

The constitutional imaginary: shared meanings in constitutional practice and implications for constitutional theory

In this article I seek to defend three main claims. Firstly, that the kinds of practices that are the object of study of constitutional theorists are undergirded by certain fundamental shared understandings. Secondly, that these shared understandings together form a rich fabric of meaning that is, broadly speaking, held in common across modern western societies, which I call the ‘constitutional imaginary’. Thirdly, that political institutions play a symbolic role as ‘repositories’ of shared understandings, which is crucial for the development, maintenance, propagation and evolution of the constitutional imaginary. On the basis of these claims I propose a distinctive role for constitutional theory: the interpretation of the social meaning of political institutions and the actions and events that take place in and around them.

Constitutional theory, interpretation and shared understandings: an illustration in three ‘referendums’

Constitutional theory is an endeavour in interpreting meaning. This is not to say that such interpretation is the only concern of the constitutional theorist: she or he may praise or criticise, suggest proposals for reform, highlight challenges, issue warnings and so on. But in order to do any of these things competently, she or he must have a firm grasp of the meanings of the objects under study. The data with which constitutional theory concerns itself – texts, institutions, practices, etc. – are not brute empirical facts. Even if one agrees with Griffith’s dramatic claim that a constitution is ‘no more and no less than what happens’, a constitutional theorist must recognise that what happens, constitutionally-speaking, is not just a set of physical movements

but a host of meaningful human interactions.¹ It is not enough to say ‘these people signed this piece of paper, those people walked through that lobby, a crowd moved from here to there’; we need to be able to say ‘the heads of state ratified the treaty, Congress enacted the bill into law, the demonstrators marched on Parliament’. Just as it is with the anthropologist, ‘thick description’ is the stock-in-trade of the constitutional theorist.² And while in straightforward situations the shift from thin to thick description may be easy to make, in many other cases the constitutional theorist will be tasked with making sense of some action, practice or predicament whose meaning appears cloudy, muddled or incomplete. In this section I give an illustration of the nature of this task, by reference to three recent votes the constitutional significance of which has been disputed: the 2014 vote in Crimea on accession to the Russian Federation, the 2017 vote in Catalonia on independence from Spain and the 2016 vote in the UK on membership of the European Union. These events present us with a double-sided conundrum. On one hand, how is it that we can recognise such diverse phenomena as candidates for inclusion within the same genus, that of ‘referendum’? What makes them similar? On the other hand, how is it that, while

¹ JAG Griffith, ‘The Political Constitution’ (1979) 19 MLR 1, 19. Griffith also said: ‘[L]aws are merely statements of a power relationship and nothing more... I am arguing then for a highly positivist view of the constitution; of recognising that Ministers and others in high positions of authority are men and women who happen to exercise political power but without any such right to that power which could give them a superior moral position...’ (ibid). Of course, to talk about such things as ‘power relationships’, ‘high positions of authority’, ‘political power’ and (a lack of) ‘any such right to that power’ is to do far more than state ‘what happens’, at least on a ‘highly positivist view’ of the latter.

² See Gilbert Ryle, ‘The Thinking of Thoughts: What is *le Penseur* doing?’ in *Collected Essays 1929-1968* (Hutchinson 1971); Clifford Geertz, ‘Thick Description’ in *The Interpretation of Cultures: selected essays* (Basic Books 1973).

the UK vote perhaps seems a paradigm example of that genus, the status of the Crimean and Catalan votes appears more dubious? What makes them different? I hope to show that answers to these questions, and, indeed, any satisfactory understanding of the controversies surrounding each of these events, requires an appreciation of certain rather nebulous ideas about the nature and significance of referendums that are shared between parties that otherwise hold opposing positions.

Genuine, fake and misfired referendums

On 27 February 2014, Russian special forces seized the Supreme Council of Crimea in Simferopol.³ The Council immediately held an emergency session in which it voted to oust the regional government and replace it with a government led by Sergei Aksyonov, the leader of a pro-Russian party that had received 4 per cent of the vote in the previous election. The following week, the parliament voted for a referendum on a proposed accession to the Russian Federation. The proposal was deemed unconstitutional by the Ukrainian Constitutional Court, but Crimea was by this time under the control of Russian forces, and the vote went ahead as planned. Official results reported 97 per cent support for accession on a turnout of 83 per cent. Following the announcement of the outcome, the Supreme Council declared the formal independence of Crimea, and the following day agreed an accession treaty with Russia. The Russian State Duma

³ I take my account of the Crimean affair from Alissa de Carbonnel, 'How the separatists delivered Crimea to Moscow' *Reuters* (London, 31 March 2014) <<https://www.reuters.com/article/us-ukraine-crisis-russia-aksyonov-insigh/how-the-separatists-delivered-crimea-to-moscow-idUSBREA2B13M20140312>> accessed 17 April 2020; and Thomas D Grant, 'Annexation of Crimea' (2015) 109 *AJIL* 68.

issued a statement that described the vote as an ‘expression of will by the Crimean people’.⁴

Ukrainian president Oleksandr Turchynov had a somewhat different opinion. He stated: ‘It is not a referendum, it is a farce, a fake and a crime against the state’.⁵

What did Turchynov mean when he said that the vote was not a referendum? One might think the empirical facts bely such a claim. Clearly we have here an important political question that was put to a general vote of the entire electorate of Crimea. While the results as officially announced are almost certainly not genuine, it is clear that a large number of Crimeans did cast a vote and likely that a majority of those voting supported accession to Russia.⁶ But Turchynov’s point was not just about the empirical facts, it was about the significance of those facts. In stating that the vote was not a referendum, he was denying precisely what the Duma asserted: that the vote was an ‘expression of will by the Crimean people’. A referendum bears a constitutional significance that is qualitatively different from other votes, such as opinion polls and consultative ballots. Here I am not referring to its legal significance – a referendum may or may not be legally binding. What I mean is that a referendum result represents a collective decision of a group of citizens that are taken to be in some way competent to legitimately make that decision. This is part of what it means for a vote to be a referendum: a vote which is intended to, but fails, to

⁴ As quoted by the Russian news agency: TASS, ‘Russian lawmakers issue statement on situation in Crimea’ (Moscow, 18 March 2014), <<https://tass.com/russia/724114>> accessed 17 April 2020.

⁵ Quoted in Elizabeth Piper, ‘With Crimean appeal, Putin goes head-to-head with West over Ukraine’, *Reuters* (London, 6 March 2014), <<https://www.reuters.com/article/us-ukraine-crisis-putin/with-crimean-appeal-putin-goes-head-to-head-with-west-over-ukraine-idUSBREA251ZW20140306>> accessed 17 April 2020.

⁶ Leaked Russian sources have indicated that real turnout is thought to have been approximately 40 per cent, with around 55 per cent voting in favour of accession: see Olena Podolian, ‘The 2014 Referendum in Crimea’ (2015) 43 *E Europ Q* 111, 121.

represent such a decision has misfired;⁷ a vote set up to mimic such a decision is, as Turchynov put it, ‘a fake’. Constitutional theory should provide us with the resources to interpret what happened in Crimea and so to adjudicate the dispute between Turchynov and the Duma.

Take another example: On 1 October 2017, just over two and quarter million people (43 per cent of the registered electorate of Catalonia) cast votes on the question ‘Do you want Catalonia to become an independent state in the form of a republic?’, with 92 per cent of votes cast answering in the affirmative.⁸ While the vote was called and organised by a democratically-elected political authority, it was conducted in defiance of a court order, and the Spanish Constitutional Court has since held that the law of the Generalitat de Catalunya mandating the vote was unconstitutional.⁹ Following the vote, the Catalan president, Carles Puigdemont, declared: ‘I assume the mandate of the people for Catalonia to become an independent state’.¹⁰ The central Spanish authorities disagreed with his assessment of the situation. In a rare television

⁷ Here I adopt the terminology of Austin’s speech act theory. According to Austin, an illocutionary speech act ‘misfires’ when ‘the procedure we purport to invoke is disallowed or is botched’, such as when a ship’s captain utters ‘I pronounce you man and wife’ to a couple whom, unbeknown to him, are already married. See JL Austin, *How to Do Things with Words* (JO Urmson and Marina Sbisa eds, 2nd edn, Oxford University Press 1976) 16.

⁸ For the turnout figures see Generalitat de Catalunya, ‘Referèndum d’Autodeterminació de Catalunya: resultats definitius’ <http://www.govern.cat/pres_gov/govern/ca/monografics/303541/govern-traslada-resultats-definitius-referendum-11-doctubre-parlament-catalunya.html> accessed 17 April 2020. For the English translation of the question see Law 19/2017, of 6 September, on the Referendum on Self-determination, article 4.

⁹ *Prime Minister v Parliament of Catalonia* STC No 114/2017, 9 October 2017. For discussion see Asier Garrido-Muñoz, ‘Prime Minister v. Parliament of Catalonia’ (2018) 112 AJIL 80.

¹⁰ Quoted in Raphael Minder and Patrick Kingsley, ‘In Catalonia, a Declaration of independence from Spain (Sort of)’ *New York Times* (New York, 10 October 2017).

address, King Felipe VI attacked the vote as unlawful and illegitimate, and said that the Catalan authorities ‘have scorned the attachments and feelings of solidarity that have united and will unite all Spaniards’.¹¹

The contested vote in Catalonia was very different from the contested vote in Crimea. While Sergei Aksyonov came to power in Crimea with little electoral mandate and as a result of foreign military intervention, Carles Puigdemont’s government came to office by way of elections whose fairness is not in dispute. There is no suggestion that the Catalan government used intimidation or force in order to secure the outcome that they desired. While there are concerns that not everyone who wanted to vote was able to do so and that not every vote cast was counted, this is not because of anything done by the Catalan authorities but rather because of the (somewhat heavy-handed) action taken by the Spanish civil guard in an attempt to stop the vote from taking place.¹² While most observers (at least in the West) seem to have agreed with Turchynov’s claim that the Crimean vote was ‘a fake’, it would be difficult to argue that the same is true of the vote that took place in Catalonia.

Nevertheless, it is not at all clear that the Catalan vote was a ‘referendum’, in the full sense of the word. It could be argued that, while the Generalitat was undoubtedly a democratic body representing the people of Catalonia, its violation of the court order meant that it was not acting as such when it called for the independence vote. Furthermore, most of the unionist MPs had walked out of the chamber in protest against what they saw as unconstitutional action by the Catalan Government, and unionist parties urged their supporters to abstain from taking part in

¹¹ Quoted in Sam Jones, ‘King Felipe: Catalonia’s authorities have “scorned” all Spaniards with referendum’ *The Guardian* (London, 4 October 2017).

¹² Jordi Pérez Colomé, ‘La misión de observadores concluye que el referéndum no cumple los “estándares internacionales”’ *El País* (Madrid, 3 October 2017).

the ballot. If the vote was not accepted as legitimate by both sides to the debate, can it feasibly represent a collective decision? In light of such concerns, an argument could be made that the attempt to hold a referendum in Catalonia misfired.

My aim here is not to resolve the question of whether the Catalan vote (or, for that matter, the Crimean vote) was a referendum in the full sense of the word, but merely to highlight the sophisticated nature of our conceptual scheme, which permits (and demands) differentiation between a referendum and a straw poll, a consultative ballot, a fake referendum designed to give a veneer of legitimacy to a *fait accompli*, an unsuccessful attempt at a referendum, and so on. The more such distinctions are made, the more refined the concept of a ‘true’ referendum becomes, as its distinctive constitutional significance appears in contrast to otherwise similar phenomena that lack such significance. Saussure’s insight that linguistic meaning lies not in individual words but in the relationships that different words have with one another holds also in relation to the meaning of constitutional events: the meaning of a referendum lies in the difference between it and a fake, a straw poll, a legislative decision, a judicial ruling and so on.¹³ When I say that constitutional theory is a matter of thick description, I mean that one of the central tasks of the theorist is to draw out the distinctions implicit in everyday constitutional discourse, in order to bring greater clarity to what is at stake in constitutional issues and better define the contours of constitutional disagreement.

The will of the people

I have spoken of the ‘distinctive constitutional significance’ of a referendum as if this itself were

¹³ Ferdinand de Saussure, *Course in General Linguistics* (Charles Bally and Albert Sechehaye eds, Roy Harris tr, Duckworth 1983) ch IV.2.

unproblematic. Of course, this is not quite the case, as can readily be seen by looking at a third example, the 2016 referendum on the UK's membership of the European Union. Unlike the votes in Crimea and Catalonia, there is little room for doubt that the vote that was held in the UK in 2016 was indeed a genuine referendum. While a few hardline 'remainers' have argued that the vote lacked any legitimacy,¹⁴ there appears to be a general consensus in the UK that the vote carries some genuine constitutional weight. There is little agreement, however, over what this weight amounts to. Opinions vary, from the position that the referendum outcome is simply something that the UK parliament ought to take into consideration;¹⁵ that it decided that the UK government must begin the process of negotiating to leave the EU but that it would be legitimate to 'think again, if the circumstances changed';¹⁶ to the view that the referendum decided that the UK must leave the EU, such that a second referendum would be a 'betrayal of democracy';¹⁷ and even that it decided not only that the UK must leave the EU, but also the European Single Market and Customs Union, even though such organizations were not mentioned on the ballot

¹⁴ eg, Gerard Delanty, 'Brexit: The case for illegitimacy' *Huffington Post* (London, 7 July 2016) <https://www.huffingtonpost.co.uk/gerard-delanty/brexit_b_10832514.html> accessed 17 April 2020.

¹⁵ eg, Robert Hunter, 'Parliament voted to hold the EU referendum – it can vote to ignore it' *The Guardian* (London, 28 June 2016).

¹⁶ In the words of former Prime Minister Tony Blair, quoted in John Murray Brown, 'Tony Blair calls on Labour leaders to back call for a second Brexit referendum' *Financial Times* (London, 4 January 2018).

¹⁷ In the words of current Prime Minister Theresa May, quoted in BBC News, 'Brexit: May vows no compromise with EU on Brexit plan' (London, 2 September 2018) <<https://www.bbc.co.uk/news/uk-politics-45385421>> accessed 17 April 2020.

paper.¹⁸ This lack of consensus is not simply down to a supposed lack of clarity in the referendum question,¹⁹ nor can it be wholly attributed to a disingenuous attempt on behalf of one side of the debate or the other to read into the referendum result whatever it is they want to see. While there may be some truth in each of these complaints, the dissensus over the meaning of the vote to leave the EU reflects at least in part a genuine lack of clarity over the constitutional significance of referendums in general. There is disagreement over whether a decision made by referendum is binding or advisory and reversible or final, and also over how to ascertain the content of the decision: is it simply the words on the ballot paper, or are the intentions and beliefs of the voters relevant?

Yet despite this uncertainty, the ongoing debate in the UK has by-and-large proceeded on the presupposition that the outcome of the vote has a particularly weighty status, and, furthermore, that it represents a decision taken by the highest authority – the ‘will of the people’. Even those campaigning to reverse the decision have accepted that this could only legitimately be done through a second referendum, which they have tellingly dubbed a ‘people’s vote’.²⁰ The link between referendums and ‘the people’ appears also in the Crimean and Catalan cases, with

¹⁸ eg, Anne-Marie Trevelyan, ‘Britain must leave the customs union – and not look back’ *Financial Times* (London, 28 April 2018).

¹⁹ As argued, for example, by Thomas Colignatus, ‘The Brexit referendum question was flawed in its design’, (*LSE Brexit Blog*, 17 May 2017), <<https://blogs.lse.ac.uk/brexit/2017/05/17/the-brexit-referendum-question-was-flawed-in-its-design/>> accessed 17 April 2020.

²⁰ See, for example, Polly Toynbee, ‘If Labour is serious about power it must back a people’s vote on Brexit’ *The Guardian* (London, 18 September 2018). Note also the acknowledgment of London mayor Sadiq Khan, when announcing his backing for a second referendum, that ‘the will of the British people was to leave the EU’ (Sadiq Khan, ‘The people must have another vote’ *The Guardian* (London, 15 September 2018)).

the notion being invoked by both the Russian and Catalan authorities in support of the claim that their ‘referendums’ were authoritative.²¹ In these cases challenges to the legitimacy of the votes are brought by way of a denial that it was ‘the people’ who went to the polls – note for example King Felipe’s pointed reference to the ‘feelings of solidarity that have united and will unite *all Spaniards*’ (the implication being that the relevant ‘people’ were the people of Spain not the people of Catalonia). So it would seem that the shared understanding about the meaning of a referendum – that which distinguishes it from a consultative poll and a fake – revolves around its connection with the idea of ‘the will of the people’.

This idea is, of course, hardly transparent: if we were faced with a visitor from a society that lacked the idea of a referendum and who found the distinction between a true referendum and a fake puzzling, it would scarcely help relieve his bewilderment to tell him that the former, but not the latter, reveals the will of the people. Note that it is difficult to articulate what the will of the people consists of other than by reference to the medium through which it is supposedly revealed.²² Essentially, part of what the ‘will of the people’ means is that it is something that, under propitious conditions, is capable of being expressed in a referendum. But in turn a genuine referendum can only be distinguished from a ‘fake’ on the basis that the former but not the latter reveals the will of the people. We are stuck within a hermeneutic circle.

²¹ See nn 4 and 10.

²² The classic example here is Rousseau: ‘the general will, to be truly such, must be so in its object as well as its essence... it must issue from all in order to apply to all’ (Jean-Jacques Rousseau, *The Social Contract* (Maurice Cranston tr, Penguin Books 1968) II.4). For a discussion of the tension between this ‘democratic’ conception of the general will and the ‘transcendent’ conception that is also present in Rousseau’s writings see Christopher Bertram, ‘Rousseau’s Legacy in Two Conceptions of the General Will’ (2012) 74 *Rev Pol* 403.

While this hermeneutic circle cannot be escaped, it can be widened. The concept of a (genuine) referendum points us not only to the idea of the will of the people, but also to other notions: to a *salus populi*, on the basis of which ‘the people’ is supposed to have chosen; to a notion of autonomy underlying the idea that each voter is to exercise his or her vote free from intimidation or bribery; to a notion of equality implicit in the practice of giving each person one vote each; to the idea of citizenship which grants to some both the entitlement to vote and the obligation to use that entitlement appropriately, while simultaneously denying the vote from others; and so on. These ideas are connected, not by a logical derivation of conclusions from premises, but by sitting together in a ‘web of significance’,²³ ie a roughly shared way of looking at the world, of understanding the meaning of what is going on.

Thus the attempt to understand ‘what happened’ in Crimea, Catalonia and the UK leads us quickly from the particular disputes at hand to much more abstract ideas about the nature of the political world. Furthermore, while at the level of the significance of particular events we find widespread disagreement, at the abstract level we encounter understandings that are widely shared. We can thus view particular constitutional disputes as competing interpretations of a basic shared fabric of meaning. If sound, this thought indicates an answer to our double-sided conundrum: the events are similar because they all engage the same complex of basic shared ideas; they are different because the meaning that they bear, in light of these ideas, differs.

I would like to suggest that the colourful embroidery of modern western constitutional practices is interwoven with essentially the same basic fabric. There is a set of fundamental

²³ In the memorable words of Clifford Geertz, ‘man is an animal suspended in webs of significance he himself has spun’ (n 2) 5.

shared understandings that make modern constitutionalism possible. I call this the constitutional imaginary.

Basic shared meanings: the social imaginary as vocabulary and grammar

The constitutional imaginary is part of the broader phenomenon that philosophers have dubbed the ‘social imaginary’.²⁴ A social imaginary is a shared world that is built up out of the creative use of humans’ collective imagination. Charles Taylor has described it thusly:

By social imaginary, I mean something much broader and deeper than the intellectual schemes people may entertain when they think about social reality in a disengaged mode. I am thinking, rather, of the ways people imagine their social existence, how they fit together with others, how things go on between them and their fellows, the expectations that are normally met, and the deeper normative notions and images that underlie these expectations.²⁵

Before turning to the specific contents of the constitutional imaginary, I should explain the general idea of social imaginaries a little more.

We can draw an analogy between a social imaginary and a language. Each are abstract, intersubjective schemes of meaning that lend sense to particular actions. Just as utterances need a language in order to be meaningful, so social actions and practices derive their meaning from a social imaginary. A society’s social imaginary plays roles that we can loosely identify as ‘vocabulary’ and ‘grammar’. As vocabulary, the social imaginary contains the ontological

²⁴ My account of the social imaginary draws mainly on Charles Taylor, *Modern Social Imaginaries* (Duke University Press 2004); though see also Cornelius Castoriadis, *The Imaginary Institution of Society* (Kathleen Blamey tr, Polity Press 1987); and Paul Ricoeur, *Lectures on Ideology and Utopia* (George H Taylor ed, Columbia University Press 1986).

²⁵ Taylor (n 24) 23.

‘ingredients’ of which society is taken to be comprised: depending on the society there may be families, classes, castes, institutions, gods, spirits and so on as well as persons; and persons may be thought of simply as such, or as holders of roles, representatives of dynasties, embodiments of the divine and so on. It also includes the various kinds of action that are possible in the society: it may (or may not) be possible in a given society to place a bet, bequeath property, negotiate a trade agreement, offer up a gift to the gods, issue a unilateral declaration of independence, hold a referendum, and so on.

In its ‘grammar’ role, the social imaginary connects the various components of society in particular ways, such that they together form what we might call an ‘imagined world’. The ontological ingredients of society are understood as sitting in particular relationships with one another. For example, castes are defined by a certain relationship of hierarchy, citizens by one of equality. Social classes can be understood as being essentially conflictual or essentially harmonious. People will share a sense of what it means for society to be ordered: for a Ladhaki Buddhist, order will be seen in constant peace;²⁶ for an ancient Celt, constant war.²⁷ A society will have a conception of time, which may be understood as cyclical or linear and as spiritual or profane. And underlying all of this will be some general sense of purpose, ie of what, roughly speaking, society is ‘for’, which might be protection against threats real or perceived, honouring the spirits of the ancestors, building the new Jerusalem, expanding man’s domination of nature and so on.

It is crucial to note that social imaginaries are not the same as widespread opinions or beliefs. A difference in opinion or belief exists where two people have conflicting cognitive

²⁶ Fernanda Pirie, *Peace and Conflict in Ladakh: the construction of a fragile web of order* (Brill 2007).

²⁷ Barry Cunliffe, *The Ancient Celts* (Penguin 1999) ch 9.

attitudes towards the same object: you think the earth is round, I think it is flat; you think King's Pawn openings are best for beginners, I think Queen's Pawn openings are; you think her apology was genuine, I think it was fake; you think Duchamp's *Fountain* is great art, I think it is trash. In these cases you and I are talking about the same object, and the nature of that object in no way depends on what you or I happen to think about it. Different social imaginaries, on the other hand, are not different ways of talking about the same thing, rather they represent different schemes of social reality. Consider, for example, the case of the Trobriand Islanders, whose economy, based on reciprocal gift-giving rather than market exchange, was famously studied by Malinowski.²⁸ It would be misleading to say that the Trobriand Islanders lacked the linguistic resources to talk about their trade agreements, that they had trade agreements of which they were unaware, or that they conceptualised their trade agreements in terms of gifts. Rather, their social imaginary did not make trade agreements possible – talk of trade agreements in Trobriand society is simply inapplicable.²⁹

To take an example from the field of constitutional theory, consider the practice of loyal opposition, the significance of which has recently been highlighted by Waldron.³⁰ One of the crucial purposes of the practice, Waldron rightly points out, is 'to familiarise the winners and the country at large with the point that criticism is okay and that policies are to be presented and

²⁸ See Bronislaw Malinowski, *Argonauts of the Western Pacific: an account of native enterprise and adventure in the archipelagos of Melanesian New Guinea* (Waveland Press 1984); and *Crime and Custom in Savage Society* (Rowman & Littlefield 1989).

²⁹ cf Marcel Mauss, *The Gift: the form and reason for exchange in archaic societies* (W.D. Halls tr, Routledge 1990).

³⁰ Jeremy Waldron, 'The Principle of Loyal Opposition' in *Political Political Theory: essays on institutions* (Harvard University Press 2016) ch 5.

defended in an explicitly and officially sanctioned adversarial environment'.³¹ The practice of loyal opposition embeds the idea of contestability into the heart of the constitution, as a bulwark against Jacobinism. But it can only do so because those who engage in and observe the practice share an understanding of its significance and proper place. Without this shared understanding, loyal opposition would be impossible, not just practically, but conceptually so. It would be misleading to say that citizens of modern liberal democracies have a different opinion of loyal opposition than that which was prevalent in (say) Old Kingdom Egypt. However one might try, there is nothing could be done in the court of an Old Kingdom pharaoh that could conceivably amount to loyal opposition: the ancient Egyptian social imaginary did not make space for such a possibility. In this respect, the difference between the two societies is, in Wittgenstein's terms, not 'in opinions but in form of life'.³² Genuine disagreements – for example over whether the impeachment of President Clinton exemplified or subverted loyal opposition, or whether the Catalan vote was a true referendum – can only break out in the context of a shared social imaginary.

The difference between social imaginary and widespread opinion is a difference in ontological status: opinions are subjective, the property of individuals; the imaginary is intersubjective, the property of a society. This is central to the analogy between a social imaginary and a language: like a language, a social imaginary is irreducibly shared.³³ It is not simply a set of ideas that people happen to have in their heads, it is part of social reality, part of

³¹ *ibid* 101-102.

³² Ludwig Wittgenstein, *Philosophical Investigations* (G.E. Anscombe tr, 3rd edn, Blackwell 1968) §241.

³³ The idea that language is irreducibly shared is one of the key lessons to be drawn from the philosophy of Wittgenstein. For discussion, see Charles Taylor, 'Lichtung or Lebensform' in *Philosophical Arguments* (Harvard University Press 1995).

the way in which people relate to one another and interact. Just as the meaning of a sentence does not lie in what any given individual happens to think that it means, so the meaning of social action does not lie in anybody's opinion about the meaning of that action. The practice of loyal opposition is not simply a set of empirical facts about the way in which certain people have behaved *plus* a widely-shared view that that behaviour demonstrates a form of unity in disagreement – the meaning of the practice is itself embedded in the actions that comprise it. A referendum is not simply the behaviour of people marking crosses on sheets of paper and these sheets being collected and tallied, *plus* a belief that the outcome of this process somehow represents the 'will of the people' – the significance of the activity *qua* referendum is itself part of the behaviour. In Taylor's words, meaning is 'out there in the practices themselves'.³⁴

Note that the social imaginary straddles the supposed divide between the descriptive and the evaluative and normative. In part its role is to carve up the social world into meaningful categories: here are social classes, there are governments, that was (or was not) a referendum. This is essentially a matter of description, of 'what happens'. However, implicit within such description are certain ideas of an inherently evaluative and normative nature. For example, the fact that a 'vote' carried out under duress is not classed as a genuine vote implicitly relies on a positive assessment of the value of human free will and/or autonomy. The distinction between a genuine and a fake or misfired referendum implies an acceptance that, when successfully undertaken, referendums are of some meaningful normative relevance. Of course, one may offer a debunking account of referendums, arguing that they carry no normative weight at all. But if one takes this line, one is not simply saying something *about* referendums, but in fact denying the appropriateness of the very concept as it is generally understood; just as to argue that

³⁴ Charles Taylor, 'Interpretation and the Sciences of Man' (1971) 25 *Review of Metaphysics* 3, 27.

promises are not generally morally binding is to argue that there is no such thing as promising as a distinctive practice at all.³⁵ It follows that a thick description of constitutional practices and events can only be rendered using normatively saturated concepts. There is no room for positivist constitutional theory.³⁶

The constitutional imaginary: the background meanings of modern constitutionalism

A social imaginary, then, is a shared world constituted by common understandings about what kinds of entities exist, how these entities interact with each other, what kinds of actions can be performed, what these actions mean, the relationship between individuals and society and between individuals *inter se*, the nature of social order, and so on. In this section I attempt to

³⁵ See John R Searle, 'How to Derive "Ought" from "Is"' (1964) 73 *Phil Rev* 43.

³⁶ This does not in itself directly challenge *legal* positivism, i.e. the thesis that whether a norm is legally valid depends upon its sources rather than its merits. Legal positivism tells us something about how we are to determine the *content* of law, i.e. what the law of a particular jurisdiction requires (forbids, permits...); it does not purport to provide a complete theory of the *nature* of law (John Gardner, 'Legal Positivism: 5½ Myths' (2001) 46 *Am J Juris* 199, 223-4). The latter will include an account of the social significance of the ideas of law and legality in constituting the shared political world of modern citizens; if my argument in this essay is correct, such an account will identify shared understandings about law (for example, that law is a form of order) that straddle the supposed divide between the descriptive and the normative. I say that my claim here does not *directly* challenge legal positivism: it may well be that a fully fleshed out account of the nature of law would yield the conclusion that the doctrinal question ('what does the law require?') cannot be answered without considering those broader values with which law is necessarily associated – but that is an issue I cannot explore here.

outline the principal common understandings that constitute the shared political world of modern constitutional democracies.

Before I do so, however, a note is in order to prevent misunderstanding. Though I talk about *the* constitutional imaginary in the singular, and claim that it is widely shared across modern western societies, I do not mean to imply that it is an entirely uniform, self-contained whole, or that its contents are somehow fixed. Nor do I mean to imply that ‘western modernity’ itself has clear-cut boundaries, or that non-western or non-modern societies lack any of the shared meanings that define the constitutional imaginary. This is not a thesis of cultural reification, still less of a clash of civilizations. I use the phrase ‘constitutional imaginary’ not to pick out a distinct ontological entity, but to delineate a set of overlapping understandings as the object of study. It is a useful concept, I believe, because these understandings are particularly widespread and influential, as well as relatively stable. None of this is to deny that shared understandings evolve over time, that the boundaries between ‘western’ and ‘nonwestern’ understandings of politics are permeable and imprecise, or that within the *relatively* homogeneous modern western world there lies considerable local variation.

Here the analogy between imaginary and language is again useful. Linguists have modelled the relationships between different languages diagrammatically as a tree, with a trunk connecting a family of languages that share basic characteristics, which then progressively splits into branches representing increasingly homogeneous groups and subgroups.³⁷ At the trunk, we

³⁷ For a visually striking example, see Holly Young, ‘A Language Family Tree’ *The Guardian* (London, 23 January 2015).

see otherwise very different languages linked by remarkable similarities in basic vocabulary.³⁸ At the tips of the branches, we see that languages are not wholly discrete but rather blend into one another. There is no clear-cut distinction between a language and a dialect: a Swede will understand the gossip in a Copenhagen café while a Jordanian might struggle to follow what is said in a Casablanca souk. We can think of the constitutional imaginary in a similar way: as a ‘language’ that has both a not inconsiderable degree of internal diversity (‘dialects’) as well as certain similarities with foreign tongues. Some basic understandings – for the example the idea that there is a distinction between the ‘public sphere’ and the ‘private sphere’ – are broadly shared across a range of societies, including many that can in no way be classified as part of western modernity. Other understandings are much more local: for example the Anglo-Saxon proclivity for jury trials, and opposition to compulsory identification cards, may derive from unspoken understandings about the nature of the state that makes them difficult for those from outside the English-speaking world to comprehend. Perhaps the ‘constitutional fetishism’ that has been said to blight constitutional politics in the United States³⁹ is the result of a worldview that is distinctive to members of that nation. But such local idiosyncrasies do not render the political life of these communities completely unintelligible to outsiders. Perhaps a Finn would find it hard to understand why US politicians so frequently invoke an eighteenth-century document in defence of twenty-first-century arguments, or a Frenchman struggle to grasp why a proposal to create a British national identity card proved so controversial. But they would nevertheless recognise the basic vocabulary of legal and political behaviour in the societies they

³⁸ For example, in Irish, French, Russian, Greek and Punjabi respectively, ‘two’ becomes *dó*, *deux*, *dva*, *dúo* and *dō*, and ‘brother’ becomes *bráthair*, *frère*, *brat*, *phrátēr* and *bharā*.

³⁹ See Max Lerner, ‘Constitution and Court as Symbols’ (1937) 46 *Yale LJ* 1290.

were observing: here are the courts, there is the legislature; these are the citizens, those are their representatives; there is a bit of separation of powers here, a bit of fusion of powers there; and so on. If you were to send a Finn to go to the US to study its constitution, she would likely find the prevailing understandings were somewhat different to those back at home, but it would not be like sending her to study the Trobriand Islanders, nineteenth-century Bali, or, indeed, Finland in the middle ages. It is this general mutual intelligibility that leads me to conclude that I am justified in talking about *the* constitutional imaginary.

The constitutional imaginary can be identified as having arisen out of the seismic social shifts that took place in Europe and, latterly, North America, between the turn of the sixteenth century and the close of the eighteenth. In the medieval era, society was understood as an organic part of a meaningful cosmos. Positive law was seen as a human stand-in for the natural law that governs the turning of the seasons, the behaviour of animals and the movement of celestial bodies; the position of the king as head of his kingdom as a worldly representation of Christ as head of the Church and ruler of the faithful.⁴⁰ The modern social imaginary is the product of the process that Weber evocatively termed ‘disenchantment’: the disintegration of religious world views and the rise of a rationalised, secularised, post-traditional society.⁴¹ Loughlin has identified two aspects of this process that are of particular relevance to the birth of the

⁴⁰ See, for example, AS McGrade, ‘Rights, Natural Rights and the Philosophy of Law’ in *The Cambridge History Of Later Medieval Philosophy: from the rediscovery of Aristotle to the disintegration of scholasticism, 1100-1600* (Norman Kretzmann et al eds, Cambridge University Press 1982); and Ernst H Kantorowicz, *The King’s Two Bodies: a study in mediaeval political theology* (Princeton University Press 1997).

⁴¹ See Max Weber, ‘Science as a Vocation’ in Peter Lassman et al (eds), *Max Weber’s ‘Science as a Vocation’* (Unwin Hyman 1988).

constitutional imaginary: the political order becomes ‘detached from its religious origins’; and the idea of *political* rule emerges as something distinct from the rendering of feudal obligations and the management of the royal exchequer and estate.⁴² As a consequence of these shifts in understanding, we see the emergence of ‘the political’ as a distinctive sphere of life, characterised by distinctive practices, values, relationships, statuses, identities and so on.⁴³ In a relatively short space of time the web of significance underlying political life was respun into an entirely new form. Not all of its component ideas were new, however. The constitutional imaginary is made up of medieval notions reshaped and repackaged for modern times, fragments of earlier ideas rediscovered from ancient Greece and Rome, as well as some radical innovations. What follows is a delineation of some of its main aspects.⁴⁴

The public

Perhaps the most basic aspect of the constitutional imaginary is the modern idea of the public, with its concomitant notions of the public sphere, public opinion, and the public interest. As Habermas recounted in his *Habilitationenschrift*, the modern public sphere – and with it the modern concept of public opinion – arose in Western Europe in the eighteenth century.⁴⁵ Print

⁴² Martin Loughlin, *Foundations of Public Law* (Oxford University Press 2012) 50; see also Neil Walker, ‘Constitutionalism and the Incompleteness of Democracy’ (2010) 39 *Rechtsphilosophie & Rechtstheorie* 206, 231.

⁴³ See Martin Loughlin, *The Idea of Public Law* (Oxford University Press 2004) ch 3.

⁴⁴ In what follows, my debt to Loughlin, *ibid*, should be apparent. Another useful overview of the constitutional imaginary, focusing on the tension between its ‘modernist’ and ‘democratic’ aspects, is provided by Paul Blokker, ‘The Imaginary Constitution of Constitutions’ (2017) 3 *Social Imaginaries* 167.

⁴⁵ Jürgen Habermas, *The Structural Transformation of The Public Sphere: an inquiry into a category of bourgeois society* (Thomas Burger tr, Polity 1992).

journals – initially a means of providing merchants with accurate information about distant markets – began to discuss first literary and then political issues, giving rise to a new kind of debate in which comments made by people in different places and in different times were understood as contributing to an ongoing, society-wide discourse. In this way, people who were widely separated in physical space could come to view themselves as sharing a kind of discursive space, and thus ‘the public’ came to be imagined. The public, engaging in public discussion and debate, is entirely different from a group of people who just happen to be talking and forming opinions about the same thing. To be a member of the public is to have a certain self-conception: to understand oneself as party to a discursive process that is oriented towards a common resolution. Similarly, public opinion – the product of this public discussion – is qualitatively different from merely widespread opinion, which may be simply inherited from preceding generations or passively absorbed by the recipients of propaganda. While a widespread opinion is merely convergent – an opinion you and I and he and she each happen to have – public opinion is irreducibly shared: it is the opinion of a collective to which we each belong.

While the modern idea of the public has historical forbears, particularly in ancient Greece,⁴⁶ the modern public differs from the ancient case in that, as historian Christian Meier has put it, the ‘social identity of the Athenian *polis* was... wholly and exclusively political’.⁴⁷ The

⁴⁶ See Hannah Arendt, *The Human Condition* (2nd ed., Chicago University Press 1999) Part II.

⁴⁷ Christian Meier, *The Greek Discovery of Politics* (David McLintock tr, Harvard University Press 1990) 142. The same can be said in respect of republican Rome: ‘In a culture built on hierarchy and status distinctions, “everyone” was rarely a useful concept, and a primary meaning of *publicus* was not “concerning everyone” but “concerning the *populus Romanus*, the legally constituted universality of Roman citizens”.’ (Amy Russell, *The Politics of Public Space in Republican Rome* (Cambridge University Press 2016) 27).

modern public is, by contrast, not wholly constituted by its political structure and is seen as existing independently of any particular political institutions. The modern public stands outside the state.

Politics

The idea of the public gives rise to a distinctively modern notion of politics as ‘public affairs’. This notion of politics carries over from classical versions the idea that politics is concerned with the pursuit of the common good, but it involves a shift in how the relationship between individuals and the common good is understood. The *salus populi* has become the *public interest*: the common good of a political community is now conceived of as something that is the fitting subject of widespread debate and contestation. Politics is understood as essentially conflictual; passionate political disagreement is not seen as threatening the fabric of the social order. This sense of healthy disagreement is undergirded by a shared understanding of certain norms of behaviour that govern the political sphere. While politics may be a realm of struggle, it is not a struggle for victory at all costs. Violence and threats are understood to be corrosive of the political realm. Furthermore, self-interested profit-seeking behaviour, truck and barter and so on – while tolerated and perhaps even encouraged in the realm of private interactions – is considered out of place in politics (which is not, of course, to say that it does not occur). The constitutional imaginary thus draws a clear distinction between the forum and the market.⁴⁸

While the modern notion of politics has as its corollary the idea that there exists such a thing as private life which ought to be free from political interference, the boundaries of the

⁴⁸ See John Elster, ‘The Market and the Forum’ in James Bohman and William Rehg (eds), *Deliberative Democracy: essays on reason and politics* (MIT Press 1997).

political sphere are not at all clear. Furthermore, questions about whether or not particular matters are within the proper scope of political concern are themselves understood as political questions. Politics thus enjoys a kind of *Kompetenz-Kompetenz* – the power to define its own remit. This can be seen in the way in which feminists have more or less successfully shifted questions about gender relations and the role of women in society from the private sphere of the family into the political sphere. The barrier that the depoliticised understanding of gender relations posed to women’s liberation was, of course, understood by feminist activists and theorists from the earliest years of the movement. Once feminist arguments gained a foothold in public political discourse, however, they could only be countered in political terms. While the struggle for women’s liberation might not yet be won, it is no longer a viable for opponents of feminism to continue to treat gender relations *en masse* as fundamentally private. Once an issue has been appeared on the political stage, it takes political action to remove it again.

This idea of politics as contestation around competing visions of the common good is intimately linked with certain institutions – in particular the legislature – that are seen as quintessentially ‘political’ in nature. Here we see a reflexive relationship between institutions and the imaginary: part of what it means for something to be a legislature is that it is a forum for the practice of politics, while our understanding of the nature of politics comes to a significant degree from our experience of legislatures. It is, for example, possible for an issue to become ‘politicised’ (or ‘depoliticised’) by transferring responsibility for it to (or away from) political institutions. A society’s constitutional structure thus has an impact on its understanding of the sphere of the political.

Law

I mentioned earlier that social imaginaries contain a sense of what it means for society to be

ordered. In the constitutional imaginary, order is conceived of as legality, as compliance with law. Law operates as a form of order by restraining exercises of force within a set of generally accepted rules. It is imagined as having adequate stability so that people can go about their lives without the constant fear of having their expectations frustrated, and as having adequate power to support itself by deterring illegal conduct through the threat of sanctions. It is also thought of as an impartial form of order, something which ought to be administered ‘without fear or favour’.⁴⁹ Of course, this is not to say that citizens of constitutional regimes believe that law always succeeds in these aims, but that, when the rule of law fails, this is experienced as a breakdown in the proper order of things.

As we saw with politics, the modern understanding of law is integrally institutional, with the quintessentially ‘legal’ institution being, of course, the court. Again the relationship between the imaginary and the institution is a reflexive one: law is that which is applied by courts; courts are those institutions that apply the law. We see here a phenomenon that I shall elaborate upon in the final section of this essay: concrete institutions provide symbolic representation of the imaginary understandings on which they depend. Political debate in the legislative assembly represents the fundamental idea of politics as a form of contestation around competing visions of the common good; the position of the judge as an impartial arbiter of a legal dispute represents the fundamental idea of law as a form of impartial order.

⁴⁹ Legal theorists of different stripes have converged on these basic ideas: see, for example, Lon L Fuller, *The Morality of Law* (2nd rev ed, Yale University Press 1969) ch II; John Rawls, *A Theory of Justice* (Clarendon Press 1973) §38; Joseph Raz, ‘The Rule of Law and its Virtue’ in *The Authority of Law* (Oxford University Press 2009); and John Finnis, *Natural Law and Natural Rights* (2nd ed, Oxford University Press 2011) X.4.

Representation, democracy and popular sovereignty

The notion of the public is central to the constitutional imaginary because it permits a new way of thinking about the ancient idea of democracy. In ancient thought, democracy was conceived of in terms of participation: a true democracy was one in which all citizens would ‘rule and be ruled in turn’.⁵⁰ Pure democracy thus tended to be disparaged as rule of the masses, and ‘mixed’ systems of government preferred.⁵¹ However, with the advent of the modern public, a new sense of democracy was able to emerge, in which the rule of the *demos* did not mean rule by active participation of the multitude, but rule by representatives steered by public opinion. It is only with the rise of the public that ‘representative democracy’ could shift from being a contradiction in terms to a widely-accepted paradigm. Citizens who, *qua* individuals, were essentially bereft of political power, could nevertheless be imagined, collectively, as exercising supervisory control over the political process through the force of a critical and reflective public opinion.⁵²

We see a similar shift in the modern understanding of law: where the constitutional imaginary differs from earlier ideas is that the law is no longer thought of as a transcendental order. Modern law appears not as timeless truths, nor is it (as it was in ancient Greece) given to a people by a mythical external source. In the constitutional imaginary, law is the product of secular agency. Now of course, premodern peoples were not ignorant of the fact that statutes, decrees and so on were made by kings, interpreted by judges and so on; they could see that in this regard the law was made by men. But these statutes, decrees and judgments owed their status *as law* to their

⁵⁰ Aristotle, *The Politics* (Stephen Everson tr, Cambridge University Press 1988) Book VI, pt ii.

⁵¹ See, for example, *ibid* Book IV.

⁵² See Charles Taylor, ‘Liberal Politics and the Public Sphere’ in *Philosophical Arguments* (n 33).

connection to a transcendental order; they were law because they were sanctioned by and represented such an order.⁵³ Modern law, by contrast, is sanctioned by and represents an earthly source of power: the popular sovereign, ‘we, the people’.

This analysis reveals two senses in which modern western democracy is ‘representative’. Firstly, legislators are representatives of the public and their decisions are expected to be grounded in public opinion. In this way, representative democracy pays respect to citizens’ capacities for moral-political judgment.⁵⁴ Secondly, there is a more fundamental sense of ‘representation’, which the constitutional imaginary shares with the imaginary of modern non-democratic regimes. It is part of the essence of popular sovereignty: the modern idea of politics that rulers rule *in the name of the people*. This sense of representation does not necessarily express democratic respect, though it does convey the idea that politics is a form of collective action.⁵⁵ It is this fundamental sense of representation that enables us to perceive a difference between political power-holders acting in an official capacity and those same persons acting in a private capacity, and between political rule and exercises of proprietary or contractual right or

⁵³ Thus in medieval jurisprudence we see seemingly paradoxical statements in which the King is described as simultaneously the embodiment of God on earth and the trustee of a legally limited power. For example, Bracton: ‘The king has no other power, since he is the vicar of God and His minister on earth, except this alone which he derives from the Law.’ (Henry De Bracton, *De Legibus et Consuetudinibus Angliae: libri quinque in varios tractatus distincti, ad diversorum et vetustissimorum codicum collationem typis vulgati* (Sir Travers Twiss ed, Longman & Co 1878) f107, quoted in Kantorowicz (n 40) 155 (Kantorowicz’s translation)). To understand this statement one has to appreciate that ‘the Law’ was not thought as having earthly origin.

⁵⁴ See Nadia Urbinati, *Representative Democracy: principles and genealogy* (University of Chicago Press 2006).

⁵⁵ Indeed, perhaps its most systemic expression is in an anti-democratic treatise: see Thomas Hobbes, *Leviathan* (Richard Tuck ed, Cambridge University Press 1991) ch XVIII.

brute assertions of power.⁵⁶ In modernity, political rule must refer back to the popular sovereign that is the source of political legitimacy.

Citizenship

While ‘the people’ is an abstract idea that is not to be confused with any concrete set of individuals, individuals are nevertheless imagined to be members of it. In the constitutional imaginary, the status of membership takes on a distinctive hue: ‘we’, collectively the people, are, taken separately, *citizens*. Citizenship is a curious status, since it involves one being both a member of a collective committed to a common good *and* an individual with rights that can be enforced against the collective. As members of the collective, citizens are entitled to participate in politics and to have their own needs and viewpoints included as part of the public interest that modern politics is supposed to promote. As individuals, citizens enjoy subjective rights, such as freedom of speech, of religion and of political opinion and the right not to be interfered with except in ways provided for by law. Citizenship thus simultaneously unites individuals (we all are *co-citizens*, joint participants in the project of self-government) and forms a kind of barrier between them (we each have rights, and thus a space of subjectivity beyond which others cannot intrude). This distinctive relationship – of being connected whilst held at a certain distance – is essentially a relationship of equality: whatever their social, intellectual, economic or physical differences, citizens appear as equals on the political stage. (Of course, this relationship also serves to exclude non-citizens, categorizing them as ‘other’.) We can thus see how citizenship, as

⁵⁶ It is on this basis that Hont has claimed that the Jacobin attack on representation was ‘aimed at reversing the whole development of *modern* popular sovereignty’ (Istvan Hont, ‘The Permanent Crisis of a Divided Mankind: “contemporary crisis of the nation state” in historical perspective’, (1994) XLII Pol Stud 166, 204, emphasis in original).

an idea, sits in a ‘web of significance’ with other aspects of the constitutional imaginary.

Citizenship is a *public* status of *political* equality, entailing protection by *law* and membership of the *self-governing people*. This complex of meanings is deeply embedded in the practices of modern liberal democracies.

The separation of powers

The separation of powers provides a clear demonstration of the dual descriptive and normative nature of the constitutional imaginary: to put it bluntly, it holds that the legislative, executive and adjudicative powers ought to be kept separate because they are separate. The imaginary notion here is not any particular institutional framework, but rather the very idea of carving up political power into these three categories. Here we see clearly the reflexive relationship between political institutions and the constitutional imaginary. We need the concept of the separation of powers in order to properly understand the workings of legislatures, executives and courts, but at the same time it is through our experiences with these institutions that we come to acquire the concept. This is not a vicious circle, but rather an example of the mutual interdependence of institutions and the imaginary, wherein each presupposes, and is moulded by, the other.

The constitution

Finally, there is the notion of the constitution itself. ‘Constitutions’, Lerner noted, ‘have an existence in men’s imagination and men’s emotions quite apart from their actual use in ordering men’s affairs.’⁵⁷ Wheare’s definition of a constitution – ‘the collection of rules which establish

⁵⁷ Lerner (n 39) 1294.

and regulate or govern the government'⁵⁸ – captures perfectly well the primary function of a constitution. But in the constitutional imaginary, the constitution is imbued with a meaning that exceeds this function. The constitution is seen as existing on a higher plane – ‘above the fray’ of ‘partisan politics’. This is not merely a matter of constitutional provisions being entrenched against easy amendment – something that is neither a necessary nor a sufficient condition for a norm to be constitutional. Nor is it simply a case of the constitution providing the ‘rules of the game’ to which those engaging in political action must comply. Rather, the constitution is seen as occupying a more dignified place, qualitatively distinguishing it from partisan politics.

Being situated ‘above the fray’, constitutions provide a way for citizens to imagine one another as essentially unified even in the face of profound and often bitter quarrels about what the polity ought to be doing. They provide a common point of reference around which can crystallise ideas about where ‘the people’ have come from and where they are headed. This is most marked in the US, where the Constitution is a key symbol of national identity. But we also see a similar phenomenon, albeit in a less pronounced manner, in other places. In Germany, the *Grundgesetz* has been said to be ‘in the society at large, a central symbol of the nation’s break with its Nazi past’.⁵⁹ The day of national celebrations in Norway is known as ‘Constitution Day’. Even in the absence of a written constitution, British (or at least English) national identity draws heavily on ‘the ancient rights of Englishmen’, Magna Carta and the sovereignty of Parliament.⁶⁰

⁵⁸ Sir Kenneth Clinton Wheare, *Modern Constitutions* (Oxford University Press 1951) 1.

⁵⁹ Bruce Ackerman, ‘The Rise of World Constitutionalism’ (1997) 83 Va L Rev 771.

⁶⁰ See, for example, William Wallace, ‘Foreign Policy and National Identity in the United Kingdom’ (1991) 67 Int’l Aff. (London) 63; and Rebecca Langlands, ‘Britishness or Englishness? The historical problem of national identity in Britain’ (1999) 5 Nations and Nationalism 53.

And of course the debate over the abortive attempt in 2004 to implement an EU constitution did not simply concern the functional utility of such a document, but the likely effect that it would have on European collective identity.⁶¹

According to the dominant imaginary of most western societies, the constitution is itself understood as higher *law*. Since the qualities that are taken to be distinctive of law – its impartiality and independence from partisan politics – are also seen as characteristics of the constitution, from a certain perspective the identification of the constitution as a form of law seems straightforward, and it is accordingly considered natural for courts to be the final arbiters of the interpretation of constitutional norms. There is, however, a prominent ‘local dialect’ of the constitutional imaginary, which is particularly persistent societies with a Westminster system of government. Building up from the same set of basic understandings – politics, law, representation and so on – it is possible also to view the constitution as an essentially *political* settlement, distinct from day-to-day partisan politics but nevertheless part of the broader political sphere. From this perspective, placing the ultimate responsibility for interpreting constitutional norms into the hands of the judiciary threatens to stifle healthy political contestation by cabining it within boundaries that are not themselves set by the public. Both of these visions of the constitution are, I would suggest, compatible with basic constitutional imaginary understandings and yet each is incompatible with the other. It can thus be said that the divide between legal and political constitutionalism is, at root, a difference in the way in which the political world is imagined.⁶²

⁶¹ See Neil Walker, ‘Europe’s Constitutional Momentum and the Search for Polity Legitimacy’ (2005) 3 ICON 211.

⁶² XXX

It is important to distinguish the shared understandings of the constitutional imaginary from any particular constitutional *theories*.⁶³ While there are many theories of (say) citizenship, the very *idea* of citizenship is not a theory. While a theory aims to describe, explain and/or justify, the constitutional imaginary plays a more primitive role: it provides the common set of understandings that are needed to make possible the practices of modern constitutional politics. A theory is an attempt to render things clear and precise; the imaginary is by its very nature incapable of neat analytical expression. It precisely the nebulous quality of the imaginary that enables us to disagree – often wildly and passionately – on particular issues. At the same time, it is the fact that we share imaginary understandings that means that we have genuine disagreements rather than simply a confused panoply of cross-purposes.

We can get a sense of how crucial the constitutional imaginary is for the way we experience the world by noting the strangeness we encounter when trying to think about what things would be like without it. For example, when we are told that ancient Athenians lacked a concept of ‘civil society’, that is, a non-political sphere of life outside of the household,⁶⁴ it takes a certain amount of intellectual effort to get beyond our initial sense of puzzlement. Or think of the separation of powers. While we might not struggle to imagine a political regime in which the separation of powers was ignored, it is much more difficult for us to conceive how powers could be delineated other than into our three familiar categories. We can imagine the functions of the

⁶³ It is also important to distinguish both from ‘constitutional theory’ as a discipline, which, I am urging, ought to be concerned both with formulating specific theories and adumbrating the broader constitutional imaginary.

⁶⁴ See Arendt (n 46) ch 2.

legislature, executive and judiciary being agglomerated, with an all-powerful institution carrying out all three, but we would want to say, of such a constitutional system, that the powers of law-making, law-application and adjudication had been conflated. We understand the deficiencies of such a system by employing the concepts with which we are familiar, even if they are denied by the system itself. We would struggle, on the other hand, to imagine a system in which the tripartite distinction was rendered otiose, not merely as a result of the different powers being confounded, but as the result of a system separating functions according to a different conceptual scheme. It would require exceptional powers of creative thought to dream up a constitutional scheme in which the legislative, the executive and the judicial powers ceased to be useful categories.

The constitutional imaginary is so integral to the way in which we experience the world that it seems almost natural to us. But of course it is not natural, it is a construction which we have built up over the centuries, and one which we have no reason to suppose that a complex society must inevitably build. To understand it is, in a sense, to understand ourselves.

Repositories of constitutional meaning: institutions as nucleation sites and condensation symbols

Once we appreciate that constitutional practice unfolds against the backdrop of the shared world of the constitutional imaginary, further questions arise. How did the constitutional imaginary come to be embedded in western societies? How does it maintain itself? What is it that makes the constitutional imaginary a stable constellation of ideas? What might lead it to change over time? The constitutional theorist might be forgiven for leaving the first of these questions to the historian. Anyone who hopes to make evaluative appraisals of constitutional systems or proposals for constitutional reform cannot, however, neglect the others. I cannot hope to give a

full answer to these questions here, but I can highlight something that will be a crucial aspect of any such answer: the way in which the constitutional imaginary finds symbolic expression in political institutions. In this section I attempt to explain how political institutions serve as ‘repositories’ of constitutional meaning, enabling such meaning to develop, helping sustain it as the common sense of society, and sometimes catalysing its evolution.

The crucial distinction between the constitutional imaginary and any particular constitutional theory is reflected in the way in which imaginary understandings are developed, sustained and propagated. While theories are formulated in explicit language, the imaginary is, in Taylor’s words, ‘carried in images, stories and legends’⁶⁵ – which is to say it is expressed symbolically. The most obvious example are perhaps foundation myths, which present the creation of the constitution as the crowning achievement of the people’s struggle against a despotic monarchy or imperial domination; the consummation of the people’s destiny to become united as one; or a moment in which the people, in the aftermath of a period of grave brutality, said ‘never again’. In each case we see constitutional self-government appear in contrast to a nefarious alternative, be that royal or imperial domination, irrelevant internecine squabbling, or pure barbaric evil.

In addition to this, day-to-day constitutional affairs are conducted with rituals and imagery that serve to reinforce shared understandings about the significance of what is going on. The flags that are raised and anthems that are played at state events serve as a symbolic link between the official business of the state and the emotional ties of nationhood. Quasi-religious courtroom design and judicial dress help to maintain the dignified status of law as ‘the proper

⁶⁵ Taylor (n 24) 23.

order of things’ despite overt connections to the divine having been cut.⁶⁶ The customary form of address from the US President to his citizens – ‘my fellow Americans’ – emphasises his status as a representative of the people. Placing the Capitol and the White House at opposite ends of Pennsylvania Avenue was a deliberate attempt to symbolise the separation of powers, as was moving the UK apex court out of the Palace of Westminster and into the Middlesex Guildhall. Such familiar examples are probably what most readily comes to mind when thinking about the way in which constitutional ideas are symbolically transmitted and perpetuated.

However, it would be a grave error to suppose that symbolic representation of the understandings of the constitutional imaginary is limited to those elements of the constitution that Bagehot called ‘dignified’ as opposed to ‘efficient’.⁶⁷ The ‘efficient’ parts of a constitution – ‘those by which it, in fact, works and rules’⁶⁸ – are absolutely crucial for the development, propagation and maintenance of the constitutional imaginary. Symbolic representation of the constitutional imaginary should not be thought of as something that occurs simply through epiphenomenal practices that coat the ‘real’ constitutional structure with an appealing symbolic varnish. Imaginary meanings belong to the ‘efficient’ workings of the constitution as much as they do to symbolic images and rituals. As politicians, judges, civil servants and the rest go about

⁶⁶ See Murray J Edelman, *From Art to Politics: how artistic creations shape political conceptions* (University of Chicago Press 1996) ch 5; Jerome Frank, ‘The Cult of the Robe’ in *Courts On Trial: myth and reality in American justice* (Princeton University Press 1949); and James L Gibson and Gregory A Caldeira, *Citizens, Courts And Confirmations: positivity theory and the judgments of the American people* (Princeton University Press 2009) 7-14.

⁶⁷ Walter Bagehot, *The English Constitution* (Fontana 1993) 44.

⁶⁸ *ibid.*

their daily work, their actions have symbolic meanings that reinforce, transmit, develop and perhaps even challenge constitutional imaginary understandings.

The fact that constitutional practices – both dignified and efficient – take place within political *institutions* is crucial to an understanding of how constitutional meaning accrues and develops. We can define an institution in Turner's terms as 'a complex of positions, roles, norms and values lodged in particular types of social structures and organizing relatively stable patterns of human activity'.⁶⁹ By political institution I mean to refer to any of a regime's official institutions, including the 'political' branches of government (the legislature, the executive, government departments, local government...), the 'legal' (the courts, tribunals, law enforcement agencies...), the 'dignified' (a constitutional monarch or figurehead president, ceremonial posts such as Black Rod in the UK...) and specialised/technocratic bodies (eg ombudsmen, executive agencies, central banks...). All such institutions play a role in representing, sustaining and developing the constitutional imaginary (though clearly some are more significant than others).

Political institutions provide socially-recognised points of reference for the constitutional imaginary. As I noted above, this is most clearly seen in relation to the separation of powers: it is through experience with real-life legislatures, executives and courts that people come to acquire this concept. What would be an incredibly complex idea to explain in the abstract becomes relatively easy to comprehend when institutional embodiments of each of the three 'powers' can be pointed to. Were it not for such real-life institutions, the separation of powers may have been proposed as a theory, but it is highly unlikely that it would have filtered through into the inherited common sense of the constitutional imaginary. But since individuals are raised into a

⁶⁹ Here I adopt the definition of Jonathan H Turner, *The Institutional Order: economy, kinship, religion, polity, law and education in evolutionary and comparative perspective* (Longman 1997) 6.

society in which these institutions are taken for granted, the separation of powers confronts them not simply as an idea but as an actual, operative fact, experienced as part of reality.

Institutions are particularly important here because of the way they detach certain activities from the individuals that perform them and bestow upon them an impersonal, 'official' quality. Such activities thus come to be understood as bearing specific kinds of meaning regardless of the personal identity of the actors. Whereas in a pre-institutional society we might say 'A physically restrained B to prevent him from taking the yams harvested by C', only where there are political institutions in place are we able to give the thicker description 'the policeman arrested the offender to protect the owner's property and thus uphold the law'. Through this depersonalization, institutions lend conduct a 'timeless' quality, where it is viewed not merely as a particular response to a particular situation, but as an example of a type.

This timeless nature of institutional action makes it possible for members of a political community to discuss its shared history in much simpler terms, thus enhancing the extent to which a shared narrative can come to be taken-for-granted. For example, looking solely at the facts, there is little in common between what happened in *Marbury v Madison*, in *Brown v Board of Education* and in *Roe v Wade*, but if we think of these cases as examples of the Supreme Court striking down unconstitutional laws, then we can construct a shared history in which the Supreme Court plays the hero's role as upholder of the rights of US citizens (this is perhaps a case in which, in the US, the language of the constitutional imaginary has developed a distinctive local dialect). The central place of rights and the Constitution in the American imaginary is to a significant extent dependent on the association of these ideas with a specific institution that stands as the embodiment and exemplar of them.

Political institutions thus serve as concrete representations of the constitutional imaginary. But their function in this regard is not simply mimetic: they do not merely reflect existing shared understandings back to society. Through symbolic representation, institutions play a crucial role in the development and evolution of the constitutional imaginary. Before concluding this essay, I would like to highlight two aspects of this complex role. Institutions function as *nucleation sites* and *condensation symbols*.

In chemistry, a nucleation site is a place around which crystals develop.⁷⁰ Analogously, political institutions provide sites around which meanings can crystallise. Narratives build up around institutions that serve to legitimate them and to situate them in the broader constitutional landscape. As a constitutional system becomes more complex, a more sophisticated system of meanings will be required to legitimate it. Layers of meaning will thus build up around institutions, so that the more enduring institutions become repositories of ideas. To give a simplified, fictional example, we can imagine a group of people in a sparsely-populated area who occasionally find it expedient to carry out certain tasks collectively, for example to divert a migrating herd into the open plains where it can easily be hunted, or to build a rope bridge across a gorge. Where there is dispute as to whether a certain proposed course of action should be followed, the matter is decided by way of majority-vote among all of the adults. When asked to describe the decision-making process, they will say ‘we decide together’, meaning that *each* of

⁷⁰ The initial formation of crystals or bubbles in a super-saturated solution is known as nucleation.

Homogeneous nucleation – the spontaneous formation of crystals solely from random thermal fluctuations in the solution – is rare. Instead, nucleation almost always begins at nucleation sites: alien surfaces or particles, such as dust in the atmosphere, or microscopic cracks in the surface of a champagne glass. In the absence of a nucleation site, it is possible to cool purified water to minus 35 degrees centigrade without ice crystals forming.

them has an equal say in decisions. Over time, with an increase in population, the group finds themselves making collective decisions on a regular basis. Meetings of all interested parties start to become overly time-consuming, and so the group decides instead to hold smaller meetings for which each hamlet appoints a delegate. Now that meetings do not present such a drain on the human resources of the group, they become more frequent, and in time the role of a delegate becomes a full-time occupation. *Ad hoc* meetings have developed into a standing institution; the assembly is no longer an event, it is now an entity. While the assembly may initially have been conceived as simply a functional substitute for the plenary meetings, it will require a shift in the legitimating narrative. ‘We decide together’ becomes ‘the assembly decides on our behalf’. In this transition, the first-person plural has undergone a qualitative shift. The assembly decides not on behalf of *each* of the members of the group (ie taken severally), but of *all* of them (taken jointly). If this narrative takes hold, then the assembly will come to stand as a symbol of the basic *unity* of the group. The matters that the assembly deals with will be come to be seen not as simply the overlapping interests of a set of individuals but as the common interests of the group. This development will allow various claims to be made that would not previously have been intelligible – for example that the spoils of a bumper harvest in one region should be shared with those in areas of drought. Whereas previously this could only be seen as a request for a favour or a proposal for a trade agreement, it can now appear as a claim about the common good. It becomes possible for goods to be transferred out of communal solidarity rather than out of charity or enlightened self-interest. It also becomes possible for war to be waged for the glorification of the *patria* rather than for necessary resources or in mutual defence. A whole host of possible new meanings thus spring out of the shift in understanding catalysed by the creation of a decision-making institution. (I should reiterate that this example is not intended to be in any

way historically accurate – as a general rule democratic communities have evolved out of non-democratic communities, not democratic non-communities.)

As a society develops complex narratives to legitimate its institutional structure, any given political institution may come to be associated with a range of different imaginary understandings. Institutions thus serve as what linguists and anthropologists have termed ‘condensation symbols’, which is to say that they ‘condense many references, uniting them in a single cognitive and affective field’.⁷¹ For example, there is a large number of ideas with which the legislative assembly is associated: government by consent, descriptive representation, the rule of law, popular sovereignty, loyal opposition, deliberative democracy and the common good, to name but a few. By representing these ideas simultaneously, the assembly-as-condensation-symbol encourages them to be associated with one another or, to put it more strongly, gives rise to a way of thinking about these issues in which their association with one another is taken for granted. The meaning of each of the condensed significata is coloured by virtue of them being bound in together; in the case of the meanings condensed by the assembly, they each become charged with a vague sense of being part of ‘democracy’.

⁷¹ Victor Turner, *Dramas, Fields and Metaphors: symbolic action in human society* (Cornell University Press 1974) 55. The idea of condensation symbols has previously been explored in the field of constitutional theory by Walker (n 61) 222-5. Walker describes *constitutionalism* as a condensing symbol: ‘a modality of thought, affect and discourse enabling individuals and groups within a political community to make sense of and to articulate a notion of their common past, to form and pronounce judgments about their common present, and to plan and project various imagined common futures’ (ibid 223). The point I want to emphasise is that the concrete nature of *institutions* allows them to project symbolic linkages much more powerfully to the general populace than *ideas* (such as constitutionalism) ever could in the abstract.

As Turner has pointed out, the meanings symbolically condensed can generally be situated at one of two ‘poles’, which he calls the ‘ideological’ (or ‘normative’) and the ‘sensory’ (or ‘orectic’).⁷² The former refer to components of the social order, while the latter refer to desires, feelings and emotions. Continuing the example of the assembly, we can identify at the sensory pole a feeling of control that follows from legislators being reliant upon ‘ordinary people like you’ for their votes; a sense of rootedness and solidarity that comes from being people being bound up with a shared institution and (therefore) a shared history; and perhaps a degree of tribalistic loyalty towards people with whom one can identify significant similarities (or, contrariwise, exclusion from a group with which one sees little in common). At the ideological pole there are norms against corruption and self-interested behaviour; an injunction to solve disagreements through words and ballots rather than by arms or purchase-power; and a more general, perhaps even over-arching norm that political power owes its genesis to the people and must therefore be accountable to and exercised for the benefit of the people. The condensation of ideological and sensory referents allows for social norms to become ‘saturated with emotional quality’,⁷³ such that it becomes possible to take genuine pride or shame in the actions of one’s representatives, feel political corruption as a form of betrayal, and experience the under-representation of one’s ethnic group as a slight upon one’s personhood. In this condensation role we see the effect of the ‘efficient’ and ‘dignified’ parts of the constitution working in tandem: through the intertwining of the practical work of political institutions with ceremonies, rituals and symbolic images the ideological and sensory poles of meaning are kept fused together, so

⁷² The former terms are used in Victor Turner, *The Forest of Symbols: aspects of Ndembu ritual* (Cornell University Press 1970) 28; the latter in Turner, *Dramas, Fields and Metaphors* (n 71) 55.

⁷³ Edward Sapir, ‘Symbolism’ *Encyclopedia of the Social Sciences XIV* (1934) 492-493, quoted by Turner, *The Forest of Symbols* (n 72) 29.

that norms and ideals become saturated with emotion, and emotional drives and attachments ennobled as civic virtue, patriotism and so on.

We can accordingly see how political institutions support the constitutional imaginary without ossifying it. On one hand, by presenting certain actions as ‘official’, they take them out of the realm of individual conduct and instead place them in the realm of the public, imbuing them with distinctive ‘constitutional’ meaning. This serves to ground the imaginary in reality, with institutions serving as concrete representations of imaginary meanings. On the other hand, as institutions evolve in response to changing material and intellectual demands, they also can drive developments and shifts in shared understandings. I have identified two ways in which such change can occur. Firstly, institutions provide fertile ground for the cultivation of new meanings (institutions as nucleation sites). Institutions not only stabilise meaning, they also allow new meaning to sediment on top of old. As meanings become more complex, tensions will likely arise, and perhaps, in time, the imaginary will shift to resolve them. Secondly, institutions can cause ideas of various sorts to become understood as essentially connected with one another (institutions as condensation symbols). The different ideas connected with, say, the representative assembly or the supreme court become coloured with a vague but powerful sense of belonging to some overarching value or rationale (such as ‘democracy’ or ‘the rule of law’). This condensation role also involves the fusion of norms of behaviour with emotional responses to symbolically-charged action. In these various ways, then, institutions generally scaffold the constitutional imaginary, while also being capable of serving as the catalysts of change.

Conclusion: constitutional theory as the interpretation of constitutional meaning

I have argued that a satisfactory understanding of constitutional practices, institutions and events requires an appreciation of certain shared ideas that underlie the political world in modern

western democracies. In order to begin to answer the question of whether a vote was a referendum and, if so, what the constitutional significance of that fact is, we need to be aware of the way that the very idea of a referendum links with notions of popular sovereignty, the common good, citizenship, the values of autonomy and political equality, and so on. We need to employ a refined account capable of distinguishing between true referendums, those which misfire and those which are fake. To do this, we must recognise that to describe something as a 'referendum' is to render a thick description using a normatively saturated concept. We need to situate the idea of the referendum within the broader context of society's constitutional vocabulary and grammar. In sum: to understand how the Crimean, Catalan and British votes can be understood as, on one hand, essentially *similar* (as attempted referendums) and yet, on the other hand, essentially *different* (as fake, misfired and successful referendums), we need to appreciate how they engage the rich web of significance that I have labelled the constitutional imaginary.

My overview of the constitutional imaginary is a first attempt at surveying the vocabulary and grammar of modern constitutional democracy, ie an attempt to unearth some of the basic shared ideas underlying particular constitutional controversies. The contents of it are hardly revolutionary; indeed, if they were revolutionary that would count against the claim that they really are generally shared understandings. Nevertheless, I hope to have highlighted connections between ideas that might not necessarily at the forefront of the minds of constitutional theorists when knee-deep in some knotty explanatory or normative debate. Awareness of these shared understandings will not cause disagreements over constitutional issues to dissipate, but it should mean that debates are conducted on a more clear-sighted basis.

Constitutional theory is not the only discipline concerned with the interpretation of societies' shared understandings. Naturally, it is a task central to sociology and to cultural studies. Anthropologists concern themselves with coming to terms with the basic understandings underlying societies that are often very different to their own. Closer to home, political theory – 'the humanities end of the happily still undisciplined discipline of political science'⁷⁴ – is, at least on one account of its vocation, also concerned with elucidating shared meanings.⁷⁵ Nevertheless, constitutional theory has a distinctive focus. The meaning which constitutional theory is primarily charged with interpreting is the meaning bound up in political institutions. Modern political institutions are enmeshed in elaborate webs of significance that have been woven through centuries' worth of practice and accompanying narrative and myth. As citizens and officials interact with institutions on a daily basis, their actions have symbolic meanings that reinforce, transmit, develop and perhaps even challenge the shared understandings of the constitutional imaginary. A society's constitutional structure serves as a concrete representation of the ideas that underpin its political practices. Whatever else constitutional theorists might do, they should strive to understand these ideas.

⁷⁴ John S Dryzek et al, 'Overview of Political Theory' in Robert E Goodin ed, *The Oxford Handbook of Political Science* (Oxford University Press 2011) 62.

⁷⁵ Such a conception of political theory is most readily associated with the so-called 'communitarian' tradition, for example Michael Walzer, *Spheres of Justice: a defense of pluralism and equality* (M Robertson 1983); Alasdair C. Macintyre, *After Virtue: a study in moral theory* (2nd ed, Duckworth 1985); Michael J. Sandel, *Liberalism and the Limits of Justice* (Cambridge University Press 1982); and Charles Taylor, *The Malaise of Modernity* (Anansi 1991). It is, however, also arguably also the approach taken by John Rawls in his later work ('a political conception of justice... is expressed in terms of certain fundamental ideas seen as implicit in the public political culture of a democratic society' (John Rawls, *Political Liberalism* (Columbia University Press 1993) Lecture I, §2.3)).