1788* (Simon & Schuster 2011) 125, 238.

[50] Akhil Reed Amar, *The Bill of Rights: Creation and Reconstruction* (Yale UP 2008).

century—the second longest period of constitutional quiescence in the country's history. If Albert's verdict that '[t]oday the entire U.S. Constitution is unamendable'[51] overstates the problem, it does not do so by much.

Albert offers two explanations for this constructive unamendability, one intrinsic to the form of the entrenchment and one contingent on evolving circumstances. First, he blames the 'formidable labyrinth' of 'the supermajority approvals required for an amendment' that was built into the amending process; second, he says that 'the current dynamics of constitutional politics have thwarted coordination between the national and state governments, and between the two national political parties'.[52] Although Albert treats these factors separately, it is their conjunction that is the real problem.[53] A lower degree of formal entrenchment could accommodate a higher degree of social disagreement, while a high degree of social cohesion might overcome an even higher bar to amendment. It is the combination of a high bar to amendment and a polarised polity that makes the American Constitution constructively unamendable. It is probably not a coincidence that the other long period of constructive unamendability in American history was the constitutional deadlock of the early 19th century that was only 'resolved' by the US Civil War and the three great postbellum amendments imposed as conditions of surrender on the losing states.[54]

Albert is no doubt right in his account of the American experience of constructive unamendability, but he is less convincing when he attempts to distinguish it from the Canadian experience. In the American case, he says, 'political dynamics' (elsewhere he calls it 'an uncodified political reality') 'make it impossible to satisfy the conditions required for an amendment'.[55] This,

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[51] Albert, 'The World's Most Difficult Constitution to Amend?' (n 29) 2013.

[52] ibid.

[53] ibid.

[54] Eric Foner, *The Second Founding: How the Civil War and Reconstruction Remade the Constitution* (WW Norton & Co 2020).

[55] ibid.

he says, differs from the 'constitutional culture against constitutional amendment' that obtains in Canada, which is the result of 'amendment fatigue and decades of costly and dramatic amendment failures'.[56] Albert makes too much of the difference. As described above, the 'decades of costly and dramatic amendment failures' were themselves the result of 'political dynamics' that preceded the *Constitution Act, 1982* and 'an uncodified political reality' that, paradoxically, was entrenched against the new Constitution and then further entrenched by it. Their different histories aside, in both Canada and the United States constructive unamendability is the result of underlying political and social factors, including similar federal systems that complicate the amending process.[57] The only material difference is that constructive unamendability was baked into Canada's new Constitution from the beginning, whereas it only became a feature of the American Constitution over time. The first was a failure of constitution-making process; the second was the work of time on a complex state. The American example shows why Albert is right to say that 'constructive unamendability is not necessarily a permanent feature of a given constitutional rule or of an entire constitution' and a 'constitution can be freely amendable in one era yet constructively unamendable in another'.[58] But this is just another way of saying that even codified Constitutions ultimately depend on underlying civic conditions for their success, and that as those conditions change it will be necessary to keep the constitutional system in good repair. If, over time, the amending process becomes over-entrenched and is unable to play its role maintaining stability by accommodating change, it risks the text becoming detached from social and political needs and expectations.

The American experience highlights two ways in which a codified Constitution can become disengaged from a state's civic condition. First, by raising the stakes of constitutional change, codified entrenchment may make it unnecessarily hard for a state to make frequent, minor and

[56] ibid 2014.

[57] ibid 2015.

[58] ibid 2014.

incremental changes. Over time, this may mean a state's needs and the people's wishes may become increasingly misaligned with the terms of the codified Constitution. Given enough time, this divergence may increase to the point of permanent functional entrenchment, which Albert diagnosis in the American state.[59] Second, it shows the difficulty of predicting future social and political change and the risk inherent in designing an amending process to suit an unknowable future. Admittedly, this was not the case in Canada, where the design flaw was eminently foreseeable. But even a design that accommodated Quebec in 1982 might not have predicted future economic, demographic, and political change in the country. As in the United States, an amending formula designed to be difficult might nevertheless have become impossible over time.

Conor Casey has described this problem as one of 'accurately capturing whether a particular change rule will make a constitution excessively difficult or easy to amend' in light of 'the thick social and political context in which the text will be situated'.[60] For this reason, he advises that '[t]he prudent constitutional regulator must pay close attention to those parts of their society's political and social culture when designing rules of change'.[61] However, the lesson of the American experience is that careful attention to present conditions is not enough. Even with access to a crystal ball, constitutional framers would be hard pressed to design rules of amendment suitable to all future ages because, as Albert observed, the same rules of amendment may have different effects in different ages. This is one reason why, in an otherwise healthy state, we should be more alert to the dangers of over-entrenchment than of under-entrenchment. If all the other forms of legal, political, and social entrenchment are capable of stabilising a state over time, as they should be in a healthy state, then formal constitutional entrenchment is hardly required except in specific and narrow circumstances[62]; if they are not, then rules of amendment that require a high degree of

[59] KN Llewellyn, 'The Constitution as an Institution' (1934) 34 Columbia L Rev 1, 30.

[60] Casey (n 20).

[61] ibid.

[62] These circumstances are discussed in section 7.2.2. and chapter 8.

unanimity are more likely to produce constructive unamendability. If the point of deep formal entrenchment is to fix the most important features of the constitutional order, this constructive unamendability risks paralysing the state's most important features. In effect, it buys formal stability at the price of civic stability.

Finally, I would note that problems with entrenchment do not occur only at the level of codified constitutional entrenchment. Bill Buzbee has described how policy preferences may be entrenched by exploiting the interests of self-interested minorities to embed policy choices that are, formally speaking, only protected by the normal legislative process.[63] Buzbee shows how American lawmakers have deliberately entrenched climate change policies using a mix of 'regulatory nudges via subsidies, tax policies and charges, and planning mandates' to produce a network of stakeholders whose business models depend on the new regulatory environment for their viability.[64] The form of such entrenchment may only be regular laws and regulations, which can in theory be changed easily, but the 'gradual entrenchment of supportive coalitions through a process of path dependence dynamics that result in "increasing returns" and "costs of exit"' deliberately manufactures the conditions for what, in chapter 6, I termed practical social entrenchment.[65] As with the constituencies created by devolution in the United Kingdom and the need to appeal to Quebeckers' political preferences in Canada, the opposition to change from a motivated minority may, in practice, deeply entrench ordinary laws and regulations that are, formally speaking, only lightly entrenched.[66] Buzbee shows how this strategy can be exploited by savvy lawmakers to entrench their preferences against the possibility of reasoned reconsideration.

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[63] William W Buzbee, 'Federalism Hedging, Entrenchment, and the Climate Challenge' (2017) 6 Wisconsin L Rev 1037.

[64] ibid 1053. See also ibid 1072, 1081.

[65] ibid 1044.

[66] ibid 1102.

I would categorise this strategy as a problem of entrenchment to the extent that it is used to create new minority interest groups who are financially motivated lock in policies that benefit them disproportionately. Buzbee, however, offers a qualified defence of the strategy. He accepts '[t]he tendency of law and regulation to become entrenched and resistant to change' and that 'prescriptive regulation can create little inducement for ongoing improvement or updating', but he argues that 'where a regulatory challenge is pervaded by shared fears that regulatory commitments will prove unstable or unmatched by other jurisdictions', it may be that deliberately creating disincentives to future regulatory change provides 'regulatory frameworks that are nonetheless stable and widely embraced.'[67] This is a valuable observation. It highlights the unavoidable fact that government regulation creates conditions on which businesses and people come to rely, which raises the cost to them (and perhaps also to society and the government) of future change, thereby deepening the practical social entrenchment of those regulations. More generally, it suggests that what I have described as practical social entrenchment may just be the operation in the legal context of a theory of behavioural economics that explains how people become attached to a new status quo so that, although they may initially resist change, 'once they start to adjust to a new normal, they may resist a return to the old ways'.[68]

Nevertheless, I would distinguish between the general case of status quo bias and the specific strategy of induced reliance that Buzbee describes. In some cases, 'reducing risks of regulatory instability and reversal'[69] may well provide a social benefit, but if it is true that 'any legislation, or even authoritative interpretation of legislation by an agency or court, will lead to investment in that new status quo and create political opposition to change',[70] then that should

[67] ibid 1101.

[68] ibid 1106 citing William K Eskridge and John Ferejohn, *A Republic of Statutes: The New American Constitution* (Yale UP 2010) 12-22, among others.

[69] ibid 1054.

[70] ibid 1106.

happen as a matter of course without the need to rig the game. It is the manipulation of this process to embed financial disincentives to future change that benefit favoured minority interests that I would classify as a potential risk of entrenchment. In the case of a policy framework designed to prevent backsliding on climate change commitments, this may be morally defensible, but the strategy itself is neutral and could be used to lock in less noble policy preferences. Even in the case of climate change, it may be vulnerable to regulatory capture by special interests and, in any case, there is no guarantee that the embedded policies will prove effective; if they do not, or if the state's needs and priorities change, using legislated incentives to create practical social barriers to changing the entrenched status quo will raise the cost of, and may prevent outright, future necessary changes to a more effective policy. That is why I include it among the perils of over-entrenchment.

7.2.2 Problems with what is entrenched

In the previous section, I considered ways in which formal constitutional entrenchment can result in over-entrenchment and constitutional paralysis. When that happens, the gap between what is entrenched and what the polity actually needs and wants will grow over time. Under a poorly designed Constitution, this disjunction may be immediately apparent, but in any Constitution that cannot be easily amended there is a risk that eventually, without regular amendments, the gap will widen. This risk can be mitigated in two main ways. The first is a formalist response to a formalist problem, which is to avoid making it too difficult to amend the Constitution. The example of many European states with entrenched Constitutions and low formal bars to amendment shows that, even if the risks of formal constitutional entrenchment described in the previous section do not always materialise, neither is it the necessity that many constitutionalists imagine.[71] When a state does have a good reason to formally codify an institution

[71] Astrid Lorenz, How to Measure Constitutional Rigidity: Four Concepts and Two Alternatives (2005) 17 J of Theoretical Politics 339, 358-59.

or arrangement, it can minimise the risk of over-entrenchment by opting for a lower threshold for amendment or, in a federation, a lower percentage of state or provincial assent.[72] The risks of too-easy change will then be counter-balanced by social and political realities. As discussed in chapter 4, the state can also mitigate these risks by assigning different depths of formal entrenchment to different constitutional provisions.

The second way that the risk of over-entrenchment can be minimised is in the choice of what is entrenched. This is easier to describe than to execute, even when it comes to matters that the overwhelming majority of the people at the time of entrenchment consider to be incontrovertible common sense. It is not hard to think of institutions and arrangements in modern states that would have commanded general and enthusiastic assent a century ago, but that if fixed permanently then would have made the state practically or morally untenable today. Extend that thought experiment back two or five centuries and the problem becomes even clearer: it is hubris to presume to dictate a permanent state identity or to predict the form and direction of what will be desirable future changes.

Nevertheless, there are times when deep formal entrenchment is necessary. One such case is when, in the absence of a deeply entrenched constitutional provision, there would be destabilising uncertainty over how basic institutions of the state are to operate or relate to each other. In these cases, when formal constitutional entrenchment is used to solve a coordination problem, the constitutional architects will no doubt do their best to entrench the solution they believe to be best, but the specific choice of what to codify often matters less than that they settle on some arrangement that falls within a range of reasonable choices.[73] In the case of the American

[72] Rosalind Dixon has shown that the amendment formula of the American Constitution requires a higher percentage of agreement with 50 states than it did with the original 13 states. Rosalind Dixon, 'Partial Constitutional Amendments' (2011) 13 U Pennsylvania J of Const L 643, 653.

[73] John Finnis, *Natural Law and Natural Rights* (2nd ed OUP 2011) 244-45 (on coordination), 284-90 (on *determinations*. See also John Finnis, 'Law as Co-Ordination' (1989) 2 Ratio Juris 97; Joseph Raz, *Practical Reason and Norms* (first published 1975, OUP 1999) 159 (on the importance of coordination).

Constitution, for example, although the framers sought what they thought were the best rational solutions for the problems of government, in many cases it mattered less *what* they decided than *that* they decided.[74] It mattered less, for example, whether senators were elected indirectly by state legislators or directly by the people of the state or whether congressmen were elected every two years or every four years than that everyone agreed on how members of the Senate and the House would be elected, or that there should be a Senate and a House at all. Even where there was passionate disagreement, such as over the infamous Three-Fifths Compromise,[75] the matter had to be settled one way or the other, at least for the time being. That is the key task of constitution-making where an accepted prior practice does not settle a question beyond reasonable dispute or controversy.

Coordination problems will be most pressing in a new state or after a constitutional revolution where the goal is to make or remake the rules of the state, if not entirely then substantially from scratch. Even when a new state inherits established institutions and arrangements, as Canada did in 1867, it may be necessary to spell out what has been inherited and what has not, as well as to settle questions that the inherited constitutional order does not. It was necessary, for example, to note in the preamble to the British North America Act that the new Dominion was to have 'a Constitution similar in Principle to that of the United Kingdom'—a short phrase that imported a long uncodified history of privileges, prerogatives, and conventions. And it was necessary to codify the division of powers in a new federal state where, unlike the United Kingdom, legislative sovereignty was to be divided. Overall, the Canadian experience of constitution-making illustrates that what does and does not need to be formally entrenched in a new state are those institutions and arrangements that must be specified and settled to avoid instability versus those that can rely on the continued operation of pre-existing and commonly

[74] Jeremy Waldron, *Law and Disagreement* (OUP 1999) 102.

[75] Constitution of the United States, Article 1, Section 2, Clause 3.

understood and accepted practice. Note, this conclusion is consistent with a view that formal entrenchment should be minimal to avoid the risk of disjunction between codified form and organic development. And it follows that, where a state can rely on existing legal, political, and social forms of entrenchment, it is not necessary to assume the risks of over-entrenchment that come with deep formal entrenchment, especially codified constitutional entrenchment.

Another example where the choice of *what* is formally constitutionalised is likely to be inconsistent with the demands of organic change is where codified constitutional entrenchment is used to settle questions of day-to-day politics. The distinction I am making here is between codifying the rules of the political system—the fundamental arrangements and institutions of the state—and codifying what should be contingent products of that system. Constitutional settlements of the form of law-making and the rules of political representation may change over time, as they have throughout history, but they will not change as often or as much as popular opinion about particular social policies or what justice and good government require under specific circumstances. Whether to entrench a specific vision of what is just, moral, and good is a core question of constitutional theory that can be evaluated through the lens of entrenchment. A state can either leave these questions to the regular legal process or even to informal social regulation, as Canada largely did before the *Constitution Act, 1982*, or it can 'constitutionalise' these questions following the American model, leaving disputes over their application to be resolved by non-democratic third parties, usually courts. Under the American model, judicial resolutions of these questions require a constitutional amendment or another judicial decision to 'un-constitutionalise' the question or to constitutionalise a different answer. Between these extremes there are also various mechanisms for non-final constitutional adjudication ranging from the 'un-entrenched' Human Rights Act 1998 in the United Kingdom and the New Zealand Bill of Rights Act 1990 to the limited legislative power to disagree with the courts in the Canadian Constitution.[76]

[76] *Constitution Act, 1982*, s 33.

The risk of constitutionally entrenching questions of day-to-day politics or permitting their constitutional entrenchment by courts is that it does not stop the question from being democratically debated, often in ways that could not have been predicted at the time of entrenchment, but it does stop them from being democratically reconsidered. The gap between the freedom to contest and the power to reconsider is a democratic deficit. Ironically, entrenched bills of rights are written in lofty, grandiloquent and abstract terms for the very reason they should not be formally entrenchment in the first place. Stating rights in general terms allows constitutional designers to secure consensus in principle, but it 'camouflages the contingency, the contestation, the challenge of each right's limitation'.[77] Because formally entrenched rights provisions are not self-executing, when they are 'actualized by specification, real-world rights reveal that no amount of championing rights-talk can obfuscate the reality that rights are the subject matter of political debate'.[78] A judicially-enforced bill of rights invites ad hoc constitution-making without the approval of either the constituting or the constituted power.[79] Unless the legislature can override the courts, as in Canada to a limited extent, or disregard them, as in the United Kingdom, or the Constitution may be easily amended, this unpredictable method of entrenchment risks the destabilisation effects described above. Even the wisest judge attempting to settle an open political question under an abstract rubric of rights is not equipped to predict whether his decision will in fact settle the question politically, or only legally.[80] The difference is important. As Richard Ekins has advised, the wisdom of judicial entrenchment turns not only 'on the force of legal argument,

[77] Grégoire CN Webber, *The Negotiable Constitution: On the Limitation of Rights* (CUP 2009) 193.

[78] ibid.

[79] Richard Ekins, 'Between Authority and Usurpation? Common Good and Constitutional Government' (2024) 69 Am J of Jurisprudence 45, 51.

[80] Lon Fuller, 'The Forms and Limits of Adjudication' (1978) 92 Harv L Rev 353, 394-404. See also JM Finnis, 'A Bill of Rights for Britain? The Moral of Contemporary Jurisprudence' (1985) 71 Proc Brit Acad 303, 328-31; Jeremy Waldron, 'The Core of the Case Against Judicial Review,' (2006) 115 Yale LJ 1346; Paul Yowell, *Constitutional Rights and Constitutional Design* (Hart 2018) ch 5.

but on whether the Court can unite the body politic in action'.[81] If it cannot, then its judgment, 'whatever its moral-legal force, may be imprudent and reckless'.[82]

The destabilising effects of judicial entrenchment can be seen in the aftermath of the decision in the American case of *Roe v Wade*.[83] If the majority of the United States Supreme Court thought that by constitutionalising a specific legal resolution it would settle the underlying political disagreement, it badly misjudged. The judgment not only failed to codify a national consensus, it catalysed a decades-long political movement to overturn the decision that shaped American politics in ways the Court could not have anticipated.[84] Where there is no underlying consensus, it is rash to entrench one[85] (and where there is one, formal entrenchment will be less important, if not redundant). This will be especially true in a system where poor constitutional design or a divided polity make amendment all-but impossible. In the case of *Roe v Wade*, the result was a multi-generational campaign to change the ideological make-up of the US Supreme Court, which has had constitutional consequences far beyond the narrow question of abortion policy. By contrast, Albert has shown that Ireland's less deeply entrenched but still codified Constitution has effectively accommodated changing social views on abortion, both in that state's initial decision to prohibit abortion in 1983 and the decision to repeal the prohibition in 2018.[86] According to Albert, in the generation between the two amendments, 'Ireland lived a quiet revolution: people across

[81] Ekins (n 79) 52.

[82] ibid.

[83] 410 US 113 (1973). A more recent example with clear political consequences is the entrenchment of the 'debt brake' in the German Basic Law in 2009. Christian Waldhoff, 'The Debt Brake as a Means of Intertemporally Safeguarding Freedom: On the Ruling of the German Federal Constitutional Court on the Second Supplementary Budget Act 2021' (2024) 20 European Constitutional L Rev 699.

[84] NW Barber, 'Why Entrench?' (2016) 14 ICON 325, 337.

[85] Notoriously, in *Dred Scott v Sandford* 60 US 393 (1856), the US Supreme Court nullified a political compromise on the future of free states. Attempting to settle the national debate over slavery, the Court laid the groundwork for the Civil War. Erwin Chemerinsky, *Constitutional Law: Principles and Policies* (Aspen Publishing 2006) 693.

[86] A constitutional amendment requires the assent of both houses of the legislature and bare majority support in a national referendum. There is no supermajority requirement and no federalist complication, while the referendum, which must be held within 90 days, adds only a minimal form of intertemporality. Constitution of Ireland, Art 46.

the land grew gradually more supportive of a woman's autonomy'[87]—and, he might have added, increasingly hostile to moral precepts they associated with the Catholic church.[88] Albert concludes that 'although an amendment can settle disagreement as a matter of current law, it cannot settle disagreement in politics and larger society' which is why 'a constitution should remain changeable according to the preferences of those it binds'.[89] If a state is determined to entrench social policy in a codified Constitution, it would do well to do so with a light touch that allows it to adapt easily to social changes, as Ireland has, not with the deep certainty of the American and Canadian Constitutions.

7.3 Consequences of over-entrenchment

The common fault of the perils of entrenchment described in this chapter is hubris. This applies to the decision to formally entrench a constitutional provision not because it is strictly necessary but on the assumption that the present entrenching power knows better than future generations as well as to the decision to delegate the interpretation of deeply entrenched but open-ended constitutional provisions to courts. These decisions are particularly presumptuous when they are made in the name of 'We the people' while ignoring the fact that 'the people' extend indefinitely into the future and denying future majorites of 'the people' an equal opportunity to amend or affirm 'our' laws, which are also 'their' laws.[90] As explained in chapter 2, a people and a state exist over time in an extended present, which requires the freedom to govern in each present moment. As also explained in chapter 2, this is not an argument against the dead hand of the past or for present heedlessness of the future; contemporary choices are inevitably constrained by past

[87] Richard Albert, *Constitutional Amendments: Making, Breaking, and Changing Constitutions* (OUP 2019) 10.

[88] Derek Scally, *The Best Catholics in the World: The Irish, the Church and the End of a Special Relationship* (Sandycove 2021).

[89] Albert, *Constitutional Amendments* (n 87) 9.

[90] Jedediah Purdy, 'The Possible Futures of American Democracy' (2023) 5 The Utah L Rev 1009, 1019.

decisions and should be made with regard for future necessities, but this does not change the need for continual representative government.[91] For that representation to be effective, it must have the power to adapt and change the law when desired and desirable. Over-entrenchment weakens or removes that power, with consequences that are discussed in the next two sub-sections.

7.3.1 The failure to accommodate contingency

The steady state of a state is not steady. As a product of human ingenuity, it would be strange if it were otherwise. Stasis is impossible, but stability is, and it can provide the illusion of stasis, which is an extended period of domestic peace without, or despite, significant internal or external change. As described in chapter 1, this sort of stability requires constant and prudent innovation and adaptation to internal and external threats,[92] which as Edmund Burke observed cannot always be determined by consistent rules because these things 'are under the dominion of circumstances'.[93] Or, as Joseph Raz wrote, '[w]hat one ought, all things considered, to do on any given occasion depends on the reasons for action which apply to that agent with respect to that occasion.'[94] Both Burke's 'dominion of circumstances' and Raz's 'any given occasion' counsel that prudence is both a free actor and a prisoner of time. Even as they are limited by the past and must anticipate the future, our freedom to act and our reasons for action only ever exist in the present.

This is another reason why Albert's idea of entrenched intertemporality is misguided. Intertemporality attempts to reconcile the fact that a society exists both over time and only ever

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[91] Margit Cohn, 'Tension and Legality: Towards a Theory of the Executive Branch' (2016) 29 Can J L & Jurisprudence 321, 321.

[92] Edmund Burke, 'An Appeal from the New to the Old Whigs' in Isaac Kramnick (ed), *The Portable Edmund Burke*, edited by (first published 1791, Penguin Portable Library 1999) 474, 476.

[93] Edmund Burke, 'The First *Letter on a Regicide Peace'* in Iain Hampsher-Monk (ed) *Edmund Burke: Revolutionary Writings* (first published 1796, CUP 2014) 251, 327. Compare Charles de Gaulle's 'doctrine of circumstances', which he contrasted with the limitations of dogmatic *a priori* doctrine. Charles de Gaulle, 'Of Doctrine' in *The Edge of the Sword* [1932] (first published 1932, Gerard Hopkins tr, Criterion Books 1960) ch iv.

[94] Joseph Raz, 'Reasons for Action, Decisions and Norms' (1975) 84 Mind 481, 482.

in the present by artificially extending the duration of 'the present' for decision-making purposes. But it is not obvious that requiring two decision-makers (or, if you prefer, two iterations of the same decision-maker) to approve the same action at two different points in time will produce a better decision. As noted earlier in this chapter, unrelated circumstances may thwart the operation of a consistent and correct majority preference that spans the two decision points. But even if they do not, a good reason to act may exist at the time of the first decision but not at the second. The persistence (*vel non*) of a reason to act is not itself evidence of a good reason because it ignores the contingent, and therefore present-bound, nature of prudence. This argument applies beyond intertemporality. Over-entrenchment of any kind is a threat to prudent government because it treats a past commitment to act in a specific way as something close to a promise to act that way *no matter what*. However, as discussed in chapter 2, when a state formally entrenches a rule or principle, it remains, or should remain, free to reconsider that commitment because doing so does not frustrate any relevant expectations in a third party, while not doing so may frustrate the only relevant party, which is the existing people of the state acting in the present (and for their future). A codified constitutional provision is, at most, a contingent prediction of what will be a prudent future assessment. It is and should be subject always to the possibility that the people may change their mind in the future, if prudence under the circumstances so requires.[95] Nor are these circumstances only external impositions: they may and often do include the changing moral, ideological, or social intuitions of the people.

Duration (of either a state or the specific form of it legal order) is contingent because circumstances are contingent; order must adapt if it is to remain orderly. This is where the constitutional flexibility of uncodified constitutions is an advantage in a healthy state. In defence of New Zealand's statutory Bill of Rights and in support of uncodified constitutions in general, Willis has observed that '[v]ulnerability to legislative override might look like weakness if legal

[95] John Finnis, 'On Hart's Ways: Law as Reason and as Fact' (2007) 52 AmJJuris 25, 32-33.

enforcement is considered paramount, but also tends to support the unwritten constitution's preference for contextual assessment and evolving practice."[96] In other words, the uncodified constitution's ability to accommodate contingency, that is to adjust to the unforeseen and unforeseeable circumstances, internal and external, that arise in any state, is its advantage. Often the political and legal changes that are required to accommodate these contingent circumstances can be channelled through established institutions and arrangements to ensure an orderly process of change, but sometimes circumstances will require the institutions and arrangements themselves to adapt.[97] In that case, the less formally entrenched the institution or arrangement is, the more easily it can adapt to accommodate necessary change, including significant change to itself, in ways that would be impossible in a state where constructive constitutional unamendability prevails. It makes intuitive sense (which sense is confirmed by common state practice) that the core political and legal institutions of the state should be more deeply entrenched than matters of day-to-day politics and social interaction. However, as the United Kingdom and Canada (insofar as parliamentary system is still governed by convention) show, it does not follow that these institutions must be formally entrenched in a codified Constitution.

Where social and political entrenchment, including conventions, practices, customs, and norms, are functionally entrenched deeply enough to order the process of change, codifying them deeply would come at the expense of the flexibility or play-in-the-joints that allows these socially and politically entrenched processes to accommodate contingency and to be changed themselves when necessary or desired. Adaptability, even of the constitutional framework, will thus be possible without disrupting the broader constitutional system.[98] The two-track evolution of the constitution—generally slower in the framework and faster in what the framework regulates—that

[96] Willis (n 11) 403.

[97] As described in chapter 1, social demands for political representation in the nineteenth and twentieth centuries required rapid constitutional changes to the franchise.

[98] Willis (n 11) 403.

I described in chapter 1 will be easier when the entrenchment of the framework is deep but informal, and when it relies on different forms of entrenchment of different functional depths in different places rather than on the single tool of deeply codified Constitutional entrenchment, especially when that entrenchment is, or has become over time, a pathological over-entrenchment. Note, this approach can accommodate the existence of a codified Constitution, especially one with different levels of codified entrenchment, so long as what is entrenched is only what it is necessary to entrench and even that not too deeply entrenched to prevent practical amendment when there is the social and political need or will for it.

The appropriate level(s) of constitutional entrenchment will, of course, depend on the specific history and circumstances of each state, but the advantage of flexibility for orderly change favours less formal entrenchment wherever it is sufficient to provide the necessary social stability. Provided it is capable of the orderly regulation of change, a regular statute that is treated as a constitutional statute is preferable to a codified constitutional provision, and the conventions of parliamentary procedure and royal prerogatives are preferable to legislated rules. In each case, less formal entrenchment secures the functional benefits of more formal entrenchment while preserving the advantages of flexibility to accommodate contingency.

7.3.2 Circumvention of over-entrenchment

The rules of change in a constitution are there to be used, and their use is 'to avoid the rival dangers of stagnation and imprudent change'.[99] But what happens when the rules of change are not apt to facilitate good government, such as when over-entrenchment prevents necessary or desired change? In those cases, a state is left with three options: (1) either the change does not happen, meaning the development of the state is effectively constrained; (2) the people rebel (legally or actually) against the constraints with unpredictable and potentially parlous

[99] Casey (n 20).

consequences; (3) or the state's political institutions effect the desired change in defiance of the formal constraints.

The first option—stagnation—is the least common in practice, but it is by implication the course favoured by those who support eternity clauses and Basic Structure doctrines. In those cases, the agent of entrenchment (political or judicial) intends that the constitutional identity (as the agent understands it) should fix rather than follow state identity, even or perhaps particularly in the face of widespread desire for constitutional change. But as Bruce Ackerman has observed, a national identity is not static: 'the narrative we tell ourselves' is a 'continual retelling' that 'plays a critical role in the ongoing construction of national identity'.[100] Constitutional barriers erected intentionally to thwart or channel this ongoing evolution of national identity thus 'encourage departure from the constitution to vindicate the Constitution'.[101] To those who favour a controlling constitutional vision, that is the virtue of permanent entrenchment. But if constitutional identity is to control state identity and both can only be defined once and forever, it will be too brittle to survive change when, inevitably, it must occur. The identity of a state over time may be shaped by a conscious appeal to, or the unconscious appeal of, a longstanding constitutional identity, but the pull of the past is not more powerful than the necessity of change. If at any point it appears to be in a healthy state, that just means that the need or desire for change is not (yet) strong enough to supersede past commitments. In Margit Cohn's formulation, '[a] constitution is both a textual construct and the emblem of the political structure and culture that precede and feed formal arrangements' and it is '[t]his latter sense of the constitution' that 'supports sophisticated versions of constitutional theory'.[102] It is because this latter sense of a constitution includes the potential for change, so must the textual construct of an effective Constitution.

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[100] Bruce Ackerman, *We the People: Foundations* (Harvard UP 1991) 36-37.

[101] Ekins (n 79) 51.

[102] Cohn (n 91) 324.

The second option—revolution—is always a latent possibility when constitutional stagnation is allowed to persist too long and cannot be circumvented (the third option, discussed below). A Constitution that denies necessary or desired change risks bursting at the seams, jeopardising not just the specific constraints preventing that change but the very concept of formal entrenchment and the authority of the courts or other agents that enforce it. If, over time, a state's Constitution fails to adapt to changing circumstances and becomes a stranger to its people, eventually the latter will turn on the former and deny its authority.[103] Hegel described the problem:

> How blind they are who may hope that institutions, constitutions, laws which no longer correspond to human manners, needs, and opinions, and from which the spirit has flown, can subsist any longer; or that forms in which intellect and feeling now take no interest are powerful enough to be any longer the bond of a nation.[104]

A Constitution that does not keep pace with the people, Hegel predicted, would produce a 'dysfunctional state' and, based on contemporary German experience, he believed that denying evolution risked, and might even justify, revolution.[105] Fortunately, examples of outright popular revolution in modern constitutional states are rare, perhaps because most modern Constitutions are still new enough that founding conditions broadly align with current needs,[106] but also because most constitutional orders have availed themselves of the third option, which includes constitutional revolution by officially sanctioned means.[107]

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[103] By the same token, '[i]f constitutional arrangements are allowed to evolve through incremental adaptation both rupture and forced interpretation are less likely.' Fusaro and Oliver (n 16) 424.

[104] Georg Wilhelm Friedrich Hegel, 'On the Recent Domestic Affairs of Wurtemberg, Especially on the Inadequacy of the Municipal Constitution' in in *Hegel's Political Writings* (TM Knoz tr, Clarendon Press 1964) 244.

[105] Shinkyu Lee, 'Freedom, the State, and War: Hegel's Challenge to World Peace' (2017) 54 International Politics 203, 210.

[106] The first modern codified Constitution is only a little over two centuries old and only a few codified Constitutions are, in their current form, older than the longest-lived persons in the state. Tom Ginsburg, Zachary Elkins, James Melton, 'The Lifespan of Written Constitutions University' (2007) U of Illinois Center for the Economics of Human Development <https://jenni.uchicago.edu/WJP/Vienna_2008/Ginsburg-Lifespans-California.pdf> accessed 12 March 2025 47.

[107] Fusaro and Oliver (n 16) 424-25; Oran Doyle 'Constraints on Constitutional Amendment Powers' in Richard Albert, Xenephon Contiades and Alkmene Fotiadou, *The Foundations and Traditions of Constitutional Amendment* (Hart 2017) 95.

The third option for dealing with over-entrenchment is to circumvent the formally entrenched barriers to change by contra-formal[108] means.[109] In the spirit of former US Supreme Court Justice Arthur Goldberg, who admonished that 'the Constitution … is not a suicide pact',[110] this method accepts that courts may avoid a constitutional, political, or social crisis by interpreting or ignoring formally entrenched laws or provisions of a codified constitutional text to conform them to presently perceived needs. This strategy is endorsed by otherwise divergent methods of jurisprudence. It is the underlying premise of 'living constitutionalism.' but it is also promoted by advocates of 'Common Good' constitutionalism.[111] According to both schools of thought, a codified Constitution should adapt to new social and political circumstances while remaining faithful to its core principles. Though they differ on what those principles are,[112] both agree that, even when the text is not (or cannot be) changed formally, it may be applied in light of these principles in ways that 'qualify or even contradict its intended meaning'.[113] Allan Hutchinson has shown how dramatic these contra-formal constitutional changes can be in practice. 'In Canada, like the United States', he writes, 'while taking place under the guise of interpretation, there have been some monumental changes in the regime of constitutional structures and rights' and

[108] I use this term rather than 'informal' to convey that the method described deliberately flouts the form of entrenchment, but, because it is employed and sanctioned by constitutional actors, it is also formally approved.

[109] Julian N Eule, 'Temporal Limits on the Legislative Mandate: Entrenchment and Retroactivity' (1987) 12 American Bar Foundation Research J 379, 387.

[110] *Kennedy v Mendoza-Martinez* 372 US 144 (1963).

[111] Somewhere in between are Albert's 'quasi-constitutional' amendments. Richard Albert, 'Quasi-Constitutional Amendments' (2017) 65 Buff L Rev 739. Also between them is Alexander Bickel's Tory constitutionalism, in which courts should be 'guided in our search of the past, by our own aspirations and evolving principles, which were in part formed by that very past'. Alexander M Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (2nd edn, Yale UP 1986) 109–10. See also Heather Gerken's positive case for circumvention, which rests on the claim that 'by blocking most formal amendments, Article V effectively redirects those constitutional energies into different, potentially more productive channels'. Heather K Gerken, 'The Hydraulics of Constitutional Reform: A Skeptical Response to Our Undemocratic Constitution' (2007) 55 Drake L Rev 925.

[112] For living constitutionalists, the principles typically include equality, autonomy, democracy, pluralism, and respect for minorities; for common good constitutionalists, they are the principles of the classical legal tradition. Adrian Vermeule, *Common Good Constitutionalism: Recovering the Classical Legal Tradition* (Polity Press 2022) 18.

[113] Ekins (n 79) 51.

'[c]onstitutional history shows that there is no change so big that it could not be achieved informally (and in spite of the written Constitution) if the political forces are sufficiently aligned to demand or facilitate it.'[114] In extreme cases, like the jurisprudence of the US Supreme Court during the New Deal, this can mean a full-blown constitutional revolution to approve the legislated will of a political majority.[115]

Whether the change is initiated by the courts or approved by them, so long as this contra-formal constitutional change occurs when the political forces of the courts and the legislature are aligned, the changes should not be destabilising. In such cases, the contra-formal amending process compensates for the problem of over-entrenchment by allowing the courts to approve desired changes that can be legislated but cannot be achieved by formal amending processes.[116] But if the courts are prepared to agree that a codified Constitution means whatever the democratic branches of government want it to mean (within reason, broadly construed), much of the supposed value of a codified Constitution is lost. Moreover, if courts have the interpretive power to accommodate the legislature's wish, they also have the power to defy it.[117] If they don't have that power, they aren't constitutionally authoritative; if they do, it raises the risk of constitutional change that increases the gap between the Constitution and the constitution as understood and desired by the people. If they take the second path, the state is left with the first two options: stagnation or rebellion. One can sympathise with judges who, faced with a strong political and social consensus, use their constitutional power to sidestep constructive constitutional unamendability while still thinking they should not. However, quite apart from the political legitimacy of amending a

[114] Hutchinson (n 41) 57.

[115] Bruce Ackerman, *We the People: Transformations* (Harvard UP 1998) 315, 360-79.

[116] Ekins (n 79) 57. See also Fusaro and Oliver (n 16) 415.

[117] Julian N Eule, 'Temporal Limits on the Legislative Mandate: Entrenchment and Retroactivity' (1987) 12 American Bar Foundation Research J 379, 387.

Constitution through judicial interpretation,[118] there are good reasons to question whether the courts have the relevant institutional capacity to determine both what the people desire and what they require.[119] When it comes to deciding questions of good governance, the courts' independence from the democratic process, which is an advantage when they are deciding civil or criminal cases, becomes a liability.[120] Disinterest is a useful quality in adjudication, but it is a severe handicap in representative government or constitution-making.

Even if one believes that courts can play a useful role in moderating the constraints of formal constitutional entrenchment, there is still the problem that courts are poorly positioned to distinguish between cases where formal over-entrenchment is preventing necessary change and cases where non-constitutional factors are usefully retarding the process of change. That is, the court may not be equipped to distinguish between a lack of political action due to over-entrenchment (a genuine peril of entrenchment) and cases where political inaction is due to proper kinds of entrenchment (normal and healthy hysteretic social or political drags on change) or cases where there is simply no political majority for a specific change, leaving an uneasy status quo the most stable option. In the first case, a court might usefully remove a formal barrier to desired change; in the second and third cases, it may be tempted to break a political deadlock when doing so would be at least as destabilising as leaving the problem to the political process. A court that inserts itself into the political process risks, in an attempt to circumvent one sort of pathological entrenchment, effecting another and at least equally worrying kind of antidemocratic pathological entrenchment.[121] This is not merely a theoretical concern. Consider Lord Clarke's warning in *R*

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[118] Emmett Macfarlane, 'Judicial Amendment of the Constitution' (2021) 19 International Journal of Constitutional Law 1894.

[119] Hutchinson (n 41) 57. See also id at 70; JAG Griffith, 'The Common Law and the Political Constitution' (2001) 117 LQR 42, 65; Paul Yowell, *Constitutional Rights and Constitutional Design* (Hart 2018) 56-72; Grégoire Webber, 'Past, Present, and Justice in the Exercise of Judicial Responsibility' in Geoffrey Sigalet, Grégoire Webber, and Rosalind Dixon (eds), *Constitutional Dialogue: Rights, Democracy, Institutions* (CUP 2019) 151, 152.

[120] Fuller, 'The Forms and Limits of Adjudication' (n 80) 394-404. See also Jeremy Waldron, 'Judges as Moral Reasoners' (2009) 7 IJCL 2, 13.

[121] Hutchinson (n 41) 70.

(Nicklinson) v Ministry of Justice that '[i]f Parliament chooses not to debate [the availability of legal euthanasia], I would expect the court to intervene'.[122] It is a strange constitutional doctrine in a democracy that would have courts not only decide the proper resolution of a contested social question but that the question must be debated in Parliament in the first place.

7.4 Conclusion

Although much writing about constitutions reflects concerns about under-entrenchment, the perils of entrenchment in healthy states are often pathologies of over-entrenchment and, in particular, the unintended consequences of formal constitutional codification. These risks arise when the process of constitutional change becomes divorced from the process of social and political change in the state. In some states at some times, it may be necessary to entrench an institution or arrangement either to settle a novel procedural question or to remove a political question from day-to-day consideration in the interests of social stability.[123] These latter cases especially are rare and specific to the idiosyncratic historical, cultural, and demographic history of a state. Where the 'normative gravity' of legal, political, or social entrenchment is sufficient to fix the contingent settlement of a matter, formal entrenchment is not just unnecessary, it invites the risks of constitutional rigidity, which include civic and legal paralysis.[124] The flexibility of less formal entrenchment also allows for adjustments to be worked out by the relevant political actors without resorting to the high-stake adversarial processes of constitutional amendment or litigation, the latter of which alienates responsibility for government to an arbitrator who is by design detached from the social and political sphere where these questions are best solved, resolved, and reconsidered. What Bernard Williams called 'the first political question'—the basic condition of

[122] [2014] UKSC 38, [2015] AC 657, 293.

[123] As discussed further in the next chapter.

[124] Willis (n 11) 401.

enduring political stability—'is not (unhappily) first in the sense that once solved, it never has to be solved again'.[125] It is a solution that is 'required all the time';[126] and, as times change, so must the solution. For this to happen, a state must avoid the perils of entrenchment.

[125] Bernard Williams, *In the Beginning Was the Deed: Realism and Moralism in Political Argument* (Geoffrey Hawthorn ed, Princeton UP 2008) 3.

[126] ibid.

Chapter 8: CONCLUSION

In this final chapter, I draw on the observations and conclusions made throughout this thesis about the nature of a time-bound constitutional states and the various forms and degrees of entrenchment to offer some general observations about entrenchment. First, I describe how formal entrenchment is usefully understood as part of a larger socially embedded constitutional order. Second, it follows that the question for any state is not whether to entrench but rather, given the state's specific history and social needs and the range of possible forms of entrenchment, what to entrench and how. Finally, I suggest a general principle of entrenchment that, in a healthy state, favours less formal kinds of entrenchment to avoid the risks of over-entrenchment, followed by two reasons that may nevertheless justify codified constitutional entrenchment and two reasons that are sometimes offered to justify codified constitutional entrenchment that are not usually good reasons.

8.1 The socially embedded constitution

I began this thesis by considering the time-bound nature of a state and why, for a state to endure, it must be capable of adapting to Burke's 'great law of change' by changing itself over time. In chapter 2, I assessed different explanations for entrenchment and concluded that the most compelling is that different forms and depths of entrenchment provide a range of stabilising features that, working together in different combinations in different polities, allow a specific polity to manage the dynamic tension between preservation and reform in a way that is suited to its specific history and contingent circumstances.[1] Note, this was as much an account of how entrenchment works as a *reason* for it; entrenchment in one form or another is a necessity of being-in-time, and as such may benefit from explanation in particular cases, but needs no general justification. The question, then, is not whether a state should entrench but what forms entrenchment should take in that state and which institutions and arrangements should be

[1] See also Asanga Welikala, 'Conservatism' in Peter Cane and Harshan Kumarasingham (eds), *The Cambridge Constitutional History of the United Kingdom: Vol I* (CUP 2023) 457, 460.

entrenched in different ways. To answer this, it is important to remember that entrenchment is not one thing, and that deliberate formal entrenchment—whether it takes the form of codified constitutional provisions or ordinary law—takes place within the broader context of informal political and social forms of entrenchment. Another way to say this is that constitutional and legal systems are socially embedded systems. That is, they exist within and in relation to those 'sedimented social practices' that have been 'normalised' in a specific social order.[2]

Joseph Raz referred to the idea that a legal system is socially embedded as 'the assumption of the primacy of the social'.[3] By this, he reminded readers that a legal system is part of a social system that includes many subsystems, including the political system, all of which interact with each other.[4] According to Raz, this meant that the continuity of the legal system should be viewed as a subset of a larger problem of the continuity of the social system of which it is a part and also in relation to all of the other non-legal subsystems and norms that interact with it,[5] among which the most important are social rules.[6] Raz claimed that 'if a society is subject to a legal system then … [t]he law provides the general framework within which social life takes place'.[7] However, because the political system (of which Raz says the legal system is part) is 'a subsystem of a more comprehensive social system',[8] it would be more accurate to say that the law provides a framework that regulates social life while, as a product of social activity, remaining in the end subject to social influence and political change itself.

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[2] Mariano Croce and Andrea Salvatore, *Carl Schmitt's Institutional Theory: The Political Power of Normality* (CUP 2022) 101. Croce and Salvatore describe 'complex practices that cannot be encapsulated by legal definitions … [i]nstitutions such as the family, the Church, and the army [which] are substantive features of the concrete order of a socio-historical civilisation.' id at 102.

[3] Joseph Raz, 'The Institutional Nature of Law' in Joseph Raz, *The Authority of Law* (OUP 1979) 103, 103.

[4] Joseph Raz, 'The Identity of Legal Systems' in Joseph Raz, *The Authority of Law* (OUP 1979) 78, 100.

[5] ibid.

[6] ibid at 92.

[7] ibid at 120-21.

[8] ibid at 100.

Raz's social rules—the 'practices of [the] people'[9]—correspond to what I have called social entrenchment. While these rules operate below the constitutional and legal systems, and in the absence of formally entrenched rules largely independent of them, their importance can be seen where they run up against formal modes of entrenchment. I have already described two cases where social entrenchment bears on political and legal entrenchment. The first of these is the effect that established social custom, expectation, and desire have on the durability of ordinary laws, resulting in what I have called practical social entrenchment of the law. This is a form of entrenchment rooted in the social system but felt in the political and legal system. The second is the class of non-legal conventions, practices, customs, and norms that can substitute for, augment, or cabin the operation of codified constitutional or legal rules. These are also social rules, albeit social rules particular to the class of officials on whom the operation of the political and the law-applying organs of the state depends. To be more specific, they are the social rules of a politically engaged subset of the population, which, in the case of constitutional conventions, are ultimately anchored by broader social expectations and control.[10] So, while Raz usefully recognised that '[s]ocial practices differ from laws because they are not institutionalized',[11] they may nevertheless impress themselves upon institutionalised practices and leave visible marks on the law.

This interdependence of legal and non-legal forms of entrenchment is at the heart of every constitutional order. As Raz noted, '[t]he rule of recognition,' which underwrites a legal order, 'being a customary rule, is constantly open to change'.[12] It is open to change because, while it is an 'an *ultimate* rule' of the legal system and the 'supreme criterion' of legal validity,[13] it is itself a social

[9] ibid at 92.

[10] See chapter 6.

[11] Raz, 'The Identity of Legal Systems' (n 4) 87.

[12] ibid 94. See also Stephen Perry, 'Hart on Social Rules and the Foundations of Law: Liberating the Internal Point of View' (2006) 75 Fordham L Rev 1171, 1171-72, 1189.

[13] HLA Hart, *The Concept of Law* (3rd edn, OUP 2012) 105-06.

practice, albeit a practice among a small group of law-applying officials. As Hart described it, 'the rule of recognition is not stated, but its existence is *shown* in the way in which particular rules are identified'[14] and 'accepted as common public standards of official behaviour by its officials'.[15] This is an account of legal validity infused with the language of social practice.[16] As such, the rule is subject to change as social practices change among the relevant officials, who are in turn affected by changes in the social habits, beliefs, and expectations of the broader public. It is not by coincidence that Raz's own observations about the social nature of the rule of recognition came in his consideration of how the continuity of a legal system depends on the continuity of the political system of which it is a part. In these cases, the behaviour of law-applying officials recognises and adapts to changes in social facts that cannot be accounted for in purely legal terms.

No theory, for example, can account for the sleight of hand by which the rule of recognition described by the Supreme Court of Canada in the 1981 *Patriation Reference* case, when it accepted the power of the Westminster Parliament to amend the Canadian constitution as 'unimpaired' and 'undiminished',[17] was replaced by a new rule of recognition by 1982, when the Court recognised Part V of the *Constitution Act, 1982* as the sole legal means of amending the constitution.[18] The decisive change between these dates was not itself legal, but rather a simultaneous act of political theatre orchestrated by the British and the Canadian governments.[19] Acting together, the two governments effected a social and political change that, once accepted by

[14] id at 101.

[15] id at 116. See also Perry (n 12) 1171.

[16] cf Scott J Shapiro, 'What Is the Rule of Recognition (and Does it Exist)? in Matthew D Adler and Kenneth Einar Himma, *The Rule of Recognition and the U.S. Constitution* (OUP 2009) 238-39.

[17] *Re Amendment of the Constitution of Canada* [1981] 1 SCR 753, 799, 801. See also Peter Oliver, 'The 1982 Patriation of the Canadian Constitution: Reflections on Continuity and Change' (1994) 28 La Revue juridique Thémis 877, 885, 890.

[18] *Re Objection to a Resolution to Amend the Constitution* [1982] 2 SCR 793, 806; Oliver, 'The 1982 Patriation' (n 17) 886-891.

[19] Peter Crawford Oliver, 'Canada I: Confederation and the Imperial Theory' in Peter Crawford Oliver, *The Constitution of Independence: The Development of Constitutional Theory in Australia, Canada, and New Zealand* (OUP 2005) 131.

the law-applying organs of Canada, altered the rule of recognition of the Canadian legal system. Recognition of Canada as an independent legal community meant that, henceforth, an act of the Westminster Parliament would be of no legal force and effect in Canada. That this change was not symmetrical insofar as the new Canadian rule of recognition was not matched by a change in the rule of recognition in the United Kingdom, does not present a logical conflict.[20] Several decades before patriation, Frank Scott described the state of affairs that would result from Canadian legal independence as one in which, '[i]n strict legal theory … the Parliament of the United Kingdom would still have a ghostly legal authority over Canada'.[21] That is not quite right. It is more accurate to say that Westminster's legal power remains very much alive, but without any authority, real or spectral, in Canada.

This asymmetrical state of affairs answers the objection that the change was, indeed, effected by law because the precipitating act was a legal act (indeed, an Act). If the Canada Act 1982 and the proclamation of the *Constitution Act, 1982* by the Queen, on the advice of the Privy Council of Canada, on April 17, 1982[22] had effected a complete transfer of legal authority from one national system to the other, any subsequent act of the Westminster parliament purporting to legislate with respect to Canada would thereafter be invalid in the United Kingdom, which (presumably) it is not. Canada was able to achieve legal independence[23] not as a direct result of the legal effects of those acts but through the reception of them by Canada's law-applying officials.[24]

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[20] Hart (n 13) 121.

[21] Francis Reginald Scott, 'The British North America (No 2) Act, 1949' (1949) 18 U of Toronto L J 205 quoted in Oliver, 'The 1982 Patriation' (n 17) 877.

[22] Natasha Dubois, 'What was really signed on Parliament Hill 40 years ago, on April 17, 1982?' (Library and Archives Canada 2022) <https://thediscoverblog.com/2022/04/14/what-was-really-signed-on-parliament-hill-40-years-ago-on-april-17-1982/> accessed 25 November 2025.

[23] Not just legal autonomy but, as Kenneth Wheare observed, legal *autochthony*. KC Wheare, *The Constitutional Structure of the Commonwealth* (Clarendon 1960) 89. '[T]he breaking of a legal link, which in practice means very little'. ibid. at 112. See also RTE Latham, *The Law and the Commonwealth* (OUP 1949) 586.

[24] *Reference re Secession of Quebec*, [1998] 2 SCR 217 at 47. See also Wheare (n 23) 109. cf HWR Wade, 'The Basis of Legal Sovereignty' (1955) CLJ 172, 196.

The practical force of an act with both legal and political dimensions was internalised by the law-applying officials in Canada, and this changed the social practice governing the exercise of their law-applying duties. This is consistent with Hart's account of change in the rule of recognition, which is a customary rule.[25] And being a customary or social rule, change to the rule may be affected and effected by external social change, including social change precipitated, but not commanded, by a legal act. An important consequence of the fact that the rule of recognition is socially grounded is that the entire legal system, including apparently rigid and deeply entrenched codified constitutional provisions, rests, as it were, on the ball-bearings of social practice and social acceptance, which allows for subtle give and adjustment as customs and social conditions change.[26]

8.2 Rigid vs flexible constitutions: A false dichotomy

In place of the common distinction drawn between written and unwritten constitutions,[27] or in the terms of this thesis, codified and uncodified constitutions, several theorists have suggested instead that constitutions should be characterised as more or less rigid or flexible.[28] This is not a new idea. More than a century ago, James Bryce considered several metaphors—'Moving and Stationary'; 'Fluid' and 'Solid or Crystallized'—before settling on 'rigid' and 'flexible'.[29] Bryce was quick to point out that just because flexible constitutions are always in a state of actual or

[25] Hart (n 13) 120-21 and notes. See also Raz, 'The Identity of Legal Systems' (n 4) 78, 94; Oliver, 'The 1982 Patriation' (n 17) 909-13.

[26] See Scott J Shapiro, 'What Is the Rule of Recognition (and Does it Exist)? in Matthew D Adler and Kenneth Einar Himma. *The Rule of Recognition and the U.S. Constitution*. (OUP 2009) 239. cf St Aquinas's reminder that custom 'has the force of law, abolishes law, and is the interpreter of law'. St Thomas Aquinas, *Summa Theologica* I-II q97 a3.

[27] On the inadequacy of this distinction, see Richard Albert, 'Multi-Textual Constitutions' (2023) 109 Virginia Law Rev 1629. On the difficulty of identifying which parts of a Constitution are actually part of the constitution, see Maxime St-Hilaire, Patrick F Baud, and Elena S Drouin, 'The Constitution of Canada as Supreme Law: A New Definition' (2019) 28 Constitutional Forum constitutionnel 7.

[28] Roscoe Pound, *Interpretations of Legal History* (MacMillan 1923) 1; Ulrich K Preuss, 'The Implications of "Eternity Clauses": The German Experience' (2011) 44 Isr L Rev 429, 430; Richard Albert, 'Measuring Amendment Difficulty' in Richard Albert, *Constitutional Amendments: Making, Breaking, and Changing Constitutions* (OUP 2019).

[29] James Bryce, 'Flexible and Rigid Constitutions' in *Studies in History and Jurisprudence, vol 1* (OUP 1901) 124, 131.

potential flux does not mean that they are unstable.[30] Under the right conditions, the elasticity of a flexible constitution allows a state to avoid civil conflict or 'revolutions by meeting them halfway'.[31] On the other hand, even the best-conceived 'rigid' Constitution is only an experiment,[32] an intellectual proposition, a paper plan for government that is forced to adapt and change as soon as it runs up against reality.[33] It is a tentative framework for government, written in light of experience in anticipation of the unknown, with unwritten constitutional and legal norms taking shape over time in ways that depend not just on what was initially proposed but on factors that precede and survive it: the social conditions, political culture, temper, mood, and stability of the society that adopted the Constitution (or on which it was imposed).[34]

However, like 'written' and 'unwritten', a dichotomy between 'flexible' and 'rigid' also turns out to be helpful but not decisive. What matters in a constitution is *what* is flexible and *what* is rigid, and *how* flexible and *how* rigid the different features are, and a healthy constitution will be neither rigid nor flexible but both, as and when required. The relative rigidity and flexibility of the codified and the customary parts, the written and unwritten parts, and the legal and non-legal parts, will not only vary greatly between states but, to be effective, *must* vary between them according to their history and needs, which arise from its unique and idiosyncratic extra-constitutional social, cultural, historic, and accidental factors. A codified Constitution will succeed to the extent its provisions are faithful to social norms that are consistent with the historically conditioned social order, without contradicting it unnecessarily or constraining its development unduly. Where a social norm

[30] id at 139.

[31] id at 147.

[32] KN Llewellyn, 'The Constitution as an Institution' (1934) 34 Columbia L Rev 1, 10.

[33] 'Everybody has plans until they get hit for the first time'. Mike Tyson, as quoted in Associated Press, 'Biggs has plans for Tyson' Oroville Mercury-Register (19 August 1987), p 1B, col 2.

[34] Ernest A Young, 'The Constitution Outside the Constitution' (2007) 117 Yale L J 408, 448; Richard Ekins, 'The Balance of the Constitution' (2022) 67 AmJJuris 199, 220. See also Jean-Étienne-Marie Portalis quoted in Llewellyn (n 32) 10 n22 ('Codes of peoples make themselves over the years, but properly speaking no man makes them').

is uncertain or contested, the law can provide independent reasons for acting that compensate for and mitigate the underlying social instability; but to the extent that what is formally entrenched is inconsonant with an established social order, the tension between them will require constant attention. If the divergence is too great, those parts of a codified Constitution that are egregiously out of step with social needs and expectations will become a problem to be managed rather than a source of stability. And, if the underlying social order is so fractious and unstable that few widely agreed social norms exist, attempts to impose order top-down through a codified Constitution will likely require extraordinary political and legal coercion.[35]

The question of which institutions and arrangements 'should' be entrenched is not a binary proposition: it opens a world of degrees and choice. For this reason, when commentators ask, 'should the United Kingdom adopt a written constitution?' the question is shorthand for a much more complicated set of questions.[36] These include, first, whether there is a good reason to adopt a written (ie, codified) Constitution. The answer may be a simple 'no' but it cannot be a simple 'yes'. An answer in the affirmative must then specify (a) what provisions should be codified and (b) how deeply (ie, to what degree) they should be codified. These choices can only be resolved by asking what the likely threats are to order and stability in the state and by considering all the formal and informal kinds and degrees of entrenchment that are already present and which will interact in important ways with the new codified constitutional form of entrenchment to form a matrix of interrelated entrenchments suited to the specific state at this time in its history and, insofar as it can be predicted, for its future.

[35] The military occupation of Japan and Germany after the Second World War and Reconstruction in the American South show what might be required. Even then, if the social order is too chaotic or fractious, order will last only as long as force is applied. This was also the lesson of the last Afghan war.

[36] See generally Vernon Bogdanor, Tarunabh Khaitan and Stefan Vogenauer, 'Should Britain Have a Written Constitution?' (2007) 78 Political Quarterly 499; AC Grayling, 'Why the UK Needs a Written Constitution' in DJ Galligan (ed), *Constitution in Crisis: The New Putney Debates* (IB Tauris 2017); Jo Eric Khushal Murkens, 'A Written Constitution: A Case Not Made' (2021) OJLS 965.

Now, let us assume the impossible: that we have surveyed all the forms and degrees of entrenchment in a state and understand how each interacts with all the others. The question then arises, how should we evaluate the success of any one example of entrenchment or determine whether it would be better entrenched in a different way? This question takes us back to the discussion of the purposes of entrenchment in chapter 2. There, after considering arguments from stability, expression, and constraint—and finding some truth and merit in each—I proposed that the most compelling explanation for and justification of entrenchment is that it is necessary to manage the inevitable fact of change in a state that will be subject to internal and external pressures over time. Entrenchment does this by providing obstacles to change of different kinds—some conscious, formal, and legal; others reflexive, informal, and social—that working separately and together promote stability either by allowing for informal and organic social change or by requiring the state to exercise 'all-things-considered' volition before formally altering prior commitments.

Because each incident of entrenchment is part of a complex matrix, stability in a state will depend on the success of entrenched institutions and arrangements in relation to each other. So, for example, a state in which religious or cultural mores are broadly homogenous and deeply entrenched in social practice may not need to entrench as many social prohibitions in law and a society with high social trust and established informal ways of solving complex problems may do well with a lighter governmental touch.[37] And a state in which there is a common understanding of, and respect for, established political principles and conventions among the men and women who populate the law-applying organs will weigh the trade-offs between certainty and flexibility that would result from entrenching those principles and conventions in a codified Constitution differently than one in which political practices have not coalesced into generally agreed principles and conventions.

[37] James H Acheson, *The Lobster Gangs of Maine* (UP New England 1988) 48-70, 133-41; Elinor Ostrom, *Governing the Commons: The Evolution of Institutions for Collective Action* (CUP 1990) 58-102 (On the success of adaptive mechanisms by unregulated long-enduring, self-organized users of common-pool resources.).

In the previous chapter, I concluded that, in a healthy state, the dangers of over-entrenchment are likely to be greater those of under-entrenchment. One reason for this is that, in a healthy state—which I define as one with a relatively stable and harmonious non-legal social and political order—informal entrenchment can perform change-moderating functions that are not possible in a more fractious or uncertain state. A second reason is that change is not one thing. Sometimes it is a wholesale substitution of an old rule for a new one; at other times it may simply be an adjustment to the existing rule. If a rule is formally entrenched in a codified Constitution that subjects *any* change to the rule to the same high bar for amendment, then even minor adjustments will be subject to the high bar of formal entrenchment. For example, once an interpretation of the Second Amendment of the United States Constitution is fixed by the judges of the Supreme Court, it may be immune not just to repeal but also to less drastic amendments to introduce reasonable and popular limits to the right. Even if these limits are supported by a super-majority of the population, the amending process may be held hostage by a minority that is reluctant to set a precedent for more significant changes by re-opening the amendment at all. The need to adapt to changing conditions and social opinion counsels a narrow approach to codified entrenchment, one that permits details in the application and interpretation of a rule or a principle to be sorted out, and re-sorted as necessary, by ordinary political or legal means.

This conclusion challenges the common idea that it is the most fundamental rights, institutions, and arrangements that need to be formally entrenched to the deepest intentional depth. To the contrary, because such rights and rules are so fundamental, the danger of getting them wrong, or of the obsolescence of their entrenched form, means they should be subject to regular reconsideration and occasional revision over time. This is the paradox I noted in chapter 6: we may safely leave unchanged customs whose value is primarily ceremonial, but questions such as the scope of rights, the make-up of the electorate, and the allocation of political power and responsibility are too important to decide once and to risk leaving fixed and unfixable forever. For this reason, a state that is able to rely on legal, political, and social entrenchment should to that

extent eschew deeply codified constitutional entrenchment. This accords with what Martin Loughlin has called the 'traditional understanding' that 'the better the constitution the fewer the written constitutional laws', which itself rests on the intuition that 'laws only reinforce a mode of conduct that has not been fully absorbed in the manners, traditions, and practices of a people'.[38]

8.3 Reasons to entrench—and not

In this and the next two sections, I will draw on the examples and analysis already provided in this thesis to suggest a general principle by which to evaluate the necessity of formal entrenchment in a state, followed, briefly, by two reasons, consistent with the general principle, why formal entrenchment may be necessary, and two commonly-cited reasons for entrenchment that are, in fact, not. The general principle arises from the reason for entrenchment described in the first two chapters of this thesis, in light of the different forms of entrenchment present in a state explored in the chapters 3 through 6, and the need to avoid the perils set out in chapter 7. To summarise: to succeed, a state must endure. To endure, it must be able to manage the threat of destabilising change. Entrenchment is a means of managing the process of change in a state in ways that promote stability and continuity. Entrenchment may be deliberate and formal, as the codification of constitutional provisions or the enactment or judicial development of ordinary law are, or it may be organic and informal, as the entrenched social and political norms, conventions, customs, and habits of a people are. Formal entrenchment is not necessarily deeper in practice than informal entrenchment, though where it is deployed, it is typically intended to make the process of change harder than it otherwise would be. Finally, where formal entrenchment is introduced, it should be negentropic—that is, it should increase rather than undermine civic stability. To do this, it must avoid common perils of entrenchment, and especially over-entrenchment.

[38] Martin Loughlin, *The British Constitution: A Very Short Introduction* (2nd edn, OUP 2023) 9.

In light of all these considerations, a general principle of entrenchment may be described as follows: a state should prefer the least burdensome form of entrenchment that is capable of managing change without increasing instability. This means, first, that where informal entrenchment will suffice, formal entrenchment should be avoided and, second, that where formal entrenchment is desirable, ordinary legal entrenchment should suffice unless one of the exceptions described below applies. It follows from this general principle that a state should, except in the rarest of circumstances,[39] reject eternity clauses and basic structure doctrines that place the important institutions and arrangements of the state beyond reason, reconsideration, and repentance.[40] It should also be careful not to place entrenched constitutional provisions beyond the reasonable possibility of amendment, as Canada did in 1982, when by failing to reconcile Quebec's opposition to the new Constitution, it undermined the very point of patriation, which was to make the Canadian Constitution amendable by Canadians.[41] Above all, a state should not assume that formal entrenchment is always a stabilising feature; the onus should be on those who want to entrench a rule in law and, especially, to entrench a legal rule more deeply than ordinary law to explain why, in light of the existing matrix of social, political, and legal entrenchment, a more formally entrenched provision is likely to be negentropic.

Because formal entrenchment is intended to inhibit change above and beyond the natural inhibitions of social and political entrenchment, and different formal entrenchments in different constitutional, political, and social orders will inhibit change to different degrees, the question of whether to entrench a particular institution or arrangement is not one but two questions: first, the preliminary question of whether informal political and social forms of entrenchment are sufficient

[39] For example, they may be useful when a political commitment to the absolute permanence of core principles is necessary to stabilise a broken constitutional order. See the discussion of Germany below in section 8.5.

[40] Richard Ekins, 'How to Be a Free People' AmJJuris 58 (2013) 163, 181.

[41] Patriation left Canada with a Constitution that is now in important ways less amendable than when the amendment power was held by the Westminster Parliament.

to accommodate foreseeable threats to civic stability and, second, if this question is answered in the negative, a further question as to the optimal form of entrenchment. Is it necessary to stop change altogether, at least until such time as there is a strong consensus that change is necessary? Or will ordinary legal entrenchment serve as a sufficient drag on change to ensure future change is deliberate but not overly difficult? The more a specific threat is likely to destabilise the order of the state, the stronger the argument is for more formal entrenchment. With these questions in mind, I will conclude by describing two circumstances that may provide good reasons to entrench and two reasons that are commonly offered for entrenchment that are not, in fact, necessarily good reasons.

8.4 Reasons to entrench

8.4.1 To settle uncertainty, especially initially

In some cases, entrenchment is necessary simply to establish a new rule, institution, or arrangement without which there would be destabilising civic confusion. As described in chapter 7, there is likely to be a need for many such cases in new states or states undergoing significant constitutional change. Formal entrenchment is necessary in such cases because there is no pre-existing informal (ie, socially or politically) entrenched way of settling the matters in question. Even where there are pre-existing rules, institutions, or arrangements, it may still be useful to specify which will continue under the new constitution. This what the approach taken with respect to Canada in 1867, when the preamble to the British North America Act specified that the new dominion desired 'a Constitution similar in Principle to that of the United Kingdom'.[42] However, when the Canadian Constitution was patriated in 1982, it was not felt necessary to reiterate that the unwritten conventions of the constitution would continue. It was not necessary to entrench formally what was understood and uncontested. On the other hand, when a new state inherits

[42] Preamble to the *Constitution Act 1867*, 30 & 31 Vict, c 3.

competing ways of settling and exercising political power, as the newly united states of America did in 1776, or where existing elements of a superseded constitutional order are deemed insufficient or unsatisfactory, as when those states replaced the Articles of Confederation of 1781 with a Constitution in 1789, it will likely be necessary to settle new rules, institutions, and arrangements formally.

In most cases, these will be rules, institutions, or arrangements chosen from among several reasonable options—eg, Do we elect a president directly or indirectly, and how often? What will the veto points be among the branches of government? How many judges should there be on the apex court? And, in a federation, what is to be the division of sovereign powers and who mediates conflicts between them? In such cases, the choices may be matter of controversy, but it is nevertheless necessary for all parties to agree on some resolution, even an imperfect one; the importance of having a settled rule is more important than which option, from within a reasonable range, is chosen. The rule should then be sufficiently entrenched to provide certainty at least until such time as the rule may prove inadequate or a different rule commands broad support and demands change. So, the form of entrenchment should be deep enough to provide initial certainty but not so deep as to prevent subsequent amendment to accommodate unanticipated circumstances or reasoned revision. That is, the form of entrenchment should allow the rule to be subject to deliberate, all-things-considered reassessment but not to whimsical change or immediate contestation by the losers of the original decision-making process.

8.4.2 To keep the civil peace

In a complex and heterogeneous state, it may be necessary to set ground rules between competing political factions and to formally entrench those rules as a condition of keeping the peace.[43] The more complex and heterogeneous the state, the more such rules may be required and

[43] Here I do not mean only political parties of the modern kind but also factions as the framers of the US Constitution understood them. James Madison, *The Federalist* (first published 1787, Jacob E Cooke ed, Wesleyan UP 1961). Such factions can cut across party lines.

the more deeply they should be formally entrenched. A state with strong religious and ideological fault lines, for example, must find a way to accommodate them within the constitutional order or risk the permanent prospect of civic stalemate or civil war. If this proves impossible, political divisions—peaceful or violent—will reveal the limits of constitutional control over a fractious society. However, where a state has a history of accommodating cultural differences (linguistic, religious, ethnic, and regional) without significant social instability, or where civic fault lines do not map neatly onto geography so that political separation is impracticable, formally entrenched rules, institutions, and arrangements may help to keep an uneasy peace that is preferable to informal disorder or formal division. An example of this is the consociational power-sharing arrangement in Northern Ireland,[44] but the formal entrenchment of representation of Quebec on the Supreme Court of Canada, of the regions in the Canadian Senate, and of the states in the US Senate are less eye-catching examples and would have been recognised as such when they were established. So too are the mechanisms of federalism and devolution respecting the principle of subsidiarity.

In some cases, social harmony can be increased by conventions and practices and ordinary laws, which may be further entrenched by socio-legal mechanisms like constitutional statutes. Examples of conventions and practices entrenched to settle otherwise recurring disagreements between competing civic factions include the Sewell Convention in the United Kingdom, the 'blue slip' courtesy and the congressional filibuster in the United States,[45] the nomination of functionally bilingual officials to senior positions in the government of Canada, and the generally accepted practice of appointing a regionally-diverse federal cabinet in Canada; examples of constitutional statutes that do this include the *Official Languages Act* in Canada—which was enacted to address

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[44] Northern Ireland Act 1998 s1. See Christopher McCrudden, 'Northern Ireland, the Belfast Agreement, and the British Constitution' in Jeffrey Jowell and Dawn Oliver (eds), *The Changing Constitution* (5th edn, OUP 2004) 195; NW Barber, *The Constitutional State* (OUP 2012) 47.

[45] Sarah A Binder and Steven S Smith, *Politics or Principle? Filibustering in the United States Senate* (Brookings Institution P 1997); Mitchel A Sollenberger, 'The Blue Slip: A Theory of Unified and Divided Government, 1979-2009' (2010) 37 Congress & Presidency 125.

rising Quebec nationalism in 1969 and substantially amended in 1988, after the first Quebec independence referendum during a period in which the federal government sought reconcile Quebec to the newly patriated Constitution—the Civil Rights Act and the Voting Rights Act in the United States, and the devolution statutes in the United Kingdom.[46]

Although they are not usually considered in this light, I would also suggest that common provisions of formally entrenched bills of rights are not just guarantors of individual rights and freedoms but of social harmony as well. Asanga Welikala has written in defence of organic, uncodified constitutions that '[t]he longevity of the constitution and its deep social acceptance are symbiotic. In this understanding, written constitutions are seen as artificial and legalistic, and if not exactly undesirable, then certainly unnecessary to a well-governed and ordered society.'[47] While agreeing in principle, I would say that this also depends on the underlying social and cultural homogeneity of a society. A healthy and homogenous society may be able to rely on existing consensus and informal methods of organic change without risking undue social destabilisation, but societies that must, through historical necessity or choice, accommodate significant cultural difference may benefit from formally entrenching provisions to lower the stakes of social and religious disagreement. The guarantees of freedom of speech and religion in the First Amendment of the United States Constitution and Article 2 of the Canadian Charter of Rights and Freedoms, for example, entrench a policy of official tolerance and accommodation of difference. By formally entrenching religious and speech rights, and making those rights difficult to repeal or amend, these states have limited the official consequences of contests over religion or ideology. As long as they

[46] Christine Bell, 'Constitutional Transitions: The Peculiarities of the British Constitution and the Politics of Comparison' (2014) PL 446, 457-64; Edward Willis, 'Unwritten constitutionalism: stability without entrenchment' (2022) PL 386, 400.

[47] Welikala (n 1) at 462.

remain entrenched, these guarantees mean that disagreement within the polity cannot be a contest for official supremacy. In complex modern countries, they are a useful peace-keeping mechanism.[48]

8.5 Not reasons to entrench

Note, at the risk of syntactical infelicity, I have not called this section 'reasons not to entrench', because that is not what I mean. I have identified reasons not to entrench throughout this thesis, and especially in chapter 7. In this section, I want briefly to respond to reasons that are often offered to justify entrenchment, but which are not, in fact, good reasons to entrench.

8.5.1 To fix norms

One of the most common assumptions about codified constitutional provisions is that they are necessary to secure fundamental norms of a society from the top down. The paradigmatic example of this is Article 79 of the German Basic Law, which secures the fundamental principles of the state set out in Articles 1 and 20 against amendment. The reason for enacting Article 1, in particular, which declares that '[t]he dignity of man is inviolable' is clear: drafted while lived experience of the Nazi regime was still vivid and raw and as authoritarian Communism was being imposed in East Germany, the drafters were understandably concerned to make future dictatorship in West Germany impossible and preferably also unthinkable.[49] This history puts the German example into the first of the exceptions described in section 3.1.1, above. The drafters of the German Basic Law believed that only the *ne plus ultra* form of entrenchment would suffice to secure a new moral foundation on which a new Germany could be built above the ruins of genocidal tyranny. Even then, the Basic Law looked forward to a time when that foundation would be

[48] See generally Russell Hardin, *Liberalism, Constitutionalism, and Democracy* (OUP 1999) ch 1, 2; David Golemboski, *Religious Pluralism and Political Stability: Obligations in Agreement* (Routledge 2022).

[49] Donald P Kommers, 'The Basic Law: A Fifty Year Assessment' in (2019) 20 German L J 571, 571. See also Jacob Weinrib, *Dimensions of Dignity: The Theory and Practice of Modern Constitutional Law* (CUP 2016) 153-54.

sufficiently stable that the German people could be trusted to assume responsibility for their own constitutional order, as expressly provided for in Article 146, which does not exclude the possibility of repealing or replacing Article 1.[50]

Whether out of constitutional habit or lingering self-doubt, the German people have never availed themselves of that power. Or, rather, they have instead in effect adopted the Basic Law as their Constitution as fully as if they had enacted it themselves. That includes the element of permanence, which is no longer necessary as a feature of constitutional stability but has been embraced as an eternal moral imperative. When, in 1958, the German Federal Constitutional Court claimed that the German Basic Law erects an 'objective system of values',[51] it implied that the fundamental features of the Basic Law must be permanent not because they are stabilising but because they are objectively right. The moral clarity of the Basic Law was welcome after what came before, and the German state's commitment to maintaining it shows the effectiveness of codified entrenchment in stabilising a new or reborn state. Still, the hubris of the Court's certainty should be apparent to anyone who imagines what the best minds of two hundred or two thousand years ago would have confidently declared to be *objectively* right. Or, for that matter, what many great minds of the twentieth century believed to be objectively right in totalising ideologies of both the Left and the Right. A state should have confidence that its core principles are correct—if it does not, it should change them—but that confidence should carry the nagging doubt that comes from an awareness of history. At the very least, it should include an awareness that even consistent and correct principles may need to be applied in different ways to changing circumstances.

[50] Article 146 provides that the Basic Law 'shall cease to apply on the day on which a constitution freely adopted by the German people takes effect'. Art 146 GG.

[51] The Lüth Case, 7 BVerfGE 198 (1958). For an analysis of this decision, see Kai Möller, 'Lüth and the 'Objective System of Values' in Sujit Choudhry, Michaela Hailbronner & Mattias Kumm (eds), *Global Canons in an Age of Contestation: Debating Foundational Texts of Constitutional Democracy and Human Rights* (OUP 2024) 255, 255-62.

Amendability prevents the state from trapping itself in a prison of certainty.[52] It is the protection a Constitution provides a state against temporary fits of overconfidence.

Confidence that inclines to permanent or deep entrenchment based on normative certainty may be misplaced in two ways. It may lock in a conception of the good that, upon further reflection or experience, appears to future generations to have been too limited or clearly wrong, or it may place the interpretation and application of the norm in the hands of a body that is not well-equipped to maintain it, especially in light of changing social norms or political pressure. The first of these is the problem of accommodating change that I have described in chapters 1, 2, 3, and 7; the second is the problem of judicial capacity that I described in chapter 7. I will not repeat those arguments except to say that I agree Melissa Schwartzberg's bracingly contrarian view that 'we ought not to embrace immutable positive law as a solution to the pressing problem of violations of [even fundamental] rights'.[53] As she explained:

> To recognize the 'core' of these norms as essentially immutable, as reflecting inherent truths about the duties of mankind, does not demand that we regard any particular positive formulation of these norms, set down at a given moment in time, as equally durable. We might wish to expand or refine our concept of who constitutes a "human being" worthy of dignity in light of moral or perhaps technological progress to include or to exclude, for example, animals or fetuses or clones or Martians.[54]

Formal entrenchment is in tension with, and often opposed to, the virtues of reason and deliberation, which are not just features of democratic constitutionalism, but preconditions of good government under any system (who deliberates and who decides may vary, but the virtue of reason and the benefits of deliberation stand).[55] At its best, formal entrenchment can require that

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[52] I am not denying objective truth or that we can distinguish between right and wrong. However, what we believe to be objectively true may prove no truer than Aristotle's certainty that some men are 'slaves by nature'. Aristotle, *Politics* (Stephen Everson ed, CUP 1996) I.5.1254b16–25; MEL Richardson, *Hammurabi's Laws: Text, Translation and Glossary* (Continuum International Publishing 2004) 105.

[53] Melissa Schwartzberg, *Democracy and Legal Change* (CUP 2007) 18.

[54] ibid.

[55] Allan C Hutchinson, 'Constitutional Change and Constitutional Amendment: A Canadian Conundrum' in Xenophon Contiades (ed), *Engineering Constitutional Change: A Comparative Perspective on Europe, Canada and the USA* (Talyor & Francis 2012) 51, 52, 55.

reasoned deliberation take place before the status quo is changed. Where this will increase the likelihood of good government, it is a useful feature of a constitutional system. However, this is simply an argument for formal entrenchment, not an argument for codified constitutional entrenchment. And it is an argument against permanent entrenchment.

The question for a healthy state is not whether its constitution will change, but how.[56] The idea that a state can fix a plan for contingency that will not itself be subject to contingency contradicts all experience of history. The fallibility of human institutions, the limits of human reason, and the inevitability of flux mean that our conception of even what we believe to be objective truth, and certainly its application to human affairs, should remain open to revision without recourse to revolution.[57] Except in cases where deeper formal entrenchment will be negentropic—eg, under the circumstances described earlier in section 8.3.1—ordinary law or convention should suffice to fix norms without incurring the risks of over-entrenchment described in chapter 7. For the same reason, I would say that, under ordinary conditions in an otherwise healthy state—that is, when it is not necessary to secure stability after civil war or, as in Germany's case, to repudiate a total moral collapse—a country that is earnestly inclined to, and capable of, enacting an effective bill of rights does not need one.

8.5.2. To provide stability

A stable social order with regular political deliberation and legal change are the best guarantors of stability in a state. Any other forms of entrenchment are complements or buttresses to this order. This means that informal and non-legal entrenchment will normally determine what needs to be formally entrenched and how. The result will be a complex matrix of entrenchment of different kinds and degrees in different states to secure different rules, institutions, and

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[56] id at 51.

[57] Schwartzberg (n 53) 17; Hutchinson (n 55) 54.

arrangements. Because the underlying social order will vary among states, it follows that even in equally healthy states what is usefully codified in the Constitution of one may be left to the ordinary legal process in another, and what is legalised in the second state may be left wholly unwritten in a third. I have already shown this to be the case, comparing the prescriptive provisions of the US Constitution to the principles and conventions of the Westminster constitution, which are at least as deeply entrenched in practice. An implication of this is that we should not necessarily assume that the different variety of constitutional forms in different states reflects differences in their efficacy, and so states should not expect to learn from the formal constitutional make-up of other states without first considering how similar the states are from the bottom up. Instead, the relevant questions that a state looking at its own matrix of entrenchment should ask are: in light of *our* history and social conditions, what rules, institutions, and arrangements should be formally entrenched? And how formally must they be entrenched to be effectively deep enough to ensure stability while still permitting change?

These are not easy questions, and even great minds can sound silly answering them. Aristotle, for example, warned against encouraging change in society because he said it would 'lead to instability and unnecessary tampering with what is working well', but also against listening to those who would fix existing the law permanently, because 'if we reason well we can make progress in lawmaking, just as we do in other arts and sciences'.[58] His Goldilocks conclusion was that 'change should not be too easy'.[59] This is true but unhelpful. It is not much more enlightening than saying a society should be 'well-organised' or 'well-governed'. In this thesis, I have argued from reason and example that, at least in a healthy state, over-entrenchment is at least as great a danger to long-term stability as under-entrenchment. This is because, with the exception of the cases

[58] Martha C Nussbaum, 'Recoiling from Reason: Review of Alasdair MacIntytre's 'Whose Justice? Which Rationality?' in Martha C Nussbaum, *Philosophical Interventions: Reviews 1986-2011* (OUP 2012) 53, 53 (quoting and paraphrasing the *Politics*)

[59] ibid.

described earlier in this chapter, in a healthy state formally entrenched Constitutional provisions are likely to be redundant. When they are adopted, they will secure the existing public consensus, or at least the reasonable compromises that a public is prepared to accept, which can be done as well by ordinary legal means reinforced by the forms of social entrenchment that underly different types of constitutional statutes, as described in chapters 5 and 6.[60] On the other hand, over-entrenchment that prevents necessary or desired change invites 'extra-lawful (unlawful) action' or risks 'trapping the community in a form of bad rule', which over time is likely to be a source of civic stagnation or civil revolt.[61] If deeply-entrenched Constitutional provisions are justified as security against social pathologies, I would respond that the record of such restraints against 'a determined populace hell-bent on tyranny' is not strong.[62] The record of codified entrenchment is even weaker when what is formally entrenched is out of step with the social and political realities of the state, as we see in the superficially attractive Constitutions of notoriously authoritarian states such as the People's Republic of China or the former Soviet Union.[63]

8.6 Conclusion

The term 'entrenchment' is most often used to distinguish rules set out in a state's codified Constitution from the ordinary laws of the state. In this thesis, I have cast a wider net, using the term to encompass both this extraordinary kind of formal entrenchment as well as the ordinary forms of legal entrenchment, and to consider both in relation to non-legal forms of political and social entrenchment. This expansive view of entrenchment brings into play two distinct ways of

[60] Further, '[t]he broader constitutional architecture, resting on political moral and institutional imperatives, is sufficiently stable to survive abrogation [of formal entrenchment] in limited, specific circumstances'. Willis (n 46) 403.

[61] Richard Ekins, 'Between Authority and Usurpation? Common Good and Constitutional Government' (2024) 69 AmJJuris 45, 57.

[62] Schwartzberg (n 53) 15.

[63] Paul Yowell, 'A Proposal for Defining and Classifying Systems of Constitutional Government' in Dimitrios Kyritsis and Stuart Lakin (eds), *The Methodology of Constitutional Theory* (Hart 2022) 332.

thinking about entrenchment. There is, first, the formal approach, which distinguishes deliberate forms of constitutional and legal entrenchment from informal, organic forms of political and social entrenchment based on the process by which each occurs; but there is also a functional or practical sense, in which we consider which features of a state's constitutional system are harder to change in practice, regardless of process by which they are entrenched. According to this second sense, we can say that some ordinary laws are more deeply entrenched than some codified Constitutional provisions, and that some unwritten conventions are more deeply entrenched than some written laws, despite not being entrenched at all in the formal sense. Note, it does not follow that what is more deeply entrenched in practice is more important to the state and its constitution. Indeed, the opposite may be true, as a matter that is integral to social or legal stability may have to be adjusted frequently to remain stable through changing times, while a more minor matter may fall out of line with popular will over time without endangering the stability of the state, enduring anachronistically because of its unimportance.

The process of constitutional or legal amendment should encourage deliberation before change without erecting unnecessary or irrelevant barriers to properly deliberated change. That is the most likely way for consistent norms to be shot through both the social and legal systems and to avoid a disjunction between the people and their institutions as a society's social beliefs, political practices, and constitutional rules evolve.[64] Formal entrenchment is an attempt to 'formalise' a principle of restraint in the state, but in practice this means putting responsibility for restraint into the hands of those with the power to enforce it. Like energy, power may be transferred but is never lost, and risk may be moved but not removed. Mechanisms like codified intertemporality or supermajorities, which are intended to make change harder do not necessarily make deliberation more likely and, in practice, may prevent all-things-considered change. There are times and places when formal entrenchment is necessary, including for coordination, but generally formal

[64] Jeffrey Goldsworthy, *Parliamentary Sovereignty* (CUP 2012) 303.

entrenchment should be left as open as possible to the possibility of reconsideration.[65] This means avoiding formal entrenchment, and especially codified constitutional entrenchment, unless it is necessary to maintain civic stability and, when in doubt, erring on the side of under-entrenchment. The dead hand should point the way, not hold us back.

From these examples and observations, I draw the following conclusions. First, entrenchment should only be used when it will be negentropic, that is when it will conduce to greater stability and not inhibit the natural continuity of organic change. Second, a healthy state should be more alert to the risks of civic destabilisation from over-entrenchment than from under-entrenchment. Third, because of this, in fixing rules, institutions, and arrangements, a state should prefer the least formal method of entrenchment that is functionally stabilising. Fourth, where formal entrenchment is necessary, it should be established by the people and amendable by the people and amendment procedures should minimise the risk of unintentional over-entrenchment. Fifth, codified constitutional entrenchment of institutional procedures and rules is less likely to be destabilising than codified constitutional entrenchment of substantive norms, rules, and answers to social disputes. Sixth, codified constitutional entrenchment may be necessary to settle coordination problems, overcome intractable social divides, or stabilise a state immediately following social collapse, but it is not normally necessary in a healthy state to fix norms or social or political stability, and attempts to do so are likely to be supererogatory, misguided, or futile.

[65] John Finnis, 'Introduction' in *Philosophy of Law: Collected Essays, Vol IV* (OUP 2011) 16.

BIBLIOGRAPHY

Books and Articles

— — 'Comment on *Chiafalo v. Washington'* (2020) 134 Harv L Rev 420

Acheson JH, *The Lobster Gangs of Maine* (UP New England 1988)

Ackerman B, *We the People: Foundations* (Harvard UP 1991)

— — *We the People: Transformations* (Harvard UP 1998)

— — *We the People: The Civil Rights Revolution* (Harvard UP 2015)

Agamben G, *The Highest Poverty: Monastic Rules and Form-of-Life* (Adam Kotsko tr, Stanford UP 2013)

Ahmed F and Perry A, 'Constitutional Statutes' (2016) 37 OJLS 461

Albert R, 'Constitutional Handcuffs' (2010) 42 Arizona State L J 663

— — 'The Expressive Function of Constitutional Amendment Rules' (2013) 59 McGill LJ 225

— — 'Constitutional Disuse or Desuetude: The Case of Article V' (2014) 94 Boston U L Rev 1029

— — 'Constructive Unamendability in Canada and the United States' (2014) 67 Supreme Court L Rev 181

— — 'Amending Constitutional Amendment Rules' (2015) 13 ICON 655

— — 'The Unamendable Core of the United States Constitution' in Koltay A (ed), *Comparative Perspectives on the Fundamental Freedom of Expression* (Wolters Kluwer 2015)
Albert R, 'The Conventions of Constitutional Amendment in Canada' (2016) 53 Osgoode Hall LJ 412

— — 'Quasi-Constitutional Amendments' (2017) 65 Buff L Rev 739

— — *Constitutional Amendments: Making, Breaking, and Changing Constitutions* (OUP 2019)

— — 'Measuring Amendment Difficulty' in Albert R, *Constitutional Amendments: Making, Breaking, and Changing Constitutions* (OUP 2019)

— — 'The Three Varieties of Unamendability' in Albert R, *Constitutional Amendments: Making, Breaking, and Changing Constitutions* (OUP 2019)

— — 'The Architecture of Constitutional Amendment' in Albert R, *Constitutional Amendments: Making, Breaking, and Changing Constitutions* (OUP 2019)

— — 'The Architecture of Constitutional Amendment' in Albert R, *Constitutional Amendments: Making, Breaking, and Changing Constitutions* (OUP 2019)

— — 'The World's Most Difficult Constitution to Amend?' (2022) 110 California L Rev 2005

— — 'Multi-Textual Constitutions' (2023) 109 Virginia Law Rev 1629

Allan TRS, 'Legislative Supremacy and the Rule of Law: Democracy and Constitutionalism' (1985) 44 CLJ 111

— — *Law, Liberty, and Justice: The Legal Foundations of British Constitutionalism* (OUP 1994)

— — *Constitutional Justice: A Liberal Theory of the Rule of Law* (OUP 2001)

— — 'Text, Context, and Constitution: The Common Law as Public Reason' in Edlin DE (ed), *Common Law Theory* (CUP 2007)

— — *The Sovereignty of Law: Freedom, Constitution, and Common Law* (Clarendon Press 2013)

Allison JWF, *The English Historical Constitution* (CUP 2007)

— — 'The Spirits of the Constitution' in Bamforth N and Leyland P (eds), *Accountability in the Contemporary Constitution* (OUP 2013)

Amar AR, *The Bill of Rights: Creation and Reconstruction* (Yale UP 2008)

Amery L, *Thoughts on the Constitution* (OUP 1947)

Aquinas T, *On Charity* (*De Caritate)* (Lottie H. Kendzierski tr, Marquette UP 1960)

— — 'De regimine principum' in *Aquinas: Political Writings* (RW Dyson ed and tr, CUP 2002)

— — *Summa Theologica*

Aristotle, *The Politics and the Constitution of Athens* (Stephen Everson ed, CUP 1996)

Aroney N, 'Law and convention' in Galligan B and Brenton S (eds) *Constitutional Conventions in Westminster Systems: Controversies, Changes and Challenges* (CUP 2015)

Austin JL, 'Lecture VIII' and 'Lecture IX' in Austin JL, *How to Do Things with Words* (OUP 1962)

Bacon F, 'The History of the Reign of King Henry the Seventh' in *The Works of Francis Bacon vol VI* (first published 1622, James Spedding et al eds, CUP 2011)

— — 'To Her Sacred Majesty' in *The Works of Francis Bacon vol VII* (first published 1630, James Spedding et al eds, CUP 2011)

Baguenard J, 'La constitution' in Jean-Matie Auby (ed), *Droit public* (2nd edn, Economica 1989)

Barak A, *The Judge in a Democracy* (Princeton UP 2006)

Barber NW, 'Against a written constitution' (2009) PL 11

— — 'The Afterlife of Parliamentary Sovereignty' (2011) 9 ICON 144

— — *The Constitutional State* (OUP 2012)

— — 'Why Entrench?' (2016) 14 ICON 325

— — *Principles of Constitutionalism* (OUP 2018)

— — *The United Kingdom Constitution: An Introduction* (OUP 2021)

— — '*Can Royal Assent Be Refused on the Advice of the Prime Minister?*' UK Const L Blog (25th September 2013) <http://ukconstitutionallaw.org> accessed 17 October 2024

Barshack L, 'Time and the Constitution' (2009) 7 ICON 553

Bauman Z, *Postmodernity and its Discontents* (Polity Press 1997)

Beeman RR, *Plain, Honest Men: The Making of the American Constitution* (Random House 2009)

Bell C, 'Constitutional Transitions: The Peculiarities of the British Constitution and the Politics of Comparison' (2014) PL 446

Bentham J, *Of Laws in General* (HLA Hart ed, The Athlone Press 1970)

Bickel AM, *The Least Dangerous Branch* (Yale UP 1962)

— — *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (first published 1962, 2nd edn, Yale UP 1986)

Bigongiari D (ed), *The Political Ideas of St. Thomas Aquinas: Representative Selections* (Hafner 1953)

Billias GA, *American Constitutionalism Heard Round the World, 1776–1989: A Global Perspective.* (NYU P 2009)

Binder SA and Smith SS, *Politics or Principle? Filibustering in the United States Senate* (Brookings Institution P 1997)

Blackstone W, *The Oxford Edition of Blackstone: Commentaries on the Laws of England, Vol 1: Of the Rights of Persons* (first published 1765, David Lemmings ed, OUP 2016)

Blick A and Hennessy P, *Good Chaps No More? Safeguarding the Constitution in Stressful Times* (The Constitution Society 2019)

Bodin J, *The Six Bookes of Commonweale* (first published 1576, Kenneth Douglas ed, Harvard UP 1962)

Bogdanor V, 'Conclusion' in Bogdanor V (ed), *The British Constitution in the Twentieth Century* (OUP 2003)

— — Khaitan T and Vogenauer S, 'Should Britain Have a Written Constitution?' (2007) 78 Political Quarterly 499

Bordieu P, *The Logic of Practice* (first published 1980, Richard Nice tr, Stanford UP 1990)

Boswell J, *The Life of Samuel Johnson, LL.D., vol III* (first published 1791, G Walker 1820)

Bosworth J and Toller TN, *An Anglo-Saxon Dictionary* (OUP 1898, 1921 supplement)

Bradley CA and Siegel NS, 'Historical Gloss, Constitutional Convention, and the Judicial Separation of Powers' (2017) 105 Georgetown LJ 255

Brazier R, 'The Non-Legal Constitution: Thoughts on Convention, Practice and Principle' (1992) 43 N Ireland Leg Q 262

— — 'Royal Assent to Legislation' (2013) 129 LQR 184

Breay C, *Magna Carta: Manuscripts and Myths* (The British Library 2010)

Brewer H, 'Slavery, Sovereignty, and "Inheritable Blood": Reconsidering John Locke and the Origins of American Slavery' (2017) 122 *American Historical Review* 1038

Brown C, *My Left Foot* (Simon and Schuster 1955)

Brownson O, *Brownson's Quarterly Review vol 2*, (BH Greene 1874)

Bryce, J 'Flexible and Rigid Constitutions' in *Studies in History and Jurisprudence, vol 1* (OUP 1901)

Buckle S and Castiglione D, 'Hume's Critique of the Contract Theory' (1991) 12 HistPolThought 457

Burke E, 'On a Motion Made in the House of Commons' [1782] in *The Works of the Right Hon. Edmund Burke volume II* (Holdworth and Ball 1834)

— — *Reflections on the Revolution in France* (first published 1790, Oxford Paperbacks 1993)

— — 'An Appeal from the New to the Old Whigs' in Isaac Kramnick (ed), *The Portable Edmund Burke*, edited by (first published 1791, Penguin Portable Library 1999)

— — 'The First *Letter on a Regicide Peace'* in Iain Hampsher-Monk (ed) *Edmund Burke: Revolutionary Writings* (first published 1796, CUP 2014)

— — 'A Letter to Sir H. Langrishe Bart. M.P. On the Subject of the Roman Catholics of Ireland and the Propriety of Admitting Them to the Elective Franchise Consistently with the Principles of the Constitution as Established at the Revolution, MP 1792 on the Constitution' in *The Works of Edmund Burke, vol 3* (Little & Brown 1839)

Buzbee WW, 'Federalism Hedging, Entrenchment, and the Climate Challenge' (2017) 6 Wisconsin L Rev 1037

Campbell J, *Transformations of Myth through Time* (Harper Perennial 1990)

Campbell J, *The Anglo-Saxon State* (Hambledon and London 2000)

Casey C, 'Constitutional Design and the Point of Constitutional Law' (2022) 67 Am JJuris 173

— — 'Common Good Constitutionalism and Constitutional Change' in Doyle O and Velasco-Rivera M (eds), *Research Handbook on Comparative Constitutional Change* (Edward Elgar, forthcoming 2026)

Chemerinsky E, *Constitutional Law: Principles and Policies* (Aspen Publishing 2006)

Chen L, 'The Continuity of a Legal System' (2022) 86 MLR 364

Cohn M, 'Tension and Legality: Towards a Theory of the Executive Branch' (2016) 29 Can J L & Jurisprudence 321

Coke E, *The Selected Writings and Speeches of Sir Edward Coke* vol 3 (Steve Sheppard ed, Liberty Fund 2003) <https://oll.libertyfund.org/titles/shepherd-selected-writings-of-sir-edward-coke-vol-iii> accessed 26 March 2024

Colon-Rios J, 'The Legitimacy of the Juridical: Constituent Power, Democracy, and the Limits of Constitutional Reform' (2010) 48 Osgoode Hall LJ 199

Cooke JE (ed), *The Federalist* (originally 1788, Wesleyan UP 1961)

Contiades X and Fotiadou A, 'Models of constitutional change' in Contiades X (ed), *Engineering Constitutional Change: A Comparative Perspective on Europe, Canada and the USA* (Routledge 2013)

Craig P, 'Constitutionalising constitutional law: HS2' (2014) PL 373.

Craig R, 'Could the Government Advise the Queen to Refuse Royal Assent to a Backbench Bill?', UK Const L Blog (22nd January 2019) <https://ukconstitutionallaw.org/> accessed 17 October 2024

Croce M and Salvatore A, *Carl Schmitt's Institutional Theory: The Political Power of Normality* (CUP 2022)

Crowcroft R, 'Political Parties' in Cane P and Kumarasingham H (eds), *The Cambridge Constitutional History of the United Kingdom.* (CUP 2023)

Debord G, *The Society of the Spectacle* (Donald Nicholson-Smith tr, Zone Books 1994)

Dixon R, 'Partial Constitutional Amendments' (2011) 13 U Pennsylvania J of Const L 643

Denning AT, *The Changing Law* (Stevens & Sons Ltd 1953)

Dias RWM, 'Legal Politics: Norms Behind the Grundnorm' [1968] CLJ 233

Dicey AV, 'English Constitutionalism under George III' (undated)

— — *Introduction to the Study of the Law of the Constitution* (8th edn [1915], Liberty Classics 1982)

— — *Introduction to the Study of the Law of the Constitution* (10th edn, MacMillan & Co 1920)

Dimock A, *The Cathedral Church of Saint Paul: An Account of the Old and New Buildings, with a Short Historical Sketch*, vol 34 (G Bell & Sons 1901).

Dixon R, *Responsive Judicial Review: Democracy and Dysfunction in the Modern Age* (OUP 2023)

— — 'The Supreme Court of Canada, Charter Dialogue, and Deference' (2009) 47 Osgoode Hall LJ 235

Dorf MC, 'How the Written Constitution Crowds Out the Extraconstitutional Rule of Recognition' in Matthew Adler and Kenneth Einar Himma (eds), *The Rule of Recognition and the US Constitution* (OUP 2009)

Doudonis P, *The Normativity of Constitutional Conventions, with Special References to the UK, USA and Greece* (DPhil Thesis Oxford 2020)

Doyle O, 'Constraints on Constitutional Amendment Powers' in Richard Albert, Xenephon Contiades and Alkmene Fotiadou, *The Foundations and Traditions of Constitutional Amendment* (Hart 2017)

Dubois N, 'What was really signed on Parliament Hill 40 years ago, on April 17, 1982?' (Library and Archives Canada 2022) <https://thediscoverblog.com/2022/04/14/what-was-really-signed-on-parliament-hill-40-years-ago-on-april-17-1982/> accessed 25 November 2025

Dubey P, 'Ancient Construction Serves as a Model for Today's Earthquake-Safe Buildings' in Informed Infrastructure (2 October 2017) <https://informedinfrastructure.com/34343/ancient-construction-serves-as-a-model-for-todays-earthquake-safe-buildings/> accessed 25 July 2025.

Dupras D, 'The 1927 Conference' in *The Constitution of Canada: A Brief History of Amending Procedure Discussions* (Canadian Department of Justice, Law and Government Division 1992) <https://publications.gc.ca/Collection-R/LoPBdP/BP/bp283-e.htm> accessed 18 March 2024

— — 'The Fulton Formulae (1961) and the Fulton-Favreau Formula (1964)' in *The Constitution of Canada: A Brief History of Amending Procedure Discussions* (Canadian Department of Justice, Law and Government Division 1992) <https://publications.gc.ca/Collection-R/LoPBdP/BP/bp283-e.htm> accessed 18 March 2024

Dworkin R, *Law's Empire* (Harvard UP 1986)

Dyzenhaus D, *The Long Arc of Legality* (CUP 2022)

Eisenberg MA, *The Nature of the Common Law* (Harvard UP 1988)

Ekins R, 'Judicial Supremacy and the Rule of Law' (2003) 119 LQR 127

— — 'Constitutional Principle in the Laws of the Commonwealth' in Keown J and George RP (eds), *Reason, Morality, and Law: The Philosophy of John Finnis* (OUP 2013)

— — 'How to Be a Free People' (2013) 58 AmJJuris 163

— — 'Legislative freedom in the United Kingdom' (2017) 133 LQR 582

— — Review of *The Principles of Constitutionalism*, (2019) 135 LQR 515

— — 'The State and It's People' (2021) 66 AmJJuris 49

— — 'The Balance of the Constitution' (2022) 67 AmJJuris 199

— — 'Self-Government and the Kingdom of Heaven,' in Aroney N and Leigh I (eds), *Christianity and Constitutionalism* (OUP 2023)

— — 'Between Authority and Usurpation? Common Good and Constitutional Government' (2024) 69 AmJJuris 45

— — and Gee G, 'Ten Myths about Parliamentary Sovereignty' in Horne A, Thompson L, and Yong B (eds) *Parliament and the Law* (Hart 2022)

Eleftheriadis P, 'Parliamentary Sovereignty and the Constitution' (2009) 22 Canadian J of L and Jurisprudence 267

Elkind JB, 'A New Look at Entrenchment' (1987) 50 MLR 158

Eliot TS, *The Dry Salvages* (Faber & Faber 1941)

— — *East Coker* (Faber & Faber 1942)

Elliott M, 'Constitutional Adjudication and Constitutional Politics in the United Kingdom: The Miller II Case in Legal and Political Context' (2020) 16 EuConst 625

Elster J, *Solomonic Judgements: Studies in the Limits of Rationality* (CUP 1989)

— — 'Constitutionalism in Eastern Europe: An Introduction' (1991) 58 U Chicago L Rev 447

Endicott T, 'Proportionality and Incommensurability' in Huscroft G, Miller B and Webber G (eds), *Proportionality and the Rule of Law: Rights, Justification, Reasoning* (CUP 2014)

— — 'The Purpose of a State' (2021) 66 AmJJuris 69

Eskridge WN, 'Reliance Interests in Statutory and Constitutional Interpretation' (2023) 76 Vanderbilt L Rev 681

— — and Ferejohn J, 'Super-Statutes' (2001) 50 Duke LJ 1215

— — and Ferejohn J, *A Republic of Statutes: The New American Constitution* (Yale UP 2010)

Eule JN, 'Temporal Limits on the Legislative Mandate: Entrenchment and Retroactivity' (1987) 12 American Bar Foundation Research J 379

Feldman D, 'The Nature and Significance of "Constitutional" Legislation' (2013) 129 LQR 343

Feldman N, *The Broken Constitution: Lincoln, Slavery, and the Refoundng of America* (Picador 2022)

Fichte JG, *Addresses to the German Nation* (Gregory Moore ed, CUP 2008)

Fielding H, 'An Inquiry into the Causes of the Late Increase of Robbers &c' [1751] in Roscoe T and Cruikshank G (eds), *The Works of Henry Fielding, Complete in One Volume* (Bohn 1852)

Finnis JM, 'A Bill of Rights for Britain? The Moral of Contemporary Jurisprudence' (1985) 71 Proc Brit Acad 303

Finnis J, 'Law as Co-Ordination' (1989) 2 Ratio Juris 97

— — *Aquinas* (OUP 1998)

— — 'On Hart's Ways: Law as Reason and as Fact' (2007) 52 AmJJuris 25

— — 'Introduction' in *Philosophy of Law: Collected Essays, Volume IV* (OUP 2011)

— — 'Law's Authority and Social Theory's Predicament' [1984] in *The Collected Essays of John Finnis, Volume IV* (OUP 2011)

— — 'Revolutions and Continuity of Law,' in Finnis J, *Philosophy of Law, Collected Essays, Volume IV* (OUP 2011)

— — 'Patriation and Patrimony: The Path to the Charter' (2015) 28 Can J Law & Juris 51

— — *Natural Law and Natural Rights* (2nd edn, OUP 2011)

Foner E, *The Second Founding: How the Civil War and Reconstruction Remade the Constitution* (WW Norton & Co 2020)

Ford PL (ed), *The Works of Thomas Jefferson, vol 5 (Correspondence 1786-1789)* (GP Putnam's Sons 1904)

Foley M, *The Politics of the British Constitution* (Manchester UP 1999)

Forsyth C, 'Heat and Light: A Plea for Reconciliation' in Christopher Forsyth (ed), *Judicial Review and the Constitution* (Hart 2000) 397

— — 'Of Fig Leaves and Fairy Tales: The Ultra Vires Doctrine, the Sovereignty of Parliament and Judicial Review' in Christopher Forsyth (ed), *Judicial Review and the Constitution* (Hart 2000)

Frankfurter F, *Mr Justice Holmes and the Supreme Court* (Harvard UP 1961)

Freeman E, *Historical Essays: First Series* (3rd edn, MacMillan and Co 1875)

Freeman S, 'Political Liberalism and the Possibility of a Just Democratic Constitution' (1994) 69 Chi Kent L Rev 619

Friar S, *The Sutton Companion to Local History* (Sutton Publishing 2004)

Fuller LL, 'The Forms and Limits of Adjudication' (1978) 92 Harv L Rev 353

Fusaro C and Oliver D, 'Towards a Theory of Constitutional Change' in Oliver D and Fusaro C (eds), *How Constitutions Change: A Comparative Study* (Hart 2011)

Galligan G and Brenton S, 'Constitutional Conventions' in Galligan B and Brenton S (eds), *Constitutional Conventions in Westminster Systems: Controversies, Changes and Challenges* (CUP 2015)

Gardner J, 'Some Types of Law' in Edlin DE (ed), *Common Law Theory* (CUP 2007)

— — 'Can there be a Written Constitution?' in Gardner J, *Law as a Leap of Faith* (OUP 2012)

Gardner JA, 'Canadian Federalism in Design and Practice: The Mechanics of a Permanently Provisional Constitution' (2017) 9 Perspectives on Federalism 1

de Gaulle C, 'Of Doctrine' in *The Edge of the Sword* (first published 1932, Gerard Hopkins tr, Criterion Books 1960)

Gee G, 'The Political Constitutionalism of JAG Griffith' (2008) 28 LS 20

— — and Webber GCN, 'What Is a Political Constitution?' (2010) 30 OJLS 273

— — and Webber G, 'A Conservative Disposition and Constitutional Change' (2019) 39 OJLS 526

Gerhardt MJ, 'Super Precedent' (2005) 90 Minnesota L Rev 1204

Gérin-Lajoie P, *Constitutional Amendments in Canada* (U of Toronto P 1950)

Gerken HK, 'The Hydraulics of Constitutional Reform: A Skeptical Response to Our Undemocratic Constitution' (2007) 55 Drake L Rev 925

Ginsburg T, Elkins Z, Melton J, 'The Lifespan of Written Constitutions University' (2007) U of Illinois Center for the Economics of Human Development <https://jenni.uchicago.edu/WJP/Vienna_2008/Ginsburg-Lifespans-California.pdf> accessed 12 March 2025

Goldoni M and Wilkinson MA, 'The Material Constitution' (2018) 81 MLR 567

Goldsworthy J, *The Sovereignty of Parliament: History and Philosophy* (OUP 1999)

— — 'The Preamble, Judicial Independence and Judicial Integrity' (2000) 11 Constitutional Forum 60

— — *The Sovereignty of Parliament: History and Philosophy* (OUP 2001)

— — *Parliamentary Sovereignty* (CUP 2010)

Golemboski D, *Religious Pluralism and Political Stability: Obligations in Agreement* (Routledge 2022)

Graham DW, 'Heraclitus' in *The Stanford Encyclopedia of Philosophy* (Winter 2023 Edition) <https://plato.stanford.edu/archives/win2023/entries /heraclitus/> accessed 12 October 2025

Grayling AC, 'Why the UK Needs a Written Constitution' in Galligan DJ (ed), *Constitution in Crisis: The New Putney Debates* (IB Tauris 2017)

Greenawalt K, 'The Rule of Recognition and the Constitution' (1987) 85 Michigan L Rev 621

Grey T, 'Do We Have an Unwritten Constitution?' 27 Stan L Rev 703 (1975)

Griffith JAG, 'Why we need a revolution' (1969) 40 PolQ 383

— — *The Politics of the Judiciary* (Fontana Press 1977)

— — 'The political constitution' (1979) 42 MLR 1

— — 'The Common Law and the Political Constitution' (2001) 117 LQR 42

Grimm D, *Constitutionalism: Past, Present, and Future* (OUP 2016)

Grossman V, *Life and Fate* (first published 1960, Robert Chandler, tr, New York Rev of Books Classics 2006)

Hamburger PA, 'The Constitution's Accommodation of Social Change' (1989) 88 Michigan L Rev 239

Hardin R, *Liberalism, Constitutionalism, and Democracy* (OUP 1999)

Harrington AM, 'The Kakure Kirishitan and Their Place in Japan's Religious Tradition' (1980) 7 Japanese Journal of Religious Studies 318

Hart HLA, 'Commands and Authoritative Legal Reasons' in Hart HLA, *Essays on Bentham* (OUP 1982)

— — 'Sovereignty and Legally Limited Government' in Hart HLA, *Essays on Bentham* (OUP 1982)

— — 'Kelsen's Doctrine of the Unity of Law' in Hart HLA, *Essays in Jurisprudence and Philosophy* (OUP 1983)

— — *The Concept of Law* (3rd edn, OUP 2012)

Hayek F, *The Constitution of Liberty* (U Chicago P 1960)

Hayne K, 'Statutes, Intentions and the Courts: What Place Does the Notion of Intention (Legislative or Parliamentary) Have in Statutory Construction?' (2013) 13 Oxford U Commonwealth LJ 271

Heard A, 'Preface' in Heard A, *Canadian Constitutional Conventions: The Marriage of Law and Politics* (OUP 1991)

Hegel GWF, 'On the Recent Domestic Affairs of Wurtemberg, Especially on the Inadequacy of the Municipal Constitution' in *Hegel's Political Writings* (TM Knoz tr, Clarendon Press 1964)

Heidegger M, *Being and Time* (Joan Stambaugh tr, State U of New York P 1996)

Hemholz R, *Natural Law in Courts* (Harvard UP 2015)

Hermogenian, *The Digest of Justinian, Vol 1* (Charles Henry Monro tr, CUP 1904)

Herodotus, *The Histories* (Tom Holland tr, Penguin Classics 2014)

Himmelfarb G, *The Roads to Modernity* (Vintage 2005)

Hobbes T, *Leviathan* (first published 1651, Richard Tuck ed, CUP 1997)

Hoek D, 'Forced Changes Only: A New Take on the Law of Inertia' (2023) 90 Philosophy of Science 60

Hogg PW, 'The Difficulty of Amending the Constitution of Canada' (1993) 31 Osgoode Hall L J 41

— — and Wright WK, *Constitutional Law of Canada* (Thomson Reuters 2023)

Holdsworth WS, 'Lecture I: The importance of our legal history' in *Some Lessons from Our Legal History* (Macmillan 1928)

Holmes OW, *The Common Law* (first published 1881, Little, Brown and Company 1923)

Holmes S, *Passions and Constraint: On the Theory of Liberal Democracy* (U Chicago P 1997)

— — and Sunstein CR, 'The Politics of Constitutional Revision in Eastern Europe' in Levinson S (ed), *Responding to Imperfection: The Theory and Practice of Constitutional Amendment* (Princeton UP 1995)

Honoré AM, 'Reflections on Revolutions' (1967) 2 The Irish Jurist 268

Horder J, *Ashworth's Principles of Criminal Law* (8th edn, OUP 2016)

Horwill HW, *The Usages of the American Constitution* (OUP 1925)

'How are seashells created? Or any other shell, such as a snail's or a turtle's?' *Scientific American* (3 October 2006) <https://www.scientificamerican.com/article/how-are-seashells-created/> accessed 4 June 2024

Howse R, 'The Concept of Odious Debt in Public International Law', United Nations Conference on Trade and Development, Discussion Papers, No 185 (July 2007) 5 <https://unctad.org/system/files/official-document/osgdp20074_en.pdf> accessed 21 August, 2023.

Hume D, *Essays Moral, Political, and Literary* (EF Miller ed, Liberty Fund 1985)

— — *Treatise of Human Nature* (first published 1739, Lewis Amherst Selby-Biggie and PJ Nidditch eds, 2nd edn, OUP 2014)

Huscroft G, 'Reconciling Duty and Discretion: The Attorney General in the *Charter* Era' (2009) 34 Queen's LJ 773

Hutchinson AC, 'Constitutional Change and Constitutional Amendment: A Canadian Conundrum' in Contiades X (ed), *Engineering Constitutional Change: A Comparative Perspective on Europe, Canada and the USA* (Talyor & Francis 2012)

Jackson J, *A Certain Idea of France* (Penguin Books 2019)

Jacobsohn GJ, *Constitutional Identity* (Harvard UP 2010)

Jaconelli J, 'The Nature of Constitutional Convention' (1999) 19 Legal Stud 24

— — 'Do Constitutional Conventions Bind?' (2005) 64 CLJ 149

Jennings I, *Cabinet Governmen*t (CUP 1959)

— — *The Law and the Constitution* (3rd edn, U of London P 1959)

Kelsen H, *What Is Justice* (U of California P 1957)

— — *The Pure Theory of Law* (Univ of California P 1967)

— — 'The Function of a Constitution' in Tur R and Twining WL (eds), *Essays on Kelsen* (first published 1967, Clarendon Press 1986)

— — *General Theory of Norms* (Clarendon 1991)

— — *General Theory of Law and State* (A Javier Treviño (tr) Taylor & Francis 2017)

Keshavamurthy CV, *Amending Power under the Indian Constitution—Basic Structure Limitations* (Deep & Deep Publications 1982)

King J, *The Doctrine of Odious Debt in International Law: A Restatement* (CUP 2016)

— — 'The Democratic Case for a Written Constitution' (2019) 72 Current Legal Problems 1

Kischel U, 'The Context of the Common Law' in Kischel U, *Comparative Law* (OUP 2019)

Knapp A, *Charles De Gaulle* (Routledge 2020)

Knopff R and Snow D, '"Harper's New Rules" for Government Formation: Fact or Fiction?' (2013) 36 Canadian Parliamentary Rev 18

Kobach K, 'May "We the People" Speak?: The Forgotten Rule of Constituent Instructions in Amending the Constitution' (1999) 33 UC Davis L Rev 127

Kommers DP, 'The Basic Law: A Fifty Year Assessment' in (2019) 20 German L J 571

de Koninck C, *The Writings of Charles de Koninck. Vol 2* (Ralph McInerny ed, U of Notre Dame P 2009)

Krishamurthy V, 'Colonial Cousins: Explaining India and Canada's Unwritten Constitutional Principles' (2009) Yale J Int'l L 207

Labunski, RE *James Madison and the Struggle for the Bill of Rights* (OUP 2006)

Laforest G and Readman R, 'More Distress than Enchantment: The Constitutional Negotiations of November 1981 Seen from Quebec' in Harder L and Patten S (eds), *Patriation and its Consequences: Constitution Making in Canada* (UBC P 2015)

Lagassé P, 'Parliament and the War Prerogative in the United Kingdom and Canada: Explaining Variations in Institutional Change and Legislative Control' (2017) 70 Parliamentary Affairs 280

— — 'The Crown and Government Formation: Conventions, Practices, Customs, and Norms' (2019) 28 Constitutional Forum constitutionnel 1

Lajoie A, 'The Implied Bill of Rights, the Charter and the Role of the Judiciary' (1995) 44 U New Brunswick LJ 337

di Lampedusa GT, *The Leopard* (Archibald Colquhoun tr, Random House 1960)

Latham RTE, *The Law and the Commonwealth* (OUP 1949)

Latham-Gambi A, 'Political Constitutionalism and Legal Constitutionalism—an Imaginary Opposition?' (2020) 40 OJLS 737

Law DS, 'Constitutions' in Cane P & Kritzer HM (eds), *The Oxford Handbook of Empirical Legal Research* (OUP 2010)

— — & Versteeg M, 'The Evolution and Ideology of Global Constitutionalism' (2011) 99 Cal L Rev 1163

Laws J, 'Law and Democracy' [1995] PL 72

— — *The Common Law Constitution* (CUP 2014)

— — *The Constitutional Balance* (Hart 2021)

Lee D, *Popular Sovereignty in Early Modern Constitutional Thought* (OUP 2016)

Lee S, 'Freedom, the State, and War: Hegel's Challenge to World Peace' (2017) 54 International Politics 203

Leontsini E, 'The Motive of Society: Aristotle on Civic Friendship, Justice, and Concord' (2013) 19 Res Publica 21

Levi EH, *An Introduction to Legal Reasoning* (U of Chicago P 1949)

Levinson S, 'Do Constitutions Have a Point? Reflections on "Parchment Barriers" and Preambles' (2011) 28 Social Philosophy and Policy 150

Leys S, *The Hall of Uselessness* (Black Inc 2011)

Llewellyn KN, 'The Constitution as an Institution' (1934) 34 Columbia L Rev 1

Locke J, 'The Fundamental Constitutions of Carolina' in *The Works of John Locke* vol 4 (W Strahan and C Rivington et al 1773)

Lorenz A, How to Measure Constitutional Rigidity: Four Concepts and Two Alternatives (2005) 17 J of Theoretical Politics 339

Loughlin M, *The Idea of Public Law* (OUP 2003)

— — 'Constitutional Theory: A 25th Anniversary Essay' (2005) 25 OJLS 183

— — 'Towards a Republican Revival?' (2006) 26 OJLS 425

— — 'Burke on Law, Revolution and Constitution' (2015) 29 Giornale di Storia Costituzionale 49

— — 'Nomos' in Dyzenhaus D and Poole T (eds), *Law, Liberty and State: Oakeshott, Hayek and Schmitt on the Rule of Law* (CUP 2015)

— — 'The Political Constitution Revisited' (2019) 30 King's LJ 5

— — 'The Silences of Constitutions' (2019) 16 ICON 922

— — 'What Would John Griffith Have Made of Jonathan Sumption's Reith Lectures?' (2019) 90 PolQ 785

— — *The British Constitution: A Very Short Introduction* (2nd edn, OUP 2023)

Lucas P, 'On Edmund Burke's Doctrine of Prescription: Or, an Appeal from the New to the Old Lawyers (1968) 11 The Historical J 35

Lucretius, *The Nature of Things* (Alicia Stallings tr, Penguin Classics 2007)

Lutz DS, *Principles of Constitutional Design* (CUP 2006)

Mack K, Anleu SR, and Tutton J, 'The Judiciary and the Public: Judicial Perceptions' (2018) 39 Adelaide Law Rev 1

Macfarlane E, "Unsteady Architecture: Ambiguity, the Senate Reference, and the Future of Constitutional Amendment in Canada" (2015) 60 McGill LJ 883

— — 'Judicial Amendment of the Constitution' (2021) 19 ICON 1894

— — 'The Unconstitutionality of Unconstitutional Constitutional Amendments' (2022) 45 Manitoba LJ 198

MacCormack G, 'Religion and Law in Traditional China' in Alan Watson (ed), *Law, Morality, and Religion: Global Perspectives* (U California P 1996)

MacCormick N, *Legal Reasoning and Legal Theory* (Clarendon Press 1994)

MacIntyre A, 'Politics, Philosophy and the Common Good' in Knight K (ed), *The MacIntyre Reader* (U Notre Dame P 1998)

Mackintosh JP, *The British Cabinet* (3rd edn, Stevens and Sons 1977)

MacMillan M, *The War That Ended Peace: The Road to 1914* (Random House 2013)

Maddox G, 'Constitution' in Ball T, Farr J, and Hanson RL, *Political Innovation and Conceptual Change* (CUP 1989)

Maier, P *Ratification: The People Debate the Constitution*, *1787-1788* (Simon & Schuster 2011)

de Maistre J, 'Generative Principle of Political Constitutions', in de Maistre J, *Major Works vol 1* (first published 1809, Edward Maxwell III tr, Imperium Press 2021)

— — *The Generative Principle of Political Constitutions* (first published 1847, Taylor and Francis 2017)

Maitland FW, *The Constitutional History of England* (CUP 1919)

Marmor A, *Law in the Age of Pluralism* (OUP 2007)

— — 'Constitutionalism, Liberalism, and Democracy' Cantillo AL, Valdivieso-León C, and García-Jaramillo S (eds), *Constitutionalism: Old Dilemmas, New Insights* (OUP 2021)

Marshall G, *Constitutional Conventions* (Clarendon Press 1984)

Martins AR, 'The *Zoon Politikon*: Medieval Aristotelian Interpretations' (2019)

McCrone D, 'What Do We Think of it So Far? Twenty-Five Years of Devolution (2025) 34 Scottish Affairs
14

McCrudden C, 'Northern Ireland, the Belfast Agreement, and the British Constitution' in Jowell J and Oliver D (eds), *The Changing Constitution* (5th edn, OUP 2004)

McKechnie WS, *Magna Carta: A Commentary on the Great Charter of King John* (James Maclehose and Sons 1914)

McLean J, 'The Unwritten, Political Constitution and its Enemies' (2016) 14 IJCL 1991

Melton J, Stuart C and Helen D, *To Codify or Not to Codify? Lessons from Consolidating the United Kingdom's Constitutional Statutes* (The Constitution Unit, UCL 2015) <www.ucl.ac.uk/constitution-unit/sites/constitution-unit/files/162.pdf > accessed 23 November 2023

Micheler E, *Company Law: A Real Entity Theory* (OUP 2021)

Mitchell DB, 'Sovereignty of Parliament-Yet Again' (1963) 79 LQR 196

Miles EA, 'After John Marshall's Decision: Worcester v. Georgia and the Nullification Crisis' (1973) 39 The J of Southern History 519

Möller K, 'Lüth and the 'Objective System of Values' in Choudhry S, Hailbronner M & Kumm M (eds), *Global Canons in an Age of Contestation: Debating Foundational Texts of Constitutional Democracy and Human Rights* (OUP 2024)

de Montesquieu CdS, *The Spirit of the Laws* (first published 1758, Anne M Cohler, Basia Carolyn Miller, and Harold Samuel Stone, trs and eds, CUP 1989)

Moore MS, 'Do We Have an Unwritten Constitution?' 63 S Cal L Rev 107 (1989)

Mulheron R, *Principles of Tort Law* (2nd edn, CUP 2020)

Mulholland M, *Northern Ireland: A Very Short Introduction*, (OUP 2003)

Munro C, 'Laws and Conventions Distinguished' (1975) 91 LQR 218

Murkens JEK, 'A Written Constitution: A Case Not Made' (2021) OJLS 965

Murphy WF, 'An Ordering of Constitutional Values' (1979–80) 53 S Cal L Rev 703

Negretto GL, 'Democratic Constitution-making Bodies: The Perils of a Partisan Convention' (2018) 16 ICON 254

Newman JH, *An Essay on the Development of Christian Doctrine* (2nd edn, James Toovey 1846)

— — *Discussions and Arguments on Various Subjects* (Longmans, Green, and Co 1885)

Nussbaum MC, 'Recoiling from Reason: Review of Alasdair MacIntytre's 'Whose Justice? Which Rationality?' in Nussbaum MC, *Philosophical Interventions: Reviews 1986-2011* (OUP 2012)

Oakeshott M, 'On Being Conservative' in Oakeshott M, *Rationalism in Politics and Other Essays* (first published 1962, rev edn, Liberty Fund 1991)

— — 'Political Education' in Oakeshott M, *Rationalism in Politics and Other Essays* (first published 1962, Liberty Fund 1991)

— —, *On Human Conduct* (first published 1975, OUP 1991)

Oliver D, *Constitutional Reform in the UK* (OUP 2003)

Oliver P, 'The 1982 Patriation of the Canadian Constitution: Reflections on Continuity and Change' (1994) 28 La Revue juridique Thémis 877

— — 'Canada I: Confederation and the Imperial Theory' in Oliver, PC *The Constitution of Independence: The Development of Constitutional Theory in Australia, Canada, and New Zealand* (OUP 2005)

Ordeshook PC, 'Constitutional Stability' (1992) 3 Const Pol Econ 137

Orwell G, 'England, Your England' in Orwell G *England, Your England and Other Essays* (Secker & Warburg 1953)

Osgood SM, 'A Pretender's Concept of the French Monarchy' (1957) 19 RevPol 77

Ostrom E, *Governing the Commons: The Evolution of Institutions for Collective Action* (CUP 1990)

O'Brien F, *At Swim-Two-Birds* (Longmans Green 1939)

Paine T, *Rights of Man* [1791, 1792] in Mark Philp (ed), *Rights of Man, Common Sense and other Political Writings* (OUP 2008)

— — *Dissertation on First Principles* [1795] in Mark Philp (ed), *Rights of Man, Common Sense and other Political Writings* (OUP 2008)

Parfit D, *Reasons and Persons* (OUP 1984)

Parker E, *Winters in the World: A Journey Through the Anglo-Saxon Year* (Reaktion Books 2022)

Partlett W, 'The American Tradition of Constituent Power' (2017) 15 ICON 955

Peabody BG and Gant SE, 'The Twice and Future President: Constitutional Interstices and the Twenty-Second Amendment' (1999) 83 Minnesota L Rev 565

Pelletier B, 'Amending the Constitution of Canada' in Oliver PC et al (eds), *The Oxford Handbook of the Canadian Constitution* (OUP 2017)

Perry A, *The Conventional Constitution* (OUP 2025)

Perry S, 'Hart on Social Rules and the Foundations of Law: Liberating the Internal Point of View' (2006) 75 Fordham L Rev 1171

Peters G and Woolley JT, 'The State of the Union, Background and Reference Table' in John T Woolley and Gerhard Peters (eds), *The American Presidency Project* (U of California 2024) <www.presidency.ucsb.edu/node/324107/> accessed 6 November 2024

Petersohn B, 'Constitutional Reform and Federal Dynamics: Causes and Effects' in Benz A and Broschek J (eds), *Federal Dynamics: Continuity, Change, and the Varieties of Federalism* (OUP 2013)

Pildes RH, 'The Destruction of Social Capital Through Law' (1996) 144 U Pennsylvania L Rev 2055

Plaxton M, 'The Caretaker Convention and Supreme Court Appointments' (2016) 72 Supreme Court L Rev 449

Plutarch's Lives (Bernadotte Perrin tr, Harvard UP 1914)

Pocock JGA, 'Burke and the Ancient Constitution—A Problem in the History of Ideas (1960) 3 The Historical J 125

Polk M, 'The Politics of Patriation: The Canada Act of March 1982' (2019) 34 London J of Canadian Studies 1

Pollock F and Maitland FW, *The History of English Law before the Time of Edward I* (2nd edn, CUP 1898)

Polzin M, 'Constitutional Identity as a Constructed Reality and a Restless Soul' (2017) 18 German LJ 1595

Post R, 'The Supreme Court, 2002 Term-Forward: Establishing the Legal Constitution: Culture, Courts and Law' (2003) 117 Harvard L Rev 8

Pound R, *Interpretations of Legal History* (MacMillan 1923)

Preuss U, 'The Implications of "Eternity Clauses": The German Experience' (2011) 44 Isr L Rev 429

Price J, 'God Created Man αὐτεξούσιον': Grotius's Theological Anthropology and Modern Contract Doctrine' in Róna P and Zsolnai L (eds) *Agency and Causal Explanation in Economics* (Springer International 2020)

Purdy J, 'The Possible Futures of American Democracy' (2023) 5 The Utah L Rev 1009

Psygkas A, 'The United Kingdom's Statutory Constitution' (2020) 40 OJLS 449

Purdy J, 'The Possible Futures of American Democracy' (2023) 5 Utah L Rev 1009

Rawls J, *Political Liberalism* (expanded edition, Columbia UP 2011)

Raz J, 'Reasons for Action, Decisions and Norms' (1975) 84 Mind 481

— — *The Authority of Law: Essays on Law and Morality* (OUP 1979)

— — 'The Identity of Legal Systems' in Raz J, *The Authority of Law: Essays on Law and Morality* (OUP 1979)

— — 'The Institutional Nature of Law' in Joseph Raz, *The Authority of Law: Essays on Law and Morality* (OUP 1979)

— — *The Concept of a Legal System: An Introduction to the Theory of a Legal System* (2nd edn, OUP 1980)

— — *The Morality of Freedom* (OUP 1986)

— — 'Authority, Law, and Morality' in Raz J, *Ethics in the Public Domain: Essays in the Morality of Law and Politics* (OUP 1995)

— — *Practical Reason and Norms* (OUP 1999)

— — 'On Reasons for Action' in Joseph Raz, *Practical Reason and Norms* (OUP 1999)

— — 'On the Authority and Interpretation of Constitutions: Some Preliminaries' in Raz J, *Between Authority and Interpretation: On the Theory of Law and Practical Reason* (OUP 2009)

Renan E, 'What Is a Nation?' in Ernest Renan, *What Is a Nation? and Other Political Writings* (first published 1882, MFN Giglioli ed and tr, Columbia UP 2018)

Richardson MEL, *Hammurabi's Laws: Text, Translation and Glossary* (Continuum International Publishing 2004)

Roach K, 'Dialogic Judicial Review and its Critics' (2004) 23 SCLR 49

Robinson E, '*Re Allister* and the entrenchment 'road not taken': A rejoinder to Kacper Majewski', UK Const L Blog (1 March 2023) <https://ukconstitutionallaw.org/ 2023/03/01/edmund-robinson-re-allister-and-the-entrenchment-road-not-taken-a-rejoinder-to-kacper-majewski/> accessed 12 June 2024

Romeo, G 'A Material Understanding of Constitutional Changes' in Goldoni M and Wilkinson MA, *The Cambridge Handbook on the Material* Constitution (CUP 2023)

Rosati C, 'The Importance of Self-Promises' in Sheinman H (ed), *Promises and Agreements: Philosophical Essays* (OUP 2011)

Rosenfeld M, *The Identity of the Constitutional Subject: Selfhood, Citizenship, Culture, and Community* (Routledge 2010)

Rousseau J-J, 'On the Social Contract' in *The Major Political Writings of Jean-Jacques Rousseau* (first published 1762, John T Scott ed, U Chicago P 2012)

Roznai Y, *Unconstitutional Constitutional Amendments—The Limits of Amendment Powers* (OUP 2017)

Rubenfeld J, *Freedom and Time: A Theory of Constitutional Self-Government* (Yale UP 2001)

—— *Revolution by Judiciary: The Structure of American Constitutional Law* (Harvard UP 2005)

Russell J, *An Essay on the History of the English Government and Constitution, from the Reign of Henry VII to the Present Time* (2nd edn, Longman 1823)

Russell P, 'Patriation and the Law of Unintended Consequences' in Lois Harder and Steve Patten (eds) *Patriation and its Consequences: Constitution Making in Canada* (UBC P 2015)

Sack AN, Les *Effets des Transformations des Etats sur Leurs Dettes Publiques et Autres Obligations Financieres* (Recueil Sirey 1927)

Salomon ME and Howse R, 'Odious Debt, Adverse Creditors, and the Democratic Ideal' in Bantekas I and Lumina C, *Sovereign Debt and Human Rights* (OUP 2018)

Sartori G, 'Constitutionalism: a Preliminary Discussion' (1962) 56 Am Pol Science Rev 853
Sathe SP, *Judicial Activism in India: Transgressing Borders and Enforcing Limits* (OUP 2002)

de Saussure F, *A Course in General Linguistics* (Wade Baskin tr, McGraw-Hill 1966)

Scally D, *The Best Catholics in the World: The Irish, the Church and the End of a Special Relationship* (Sandycove 2021)

Schama S, *Citizens: A Chronicle of the French Revolution* (Alfred A Knopf 1989)

Schlesinger AM, *The Imperial Presidency* (Houghton Mifflin 2004)

Schmitt C, *On the Three Types of Juristic Thought* (first published 1934, Josephy W Bendersky tr, Praeger 2004)

—— *Constitutional Theory* (Jeffrey Seitzer tr, Duke UP 2008)

Schneer J, *Ministers at War: Winston Churchill and His War Cabinet* (Basic Book 2015)

Schneiderman D, 'Unwritten Constitutional Principles in Canada: Genuine or Strategic?' in Dixon R and Stone A (eds), *The Invisible Constitution in Comparative Perspective* (CUP 2018)

Schwartzberg M, *Democracy and Legal Change* (CUP 2007)

Scott FR, 'The British North America (No 2) Act, 1949' (1949) 18 U of Toronto L J 205

Scott SA, 'Pussycat, Pussycat or Patriation and New Constitutional Amendment Processes' (1982) 20 U of W Ontario L Rev 247

Shafir G, 'Human rights under American populism' in Brysk A (ed) *Populism and Human Rights in a Turbulent Era* (Edward Elgar P 2023)

Shakespeare W, *Troilus and Cressida* (first published 1609, David Bevington ed, Bloomsbury Arden Shakespeare 2015)

— — *Julius Caesar* (first published 1623, Methuen 1964)

Shapiro SJ, 'What Is the Rule of Recognition (and Does it Exist)? in Adler MD and Himma KE, *The Rule of Recognition and the U.S. Constitution* (OUP 2009)

Shepheard W, *Of Corporations, Fraternities, and Guilds* (London, H Twyford, T Dring, & J Plate 1659)

Siegel N, 'The U.S. Constitution, Constitutional Conventions, and President Trump' (OxHRH Blog, 1 March 2017) <https://ohrh.law.ox.ac.uk/the-u-s-constitution-constitutional-conventions-and-president-trump> accessed on 30 October 202

Skeffington DA, 'The Concept of the Constitution in the Jurisprudence of Michael Oakeshott' (2020) VI LSE Law Review 1

— — *The Political Constitution: An Idea Worth Protecting?* (The Constitution Society 2022)

Smith DG, 'An Analysis of Two Federal Structures: The Articles of Confederation and the Constitution' (1997) 34 San Diego L Rev 249

Sollenberger MA, 'The Blue Slip: A Theory of Unified and Divided Government, 1979-2009' (2010) 37 Congress & Presidency 125

St-Hilaire M, Baud PF, and Drouin ES, 'The Constitution of Canada as Supreme Law: A New Definition' (2019) 28 Constitutional Forum constitutionnel 7

Strauss L, 'What is Political Philosophy' in Strauss L, *What is political philosophy?* (first published 1959, U of Chicago P 1988)

Suksi, M *Bringing in the People: A Comparison of Constitutional Forms and Practices of the Referendum* (Martinus Nijhoff Publishers 1993)

Sumption J, *Trials of the State: Law and the Decline of Politics* (Profile Books 2019)

Suteu S, *Eternity Clauses in Democratic Constitutionalism* (OUP 2021)

Tammelo I, 'The Antinomy of Parliamentary Sovereignty' (1958) 44 Archiv für Rechts- und Sozialphilosophie 495

Taylor C, 'Leading a Life' in Chang R (ed), *Incommensurability, Incomparability, and Practical Reason* (Harvard UP 1998)

— — *Modern Social Imaginaries* (Duke UP 2004)

Thayer JB, *The Origin and Scope of the American Doctrine of Constitutional Law* (Little, Brown, and Co 1893)

Thayer JB, *Legal Essays* (Boston Book Company 1908)

Thucydides, *The Peloponnesian War* (PJ Rhodes ed, Martin Hammond tr, OUP 2021)

Tobi J, *The Jews of Yemen: Studies in Their History and Culture* (Brill 1999)

de Tocqueville A, *Democracy in America* (first published 1835-40, Phillips Bradley ed, Vintage 1945)

Tomkins A, *Public Law* (OUP 2003)

Tribe L, 'A Constitution We Are Amending: In Defense of a Restrained Judicial Role' (1983) 97 Harvard Law Review 433

Tribe LH, 'The Idea of the Constitution: A Metaphor-morphosis' (1987) 37 J of Legal Education 172

— — *The Invisible Constitution* (OUP 2008)

Trudeau P, 'Quebec and the Constitutional Problem' in Trudeau P, *Federalism and the French Canadians* (MacMillan 1968)

— — 'A Constitutional Declaration of Rights' in Trudeau P, *Federalism and the French Canadians* (MacMillan 1968)

— — 'Federalism, Nationalism, and Reason' in Trudeau P, *Federalism and the French Canadians* (MacMillan 1968)

Tuchman BW, *The Guns of August* (MacMillan 1962)

Tully J, *Strange Multiplicity: Constitutionalism in an Age of Diversity* (CUP 1995)

Tushnet M, 'Some Reflections on Method in Comparative Constitutional Law' in Choudhry S (ed), *The Migration of Constitutional Ideas* (CUP 2006)

— — 'Comment on Doyle's Constraints on Constitutional Amendment Powers' Albert R, Contiades X, and Fotiadou A (eds), *The Foundations and Traditions of Constitutional Amendment* (Hart 2017)

Twomey A, *The Veiled Sceptre* (CUP 2018)

Tyler CW, 'Federalism and Constitutional Norms' (U Chicago L Rev, forthcoming 2027)

Upton JD, *The Constitutional Thought of Joseph de Maistre* (Thesis submitted to the Department of Law of the London School of Economics for the degree of Doctor of Philosophy, London, November 2008)

Van den Berge L, 'Law, king of all: Schmitt, Agamben, Pindar' (2019) 13 Law and Humanities 198

Vermeule A, 'Political Constraints on Supreme Court Reform' (2006) 90 Minnesota L Rev 1154

—— 'Conventions of Agency Independence' (2013) 113 Columbia L Rev 1163

—— *Common Good Constitutionalism: Recovering the Classical Legal Tradition* (Polity Press 2022)

Vinx L, 'Constitutional Indifferentism and Republican Freedom' (2010) 38 Political Theory 809

Voegelin E, '*The Nature of the Law* and Related Legal Writings' in Pascal RA, Babin JL, and Corrington JW (eds) *The Collected Works of Eric Voegelin, vol 27* (Louisiana State UP 1989)

—— 'Letter to Robert Heilman, August 20, 1959' in *Robert B Heilman and Eric Voegelin: A Friendship in Letters 1944-1984* (Charles R Embry ed, U of Missouri P 2004)

Von Mehren A, 'Judicial conception of legislation in Tudor England' in Sayre P (ed), *Interpretation of Modern Legal Philosophies, Essays in Honor of Roscoe Pound* (OUP 1947)

Wade HWR, 'The Basis of Legal Sovereignty' (1955) CLJ 172

Waldhoff A, 'The Debt Brake as a Means of Intertemporally Safeguarding Freedom: On the Ruling of the German Federal Constitutional Court on the Second Supplementary Budget Act 2021' (2024) 20 European Constitutional L Rev 699

Waldron J, *Law and Disagreement* (OUP 1999)

—— 'The Core of the Case Against Judicial Review' (2006) 115 Yale LJ 1346

—— 'Judges as Moral Reasoners' (2009) 7 IJCL 2

Walker G, *A History of the Ulster Unionist Party: Protest, Pragmatism, and Pessimism* (Manchester UP 2004)

Walker N, 'Rosenfeld's Plural Constitutionalism' (2010) 8 ICON 677

Walters MD, 'Common Law Constitution in Canada: Return of *Lex Non Scripta* as Fundamental Law' (2001) 51 U Toronto LJ 91

—— *A.V. Dicey and the Common Law Constitutional Tradition: A Legal Turn of Mind* (CUP 2020)

Webber GCN, *The Negotiable Constitution: On the Limitation of Rights* (CUP 2009)

Webber G, 'Eulogy for the constitution that was' (2014) 12 ICON 468

—— 'Past, Present, and Justice in the Exercise of Judicial Responsibility' in Sigalet G, Webber G, and Dixon R (eds), *Constitutional Dialogue: Rights, Democracy, Institutions* (CUP 2019)

— — 'Can the Constitution of a Fruit Fly Be Written?' in Dempsey MM and Tanguay-Renaud F (eds), *From Morality to Law and Back Again: A Liber Amicorum for John Gardner* (OUP 2023)

Weill R, 'Constitutional Statutes or Overriding the Court-On Bruce Ackerman's We the People: The Civil Rights Revolution' (2016) 13 Jerusalem Rev of Legal Studies 1

Weinrib J, *Dimensions of Dignity: The Theory and Practice of Modern Constitutional Law* (CUP 2016)

Weinrib LE, 'The Postwar Paradigm and American Exceptionalism' in Choudhry S (ed), *The Migration of Constitutional Ideas* (CUP 2007)

Welikala A, 'Conservatism' in Cane P and Kumarasingham P (eds), *The Cambridge Constitutional History of the United Kingdom: Vol I* (CUP 2023)

West R, 'Toward a First Amendment Jurisprudence of Respect: A Comment on George Fletcher's Constitutional Identity' in Rosenfeld M (ed), *Constitutionalism, Identity, Difference, and Legitimacy* (Duke UP 1994)

Wheare K, *Modern Constitutions* (OUP 1951)

— — *The Constitutional Structure of the Commonwealth* (Clarendon 1960)

Wheeldon J, 'Prorogation as Constitutional Harm' (2011) 34 Canadian Parliamentary Rev 69

Windrow H, 'A Short History of Law, Norms, and Social Control in Imperial China' (2006) 7 Asian-Pacific Law & Policy 244

Whittington K, 'The Status of Unwritten Constitutional Conventions in the United States' (2013) 5 U of Illinois L Rev 101

— — 'The Vexing Problem of Faithless Electors' (2020) Cato Supreme Court Rev 67

Wilde O, *The Picture of Dorian Gray* (first published 1890, Norton 2006)

Wilkinson MA, 'The Reconstitution of Postwar Europe: Liberal Excesses, Democratic Deficiencies' in Dowdle MW and Wilkinson MA (eds), *Constitutionalism Beyond Liberalism* (CUP 2017)

Williams B, *In the Beginning Was the Deed: Realism and Moralism in Political Argument* (Geoffrey Hawthorn ed, Princeton UP 2008)

Willis E, 'Unwritten constitutionalism: stability without entrenchment' [2002] PL 386

Wills G, *Lincoln at Gettysburg: The Words That Remade America* (Simon & Schuster 1992)

Winterton G, 'The British Grundnorm: Parliamentary Supremacy Re-Examined' (1976) 92 LQR 591

Wischmeyer T, 'Review of Yaniv Roznai's *Unconstitutional Constitutional Amendments*' (2017) 15 ICON 1242

Wittgenstein L, *On Certainty* (first published 1969, GEM Anscombe and GH von Wright, eds, Denis Paul and GEM Anscombe, trs, Blackwell Publishing 1975)

Woelk J, 'Germany' in Oliver D and Fusaro C (eds), *How Constitutions Change: A Comparative Study* (Hart 2011)

Wood DP, 'Why Term Limits for Supreme Court Justices Make Sense' in Brennan Centre for Justice <www.brennancenter.org/our-work/analysis-opinion/why-term-limits-supreme-court-justices-make-sense> accessed 19 August 2024

Wood GS, *Empire of Liberty: A History of the Early Republic 1789-1815* (OUP 2009)

Wordsworth W, 'My heart leaps up' in Reed H (ed), *The Complete Poetical Works of William Wordsworth* (Troutman & Hayes 1851)

Yack B, 'Popular Sovereignty and Nationalism' (2001) 29 Political Theory 517

Young EA, 'The Constitution Outside the Constitution' (2007) 117 Yale L J 408

Young AL, *British Government and the Constitution* (8th edn, CUP 2021)

Yowell P, *Constitutional Rights and Constitutional Design* (Hart 2018)

— — 'A Proposal for Defining and Classifying Systems of Constitutional Government' in Kyritsis D and Lakin S (eds), *The Methodology of Constitutional Theory* (Hart 2022)

Other

Benedict XVI (Joseph Ratzinger), Address of His Holiness Benedict XVI to the Roman Curia Offering them His Christmas Greetings, Thursday, 22 December 2005 <www.vatican.va/content/ benedictxvi/en/speeches/2005/december/documents/ hf_ben_xvi_spe_20051222_roman-curia.html> accessed 23 October 2023

Cabinet Office, *The Cabinet Manual A guide to laws, conventions and rules on the operation of government* (Cabinet Office 2011) <https://assets.publishing.service.gov.uk/media/ 5a79d5d7e5274a18ba50f2b6/cabinet-manual.pdf> accessed 5 November 2024

Constitutional Accord: Canadian Patriation Plan (1981)

'Declaration of Independence: A Transcription' America's Founding Documents, U.S. National Archives and Records Administration <www.archives.gov/founding-docs/declaration-transcript> accessed August 17 2023

Dicey AV, Letter to James Bryce, 16 March 1897, James Bryce Papers, Bodleian Library, Oxford, Bryce 2, fols 240-3

Hansard (Canada), Senate Debates (30 March 1988) 2999

HC Deb 17 February 1982 vol 18 col 299.

HC Deb 17 February 1982 vol 18 col 320

House of Lords Library, *The Salisbury-Addison Convention* (19 June 2015) <https://lordslibrary.parliament.uk/ research-briefings/lif-2015-0011/> accessed 23 October 2024

Jefferson T, Proposals to Revise the Virginia Constitution: I. Letter to "Henry Tompkinson" (Samuel Kercheval), 12 July 1816, Founders Online <https://founders.archives.gov/documents/Jefferson/03-10-02-0128-0002> accessed 27 February 2024

Johnston, N *The Pre-election period of sensitivity* (House of Commons Library 2024) <https://research briefings.files. parliament.uk/documents/SN05262/SN05262.pdf> accessed 6 November 2024

Reston J, 'Partial Transcript of an Interview with Kissinger on the State of Western World' *New York Times* (New York, 13 October 1974)

Senate of Canada, 'How a Venerable Senate Icon Got the Sack' (2020) SenCA+ Magazine (28 January 2020) <https://sencanada.ca/en/sencaplus/how-why/how-a-venerable-senate-icon-got-the-sack/> accessed 5 November 2024

'St Edward's Staff', Royal Collection Trust <www.rct.uk/collection/31717/st-edwards-staff> accessed 29 October 2024

Taillon P, *Les obstacles juridiques à une réforme du fédéralisme* (Institut de recherche sur le Québec 2007) <https://irq.quebec/wp-content/uploads/2015/03/Obstaclesjuridiques.pdf> accessed 26 June 2026

Transcript of Oral Argument at 21, 33, *Chiafalo*, 140 S Ct 2316 (2020) (No 19-465) <www.supremecourt.gov/oral_arguments/argument_transcripts/ 2019/19-465_c0n2.pdf> accessed 28 October 2024

Tyson M, as quoted in Associated Press, 'Biggs has plans for Tyson' Oroville Mercury-Register (19 August 1987)

'Written evidence from the Foreign and Commonwealth Office on Clause 18 of the EU Bill' in House of Commons European Scrutiny Committee, *The EU Bill and Parliamentary sovereignty: Tenth Report of Session* 2010–11, vol II (The Stationery Office Limited 2010) 40-43, <https://publications. parliament.uk/pa/cm201011/cmselect/cmeuleg/ 633ii/633.pdf> accessed 26 March 2024