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TWO CLAIMS ABOUT THE NATURE OF CONSTITUTIONAL LAW*

INTRODUCTION

If one stops to consider theoretical work on the nature of different areas of law, it is hard not to detect asymmetry. There exist, for example, important debates about the nature of tort and contract. Some assert that the rules of tort function to approximate market prices for the allocation of risk. Others assert (perhaps more plausibly) that torts are, most fundamentally, wrongs for which the law provides recompense. Theorists of contract debate whether the social relation that lies at the heart of that institution is promise or agreement. In turn, there is an animated discussion in the literature about whether punishment or accountability is the defining mark of criminal law. If we turn, instead, to questions about the nature of constitutional law, there is a relative paucity of writing.¹ To be sure, there is important

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¹ Philosophical treatment of the issue goes back at least as far as Aristotle, although he was concerned more with the forms of constitutional government than the genus to which they belong. Sieyès and Schmitt are the two most important constitutional theorists of their generations, although each was in different ways concerned with the conditions under which the constitution is created, rather than the law that results from such a settlement. Analysis of the idea of constitutional law as a distinctive category of thought really begins with Kelsen, whose views will be discussed in depth below. Some more recent additions to the literature include Karl Loewenstein, 'Constitutions and Constitutional Law in the West and in the East' (1969) 30 *The Indian Journal of Political Science* 203, Joseph Raz, *Between Authority and Interpretation: On the Theory of Law and Practical Reason* (Oxford University Press 2009) ch 13, Larry Alexander, 'What are Constitutions, and What Should and Can they Do?' (2011) 28 *Social Philosophy and Policy* 1, David Dyzenhaus, 'The Idea of a Constitution: A Plea for Staatsrechtslehre' in David Dyzenhaus and

theoretical work in this area, especially on the nature of constitutional interpretation and judicial review and on doctrines such as the separation of powers and proportionality.² But these discussions presuppose answers to yet more basic questions. What is the constitution such that it might be the object of interpretation? What is proportionality such that it is a doctrine of constitutional law?

Some may consider this question to be too obvious to be worth addressing. Constitutional law is the law of “The Constitution”. What to say about this self-certifying approach? In the first place, it fails to generalise across legal orders. Famously, the UK has no codified constitution. Yet it undoubtedly has *a* constitution. Second, even in legal orders that have codifying constitutional texts, these will often

Malcolm Thorburn (eds), *Philosophical Foundations of Constitutional Law* (First edition. edn, Oxford University Press 2016), Mitchell Berman, ‘Constitutional Law’ in John Tasioulas (ed), *The Cambridge Companion to the Philosophy of Law* (Cambridge University Press 2020) and Paul Yowell, ‘A Proposal for Defining and Classifying Systems of Constitutional Government’ in Dimitrios Kyritsis and Stuart Lakin (eds), *Methodology of Constitutional Theory* (Hart Publishing 2022)

² On judicial review see, for example, John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* (Harvard University Press 1980), Ronald Dworkin, *Freedom's Law: The Moral Reading of the American Constitution* (Oxford University Press 1996), Jeremy Waldron, ‘The Core of the Case against Judicial Review’ (2006) 115 *The Yale Law Journal* 1346 and Rosalind Dixon, *Responsive Judicial Review: Democracy and Dysfunction in the Modern Age* (Oxford University Press 2023). On constitutional interpretation see Keith E. Whittington, *Constitutional interpretation: Textual Meaning, Original Intent, and Judicial Review* (University Press of Kansas 1999), Aileen Kavanagh, ‘The Idea of a Living Constitution’ (2003) 16 *Canadian Journal of Law & Jurisprudence* 55, Raz, *Between Authority and Interpretation*, ch 13 and Mitchell N Berman, ‘Originalism is Bunk’ (2009) 84 *New York University Law Review* 1. On the separation of powers: Eric Barendt, ‘Separation of Powers and Constitutional Government’ [1995] *Public Law* 599, Bruce Ackerman, ‘The New Separation of Powers’ (2000) 113 *Harvard Law Review* 633 and Jeremy Waldron, ‘Separation of Powers in Thought and Practice’ (2013) 54 *Boston College Law Review* 433. On proportionality see Robert Alexy, *A Theory of Constitutional Rights* (Oxford University Press (1985) 2002) and Jamal Greene, ‘Rights as Trumps’ (2018) 132 *Harvard Law Review* 28.

count as a first but not the last word on the relevant legal standards. However long you stare at the 1787 US Constitution as amended, you will find in it no constitutional right to marital privacy. Nonetheless, following *Griswold v Connecticut*, any attempt on the part of a state to deny access to contraception to married persons is unconstitutional.³ The Constitution didn't tell us that, but US law undoubtedly contains the right that *Griswold* first announced. Finally, and perhaps most importantly, the self-certification approach merely delays rather than answering the questions with which we are concerned. We want to know what makes "The Constitution" a constitution, and that depends on the nature of constitutions.

Here I attempt to make progress on this issue by defending two claims drawn from the work of John Gardner.⁴ Gardner's fundamental insight is that the relationship between the different parts of public law—that is between constitutional and administrative law—is contrastive. Whereas administrative law concerns bodies whose power is conferred on them by superior legal institutions—bodies whose powers are, for the most part, creatures of statute—constitutional law regulates bodies whose powers are not the product of such higher authority. The powers of such bodies are, in a sense I will go on to describe, fundamental within the legal order. Hence, for example, while the Environmental Protection Agency has its powers granted to it by Congress, the executive, legislative and judicial powers enunciated in Articles I, II and III of the US Constitution are legal bedrock. There is no superior legal institution standing above the Constitution, and hence no legal authority that conferred these powers. Equally, the Employment Tribunal may be a creature of parliamentary legislation, but the authority of the Westminster Parliament is not a consequence of some sovereign above the legislature. It is this fact about Parliament that makes it a constitutional institution. Constitutional law is, in turn, the law that regulates such institutions. It both constitutes and restrains their power, for example, by specifying the process for the creation of valid legislation, and by policing the exercise of legislative power through constraints relating to rights, federalism, or sovereignty. Because this account takes as its

³ *Griswold v. Connecticut* 381 US 479 (1965)

⁴ The crucial paper is "Can There Be a Written Constitution?" See John Gardner, *Law as a Leap of Faith: Essays on Law in General* (Oxford University Press 2012) ch 4.

anchoring point a distinct kind of institution, we can call it the institutional account of constitutional law.⁵

There are a number of immediate objections to this approach. Aren't constitutional rights binding as much on administrative agencies as they are on Congress? Indeed, doesn't Congress have its powers delegated to it by the Constitution? And aren't certain institutions with statutory authority nonetheless constitutional institutions? Consider in this regard bodies such as the Scottish Parliament in the UK which has constitutional status even though it, as a creature of statute, owes its powers to the Westminster Parliament. I say something in response to these and related objections later in the paper. However, to situate and motivate the account, I begin by considering and critiquing the leading alternative approach, defended in most depth by Hans Kelsen. According to this view constitutional law is the ultimate law of the legal system. "The Constitution" is the constitution because no other law sits above it. This account is the subject of section one. Section two introduces the institutional account and clarifies the contrast on which it depends, between fundamental and derivative forms of legal authority. In turn, section three explains the role of constitutional law in regulating the fundamental powers of the state. Between them, sections two and three lay out the two claims that make up the title of this piece.

While this piece engages with legal doctrine across a range of jurisdictions, it is not a paper in comparative constitutional law. As a paper on the nature of constitutional law, it seeks to clarify the bounds within which such comparisons take place. Nor does the paper engage directly in questions of normative constitutional theory; questions about, for example, the kinds of constitutional constraints legal orders ought to embrace, or the distribution of powers most conducive to good government. These questions of constitutionalism, while distinct from the definitional question addressed in this piece, nonetheless take their character from it. If it is in the nature of constitutions that

⁵ Although the core claim I will defend is attributable to Gardner, versions of the view that constitutional law is concerned with the basic institutions of a society can be traced to Aristotle and more recently to writers such as Ivor Jennings and Karl Loewenstein. See Ivor Jennings, *The Law and the Constitution* (5th edn, University of London Press 1959) 33, 36 and Loewenstein, 'Constitutions and Constitutional Law in the West and in the East' 207-209

they ought to constrain, we should be clear about what they constrain. This is the question about the nature of constitutional law.

Several points about the scope of the paper. First, as this paper concerns the nature of constitutional law, I will, for the most part, ignore a second crucial facet of constitutional practice: the conventional norms of the constitution.⁶ These are the rules of political practice that regulate the behaviours of constitutional actors in the exercise of their functions. Such rules may be formalised, as is true of the Ministerial Code in the UK, or the Standing Rules of the US Senate, or an informal, customary, part of political practice, such as the norm that the monarch must assent to bills that have passed through both houses of the Westminster Parliament. Depending on the system in question, and the constitutional issue at hand, such rules may be as or more important than legal constitutional rules. They are, however, beyond the scope of this paper. Second, while the paper is centrally concerned with the nature of constitutional law, it will also make several claims about administrative law: for example, about the nature of administrative authority and the relationship between judicial review in these two areas of law. Given that constitutional and administrative law are, on the view I seek to defend, contrastive categories, this should come as no surprise. Finally, the paper takes as its starting point Gardner's core insight, but it fleshes that insight out in ways that he may or may not have been amenable to. Regardless of this fact, it is a remarkable testament to Gardner's powers as a scholar that in one quick remark in his only article on the philosophy of public law, Gardner made such progress on one of its central, if underexplored, questions.⁷

⁶ See, for the most important treatment of this topic, Geoffrey Marshall, *Constitutional Conventions: The Rules and Forms of Political Accountability* (Oxford University Press 1984). See further Adam Perry, *The conventional constitution* (Oxford University Press 2025). For recent work on this topic in the US see Keith Whittington, 'The Status of Unwritten Constitutional Conventions in the United States' (2013) 2013 University of Illinois Law Review 1847 and Ashraf Ahmed, 'A Theory of Constitutional Norms' (2021) 120 Michigan Law Review 1361.

⁷ Gardner died in 2019, aged 54. This paper is dedicated to his memory.

CONSTITUTIONAL LAW AS FUNDAMENTAL LAW

It is a common thought that the Constitution is, within the hierarchy of the legal order, the most fundamental form of law. In *Marbury v Madison*, Chief Justice Marshall reasoned that “the Constitution is either a superior paramount law, unchangeable by ordinary means, or it is on a level with ordinary legislative acts.”⁸ Embracing the former claim, the court used this premise to justify the developing practice of judicial review in America. It is *because* the Constitution is “the fundamental and paramount law of the nation” that the courts have capacity to review legislation for compatibility with it.⁹ Consider, in this regard, a structured chain of authority relations that is commonplace in legal orders. An administrative decisionmaker issues a compliance order to an energy provider for failure to keep below a specific rate of emissions. That decision is made under federal regulations. The relevant regulation finds its source in the Clean Air Act, which is a statute passed by Congress. In turn, Congress is lawfully able to pass such a statute because of the Commerce Clause, which permits federal legislation on matters affecting interstate trade. The Constitution is the “superior paramount law” because, while the administrative decision must be in accordance with the regulation, the regulation in accordance with the statute, and the statute in accordance with the Constitution, there is nothing the Constitution must accord with. It is the ultimate law of the legal system.

⁸ *Marbury v. Madison* 5 US 137 (1803), 176. Notice that there are two different ideas of fundamentality here. The first is the idea of superior law, and the second the idea of entrenched law. These are clearly distinct. For example, if the legislature were able to issue rules binding on itself these rules would be entrenched, but not superior to any other legislative enactment. Entrenchment is both a matter of degree – norms may be more or less entrenched – and relative – some norm is only entrenched relative to another law-making process. It therefore fails to provide a criterion that distinguishes constitutional from other forms of law. Later in the paper I will try to say something to accommodate those who are attracted by an account of constitutional law in terms of entrenchment. For sceptical discussion of whether entrenchment is necessary to constitutional law see Mark Tushnet, ‘Constitution’ in Michel Rosenfeld and others (eds), *The Oxford Handbook of Comparative Constitutional Law* (Oxford Academic, Oxford University Press 2012) 226-230

⁹ *Marbury v. Madison*, 177

Kelsen provided us with the most theoretically adept version of this claim.¹⁰ Law, he argued, is an order that regulates its own creation. It is a hierarchical organisation of norms whose systematicity depends on their relations to each other. Kelsen conceived of all law in terms of chains of validation, with the higher law providing for the validity of law at lower levels within that order. While inferior norms were not deducible from superior norms – we cannot infer federal regulation 40 C.F.R. Part 60 from the Clean Air Act – the latter nonetheless provides the logical space within which the former could be enacted. Hence, the Clean Air Act is the *reason* for the validity of the regulation. For Kelsen the legal order bottomed out in orders to officials to apply coercive sanctions in the case of violation, and it topped out in the constitution. As the ultimate basis for the validity of all other norms within the legal order, “the constitution represents the highest level of positive law.”¹¹

That qualifier – the highest level of *positive law* – was important to Kelsen. While he considered the constitution to be the most fundamental law within the legal order, he did not consider it the most fundamental rule of that order. This role was reserved for the basic norm, a logico-hypothetical presupposition of legal thought.¹² While, Kelsen argued, we could trace the validity of the decision to the regulation, the regulation to the statute, and the statute to the constitution, there could be no legal reason for the validity of the constitution. Were there one, the constitution would not be the fundamental law of the legal system. Yet, it was undoubtedly true that the constitution was valid. Hence, its validity depended not on a positive norm of the legal order, but on a presupposed norm. Such a standard, Kelsen argued, must be assumed if we are to make sense of

¹⁰ Hans Kelsen, *Pure Theory of Law* (Max Knight tr, University of California Press 1960 (1967)) 221-222. For further endorsement of the fundamental law analysis see Dieter Grimm, ‘Types of Constitutions’ in Michel Rosenfeld and others (eds), *The Oxford Handbook of Comparative Constitutional Law* (Oxford Academic, Oxford University Press 2012) 104 and Alexander, ‘What are Constitutions, and What Should and Can they Do?’ 3-4

¹¹ Kelsen, *Pure Theory* 222

¹² *Ibid* 198-205

the binding character of the legal order. According to the basic norm, “the historically first constitution is valid.”¹³

There are lots of things that can and have been said about the idea of the basic norm. I want to bracket these and focus on Kelsen’s argument for the fundamental status of constitutional law: the chain of validity. Recall that for Kelsen, the constitution is the highest form of positive law because it is the reason for the validity of all other legal norms. Some norm is valid if it complies with the constitution, or valid because made in accordance with a norm that complies with the constitution, etc.¹⁴ The constitution, however, is not a singular rule but a set of rules. Kelsen’s thesis is that a rule is a constitutional rule because and to the extent that it features as a premise in an argument, the conclusion of which is the validity of some norm. Such rules have, if not a singular form, then, at least, a singular function.

There can be no doubt that some rules of constitutional law satisfy this thesis. Consider that Art I, § 7 of the US Constitution determines the procedure for the creation of valid legislation. Unless some bill is passed by simple majority and signed by the President, or, failing that, passed by supermajority, it remains a bill, that is, not yet law. This cluster of rules is reason for the validity of legislative norms. However, the substantive standards of the Constitution that determine what Congress may or may not legislate on – “interstate trade”, “speech”, etc. – regulate the content of that which is already law. Unless and until disapplied by a competent court, legislation that violates these requirements is binding and effective. The unconstitutionality of some statute is, as Kelsen himself prominently recognised, a reason to invalidate it or set it aside, not a reason to believe that it was never law in the first place.¹⁵ Thus, while a statute is only a statute if it is properly

¹³ Although see Hasan Dindjer, ‘Presupposition and Practice at the Foundations of Law’ in Brian Leiter (ed), *Oxford Studies in Philosophy of Law: Volume 6* (Oxford Academic, Oxford University Press 2026) for a different take on the role of the basic principle in the context of individual legal orders.

¹⁴ The other side of this coin is that some norm is invalid if it does not comply with the constitution. As the Supreme Court put the point in *Marbury* (and Kelsen’s argument would later mirror) “a legislative act contrary to the Constitution is not law. *Marbury v. Madison* 177

¹⁵ Kelsen, *Pure Theory* 271-278.

enacted it remains a statute even if it restricts the freedom of speech or some other important constitutional right. It is a valid rule, albeit one the courts ought to overturn.

These dynamics of constitutional adjudication presented Kelsen with a dilemma. Rights and other substantive constitutional constraints are undoubtedly a part of the constitution. Yet they do not serve as conditions on the validity of legislation. Rather, they form premises in an argument, the conclusion of which is that some law ought to be invalidated or overturned. It follows from this that a statute may be valid even if inconsistent with such regulative rules of the constitution. How did Kelsen square this circle? He did so by insisting that constitutional constraints have, what he called, an alternative character. While, Kelsen suggested, the constitution *explicitly* prohibits legislation that violates the right to free expression it *implicitly* permits the same. Hence

the provisions of the constitution concerning the [constitutionality] of statutes... have this meaning: even statutes that do not conform to these norms ought to be considered as valid until and to the extent that they are not rescinded... The so-called unconstitutional statutes are constitutional statutes which, however, may be rescinded in a special procedure....¹⁶

Thus, while the US Constitution on its face requires that “Congress shall make no law... abridging the freedom of speech” it implicitly licenses such law, albeit on condition that such a statute may be annulled by a competent court. It is the alternate character of the right to free speech that allows it to stand as reason for the validity of law inconsistent with its own terms.

As surprising and ingenious as Kelsen’s solution is, it cannot save his analysis of constitutional constraints. While the alternative character reading preserves for the constitution a singular function—as condition for the validity of law—it fails to accord constitutional rights status as a part of that legal order. Recall that for Kelsen some norm is a part of the constitution because and to the extent that it features within the chain of validity. Yet according to the alternate character reading of, for example, the right to free speech, legislation that

¹⁶ Ibid 274

violates this requirement remains constitutionally permitted: “so-called unconstitutional statutes are constitutional statutes which, however, may be rescinded in a special procedure....” It follows that US law contains no rule restricting the regulation of free speech.

And yet US law undoubtedly does contain such a rule. The crucial point is that such a provision has a different function from the rules specifying the procedure for the creation of valid legislation. As a constraint that bears on the content of the law, it presupposes that it is law. But for such a norm the court ought to apply the statute. Given this constitutional right the court ought to invalidate the statute or set it aside. We should distinguish between the formal rules that specify the procedure for the creation of valid legislation—the rules *constitutive* of the legislature’s authority—and the substantive standards that determine the constitutionality of the law created through exercise of that authority. These determine the circumstances in which courts ought to invalidate legislation.¹⁷ Embracing this distinction allows us much of what Kelsen was driving at: that the constitution, in one part, is the reason for the validity of legislation, and, in another, regulates the force or binding effect of law made under it. Yet it also forces us to reject his argument for the fundamental status of the constitution within the legal order. In holding that some rule has constitutional status because it is the reason for the validity of other law, Kelsen confused a part for the whole.

We can, however, assess the fundamental law thesis on its own terms. Regardless of how we arrive at the claim, is the idea of constitutional law as the ultimate law of the legal order explanatory and extensionally adequate? For one, it might be suggested, even if rights-based constraints are not the reason for the validity of legislation, they are nonetheless superior to that legislation and hence reason to invalidate it. Second, the codified constitution is preceded by no higher form of legal authority. The US Constitution, for example, was a result of an extra-legal process, ratification by the states in accordance with the rules laid down by the 1787 Philadelphia Convention, and its various amendments the product of reflexive use of the procedure contained in the Constitution itself. The ultimate law analysis allows us to make sense of these familiar facts. In turn, the thesis avoids the problem of self-certification. Some document is the

¹⁷ For this distinction see Thomas Adams, ‘Criteria of Validity’ (2025) 88 *The Modern Law Review* 557

constitution, not because it is called “The Constitution” but because of its role as a “fundamental and paramount law”. Finally, such an approach has the capacity to accommodate a multiplicity of constitutional forms. As Kelsen noted, an ultimate law “may be created by custom or by a specific act performed by one or several individuals. In the latter case it is... called a “written” constitution, in contradistinction to the “unwritten” constitution brought about by custom.”¹⁸ Equally, the fundamental law “may consist partly of norms of written and partly of unwritten law.”¹⁹ The thesis contains no prejudice in favour of the codified constitution. Instead, it insists that whatever the source of constitutional law, that it exist at a certain level within the hierarchy of the legal order.

These are the things to be said in favour of the Kelsenian view. What is to be said against it? A first problem is that it is unable to reckon with the possibility of constitutional law that results from the ordinary lawmaking process. Consider, in this regard, the UK’s uncodified constitution. One thing that is undeniably true of this system is that it is to some degree dependent on common law rules for its most foundational constitutional doctrines. The sovereignty of Parliament is a doctrine of UK law not because promulgated through some act, but because the courts have, in the period since the Glorious Revolution, come to treat Parliament’s law as superior to all other law. Even though the sovereignty of Parliament has good claim to be the most fundamental doctrine of the constitution, it is hardly the only doctrine of the constitution. In reality the constitution of the United Kingdom is a patchwork of rules with different sources, including those drawn from statutes. For example, the Acts of Union 1707 and 1801, the Parliament Acts of 1911 and 1949, the Scotland, Northern Ireland and Wales Acts of 1998, and the Human Rights Act 1998 all contain rules that form part of the architecture of the constitution. They do so, moreover, even though each is a product of the ordinary legislative process and in this way akin to any other statute. As A. V. Dicey held “neither the Act of Union with Scotland nor the Dentists Act 1878 has more claim than the other to be considered a supreme law.”²⁰ Nonetheless, and this was Dicey’s point, there can be no doubt

¹⁸ Kelsen, *Pure Theory* 222

¹⁹ *Ibid* 222

²⁰ A. V. Dicey, *Introduction to the Study of the Law of the Constitution* (10th edn, Macmillan & Co. Ltd. 1915 (1959)) 145

that the Act of Union is, whereas the Dentists Act is not, a constitutional statute. The ultimate law analysis cannot explain this.

Or can it? It is sometimes suggested that, even within the confines of the UK's uncodified constitution, statutes with a constitutional function have a special status that distinguishes them from other laws. In the case of *Thoburn* Lord Justice Laws made this argument:

In the present state of its maturity the common law has come to recognise that there exist rights which should properly be classified as constitutional or fundamental...And from this a further insight follows. We should recognise a hierarchy of Acts of Parliament: as it were "ordinary" statutes and "constitutional" statutes.... Ordinary statutes may be impliedly repealed. Constitutional statutes may not.²¹

According to orthodox analysis, a new statute may supersede earlier legislation either by expressly repealing it, or, failing that, by containing norms inconsistent with the earlier legislation. In most legal orders a rule is adopted whereby the later law takes precedence over the earlier law in the case of such conflict. In the UK, that doctrine is known as implied repeal. On Laws' view this rule does not apply to statutes that have a constitutional status. Hence, according to his claim, the Act of Union and Human Rights Act are immune from implied repeal, whereas the Dentists Act is not.²² This is the doctrine of constitutional statutes.

In fact, however, defenders of the Kelsenian approach should not look to this doctrine to accommodate legislation within their account. In the first place, whether any statutes are immune from implied repeal as a matter of UK law remains a contested question.²³ Yet there can be no

²¹ *Thoburn v Sunderland City Council* [2002] EWHC 195 (Admin) at [62]-[63]

²² See, for corroborating analysis, Mark Elliott, 'Embracing Constitutional Legislation: Towards Fundamental Law?' (2003) 54 Northern Ireland Legal Quarterly 25

²³ See, for reasons to doubt Laws analysis, Adam Tomkins, *Public Law* (Oxford University Press 2003) 107, 118-119 and Thomas Adams 'The Dead Man and the Constitution' *The Cambridge Law Journal*, (forthcoming). More recently the Supreme Court has cast some doubt

doubt that the Act of Union is, whereas the Dentists Act is not, a part of UK constitutional law. We need to be able to explain this apart from controversy around the doctrine of constitutional statutes. Even assuming some statutes are immune from implied repeal, however, this would not make such statutes ultimate law. This is so for two reasons. First, the presence or absence of implied repeal goes to the degree of entrenchment of some law, as opposed to its hierarchical status within the legal system. Entrenchment concerns the extent to which some law is capable of being repealed or amended by other law, whereas the Kelsenian analysis concerns the hierarchical ordering of laws within the legal system. For example, according to Article 79 (3) of the German Basic Law, principles of federalism as well as Articles 1 and 20 of the Basic Law are incapable of being amended by any means. All other parts of the constitution may be amended in accordance with the process set out in Article 79 (1) and (2). Thus, some parts of the German constitution are absolutely entrenched, whereas others receive a degree of relative entrenchment, safeguarded by a supermajority requirement set out in Article 79 (2). However, it would be wrong to hold that Articles 1 and 20 are superior to other parts of the Constitution. The Basic Law represents the fundamental law of the German Republic. In turn, certain of its provisions are more entrenched than others. Thus, even if the Act of Union were immune from implied repeal and the Dentists Act was not, the former would be more deeply entrenched, but not hierarchically superior to laws regulating dentistry. Second, the fundamental law analysis is premised on the idea that constitutional law represents the highest level of law within the legal order. Statutes, even those immune from implied repeal, would not satisfy this constraint. In its most strident form, the doctrine of constitutional statutes represents a claim to modify the rules surrounding the UK Parliament's continuing sovereignty: the rules by virtue of which later legislation supersedes earlier legislation. Parliament's sovereignty, however, is prior to the effect of any statute.

on this doctrine. See *Re Allister* [2023] UKSC 5 at [66] and for comment Kacper Majewski, 'Re Allister: The End of 'Constitutional Statutes'' <<https://ukconstitutionallaw.org/2023/02/21/kacper-majewski-re-allister-the-end-of-constitutional-statutes/>>

This, then, is the first problem for the fundamental law account: it is unable to explain constitutional law that is also ordinary law.²⁴ The problem replicates for any source of law superior to statutes, but inferior to the codified constitution. Consider that in France organic statutes (*lois organiques*) sit above regular legislation, but beneath the Constitution. Such statutes regulate, for example, the functioning of the Conseil Constitutionnel. They also provide grounds for the review of ordinary legislative enactments. Organic laws, while superior to statute, are inferior to the 1958 Constitution.²⁵ Yet they are undoubtedly a part of French constitutional law.

Further difficulties arise for the fundamental law analysis in codified constitutional orders where courts have the capacity to issue intra-systematically binding interpretations of the constitution. Return to the case of *Griswold v Connecticut*. In this case the Supreme Court determined that married people's constitutional right to privacy meant they could not be barred from using contraception. The immediate difficulty is that the Constitution does not, in terms, specify such a right. There are, no doubt, theories on which *Griswold* is a legitimate extension of the justificatory logic underlying rights that are features of the US Constitution. It is very hard, however, to sustain an argument based on deductive inference from the 1787 Constitution as amended through to the result in *Griswold*. That said, it is undoubtedly true today that American subjects have the constitutional right to use contraception. Earlier I used this observation to show that constitutional law outruns the self-certified constitution. Now I want to use it to show how the law of the constitution outruns the idea of ultimate law.

Because the Supreme Court has the capacity to set precedent, its decisions are loosely binding on itself as a matter of horizontal *stare decisis*. Crucially, they are absolutely binding on all other courts as a matter of vertical *stare decisis*. This means that any other court, faced

²⁴ Ordinary statutes are also sources of constitutional law in New Zealand. In Israel, although such statutes have always had a distinctive descriptor—they are Basic Laws—it was only in 1995 that the Israeli Supreme Court decided that such laws should occupy superior status to other statutes. See *United Mizrahi Bank v. Migdal Cooperative Village* [1995] IsrLR 1

²⁵ Indeed, they are subject to pre-enactment review for their constitutionality.

with a statute that violates the right to marital privacy, would be bound to follow *Griswold* and set aside or invalidate that legislation. Moreover, because the Supreme Court's decision presents itself as an interpretation of the Constitution it is incapable of being overridden by political means, except through process of constitutional amendment. All these facts render the right described in *Griswold* a close functional analogue of rights derived directly from the Constitution.²⁶ Nonetheless, it is distorting to describe a binding interpretation of this fundamental law, as itself part of that fundamental law. Just as we distinguish a court's interpretation of a statute from the statute, so we should distinguish the court's interpretation of the constitution from the constitution. Consider that courts at any level within the hierarchy of American law may issue binding interpretations of the Constitution. Are these, by dint of the fact that they resolve constitutional questions, part of the "fundamental paramount law"? Federal district courts have no power to set precedent and so their decisions, even if binding on the parties, do not create law. Moreover, if a court of appeals reverses the decision of a district court on a constitutional matter, it is not overriding "superior... law". It is overriding the decision of an inferior institution based on its interpretation of the fundamental law. Even the Supreme Court, as ultimate arbiter of the law, remains answerable to the same. Though no other court may hold it accountable for its overreach or mistakes, this does not render the Supreme Court impermeable to criticism, including on the ground that it has overshot or undersold the rights contained in the Constitution.

To some this argument may seem to stray into turbulent waters, to take sides in famous debates about constitutional interpretation.²⁷ To distinguish between the constitution as ratified and the interpretation of that document, holding the latter to be answerable to the former, is surely to embrace some combination of textual supremacism and originalism. The first is the view that the codified constitution is the only legitimate source of constitutional law. The second is the view

²⁶ Although it is not an exact functional analogue. For one, a decision by a court that strays very far from the constitutional text strains the legitimacy of that decision in a way that straightforward application does not.

²⁷ See, for analysis of theories of interpretation, Mark Greenberg, 'Legal Interpretation' <<https://plato.stanford.edu/entries/legal-interpretation/>>

that constitutional interpretation ought to align with the original constitution, as enacted. In fact, however, the argument stops decisively short of either conclusion. Consider a parallel analysis of legislation. To note the distinction between some statute and a court's authoritative interpretation of that statute is not to express the normative proposition that the court has decisive reason to mirror the requirements of that statute. No doubt a court ought, all other things being equal, to determine the case in front of them in accordance with statutory law. But things are not always equal. Indeed, the judge may satisfy their responsibility to the legislative scheme without so doing. Consider that courts in many jurisdictions hold defences such as duress to be available to individuals who have committed statutory crimes, even if the legislation makes no reference to such a defence. However, because the invocation of such a doctrine is both responsive to the content of the statute – it presupposes that the statute applies to the conduct in question – and sensitive to facts about legislative choice – the legislature may, if it chooses, exclude the defence – its use is consistent with the idea that the court, in its interpretive task, is answerable to the legislation. Codified constitutions are, of course, different from legislative acts. In the first place, they are often much harder to amend than their statutory counterparts. This fact may influence our sense of what counts as a legitimate response to the text. It should not, however, undermine our faith in the distinction between the norms that arise from the constitution, and those that arise from interpretation of that object. In systems of precedent the latter as well as the former is a source of constitutional law.²⁸

We should accept that US constitutional law consists in much more than the written constitution that forms its basis. Aspects of this law

²⁸ Notice, equally, how this distinction can hardly be discarded by living constitutionalists. The bad version of the living constitutionalist view is that the meaning of the constitution evolves of its own volition. The better version is that there is legitimate space for the courts to expand upon or supplement the requirements of the codified constitution based on changed social circumstances. Most people believe this is true in some contexts at least some of the time. The question then becomes when such constitution-updating decisions are legitimate. The meaning of the original constitution can hardly be irrelevant to this task. At any rate, the idea of constitution updating presupposes that there was a constitution to update. This is the distinction on which my argument fastens.

are no doubt a legitimate part of the judge-made constitution. For example, a range of substantive constitutional doctrines render more precise and workable vague constitutional standards; strict scrutiny, rational basis. Other doctrines, such as standing, mootness, and the prohibition on advisory opinions, marshal and limit the judicial process.²⁹ Greater difficulties arise when rights are invented whole cloth, or stretched beyond any plausible conception of their meaning, for example where working hours regulations are considered unconstitutional as a matter of due process.³⁰ The constitutional rules that arise from such decisions are no less a part of US law for it. Interpretive precedent is thus further reason to deny any equivalence between fundamental law and constitutional law. Originalists insist that this lack of equivalence is a bad thing, at least where that precedent goes so far as to contradict the requirements of the Constitution.³¹ What they should not, indeed cannot, deny is that this law – bad in their books – is law.

Kelsen developed his understanding against the backdrop of the civil law, which places special emphasis on codification and contains no general system of precedent. Even within this frame, however, his account faces difficulties. For one, as we have already noted, in civil law systems it is perfectly possible for the codified constitution to sit alongside a special system of statutory constitutional law. So too, the absence of a general system of precedent is compatible with the existence of a local system of constitutional precedent. In Germany, decisions of the Constitutional Court are binding as much in their essential reasoning as in the operative parts of that court's judgments. In common law terms, the *ratio* of the Court's decision is as much authority for other courts as the result. Hence, that court's decisions about the requirements of the Basic Law may sit alongside the Basic Law as major sources of constitutional law. Even in the absence of any such system, extra-textual constitutional norms may plausibly arise

²⁹ They do so, moreover, in a way that bears some relation to that constitutional text: "cases and controversies".

³⁰ *Lochner v. New York* 198 US 45 (1905)

³¹ More sophisticated versions of originalism build in a legitimate role for precedent in cases where the original constitution underdetermines the question before a court. See, for example, Lawrence B Solum, 'Originalism and Constitutional Construction' (2013) 82 Fordham Law Review 453

via other less formal routes. For example, under the Austrian Constitution of which Kelsen was major architect, decisions of the Constitutional Court invalidating statutes and regulations are binding on all other organs of state. However, in contrast to the German position, the reasons for that court's decision are not, as a matter of law, authority for other courts.³² The result is one in which the court has systemically effective remedial powers, but no final authority over the content of the law. Nonetheless, the fact that the Constitutional Court remains the ultimate arbiter of constitutional questions constitutes strong incentive for other courts to adopt the principles enunciated by this court. There may arise from such practices customs that are not straightforwardly derivable from the formal constitution, but which nonetheless have plausible title to form part of that order's constitutional law. The most important of these is the rule of law or *rechtsstaatsprinzip*.³³

If the Act of Union, post-*Griswold* right to privacy and *rechtsstaatsprinzip* are not unified as fundamental law, what explains their shared status as constitutional law? A different answer begins, not by looking to the hierarchical status of such laws within the legal order, but to the hierarchical position of the institutions subject to such standards. Return to the chain of validity and the distinction between, say, Congress and the Environmental Protection Agency. While the latter is a creature of statute the former is a creature of the Constitution. The crucial difference between these two sources of authority is that while the statute is valid because Congress created it, the Constitution itself is not validated by any higher source of legal authority. Hence, the Environmental Protection Agency exercises a derivative form of authority whereas Congress does not. The latter has its power vested in it by the Constitution, which is the founding law of the legal system. Or take the different powers exercised by ministers in the UK under statute and prerogative. Statutory powers are created by Parliament. By way of contrast prerogative powers, for example, to

³² That is, save the court that referred the case to the Constitutional Court in the first place. See Arts 89, 139 (6) and 140 (7) Bundes-Verfassungsgesetz.

³³ While there are textual protections in the Austrian Constitution that speak to rule-of-law concerns, for example Art 18, the Bundes-Verfassungsgesetz did not enact the general principle. Hence, the Federal Constitutional Court has held that the "general rule-of-law principle...underlies the Federal Constitution." See *VfSlg* 20697/2024

sign international treaties, go to war or make *ex gratia* payments, are vestiges of royal power. As residuary powers of the Crown, they are forms of authority for which there is no higher warrant. Within the legal order the prerogative is a fundamental source of legal authority, whereas a statutory authorisation is not. Gardner's central insight is that this distinction—between derivative and fundamental authority—is key also to understanding the difference between the constituent parts of public law:

As a student of UK constitutional law I was given to understand—or maybe simply came to understand by myself—that the distinction between questions of constitutional law and questions of ordinary public law (also known as administrative law) lies in the type of institutions that these respective parts of the law regulate. Administrative law regulates institutions whose powers are delegated. Constitutional law regulates those that do the delegating; i.e. institutions whose powers are not delegated but are, as it is sometimes put, inherent or original.³⁴

For Gardner, constitutional law is administrative law's bigger brother, not because it is a higher form of law, but because it concerns a higher form of authority. Thus, our motley crew of constitutional rules and principles are united not because of their source or provenance but because of their shared object: institutions whose authority is, within the legal order, fundamental. The Act of Union is a constitutional statute because of its role in the creation of the UK Parliament. Post-*Griswold* privacy rights are constitutional because they bear on the authority of institutions such as Congress and the state legislatures. In turn, while the *rechtsstaatsprinzip* is not a formal part of the Austrian Constitution, it is a feature of Austrian constitutional law because binding on the fundamental organs of government. This, at any rate, is the argument I want to make in the remainder of the paper. In the next section I clarify what it means for an institution to have fundamental authority. In the one that follows I explain what it means for the law to regulate such authority.

³⁴ Gardner, *Law as a Leap of Faith* 98

CONSTITUTIONAL AUTHORITY AS FUNDAMENTAL AUTHORITY

If constitutional law has as its locus a certain kind of institution, we first have to get clear on the nature of that institution. Gardner describes the form of authority that is the subject of his analysis as “inherent or original” power. However, as such notions are commonly used to designate not legal power internal to a constitutional order, but the legitimating force of the populace (“we the people...”) I will eschew such terminology in favour of the idea of fundamental authority. This is fundamental authority *within* the legal order. Second, Gardner’s account contrasts this authority with delegated power. On a narrow reading delegation means the transfer of power from one to another. The first has a decision-making authority and they assign it to an inferior body. On this view, the only powers the legislature can delegate are legislative powers. However, legislatures may also create powers that are distinct in kind from their own. For example, they may create courts and tribunals, or administrative regulatory authorities. These are not delegations in the narrow sense, and yet such institutions are hierarchically inferior to “those that do the delegating.” In this sense the concept is used to represent any case in which the authority of a superior institution is reason for the authority of an inferior institution. As this is the crucial contrast for the purposes of thinking about the hierarchy of institutions, I will use the concept in this broader sense. Additionally, I will talk about institutions whose powers are devolved or derivative as a way of representing this idea. Finally, although Gardner described constitutional authorities as those who “do the delegating”, he was no doubt aware that their identifying mark was the hierarchical status of their authority, not the tasks they execute through exercise of that authority. While it is inherent to the idea of fundamental power that it is not an artefact of higher legal authority, it is not an attribute of such power that it implicates the creation of derivative forms of authority. The UK Parliament is a constitutional institution because of its status within the legal order, regardless of whether it grants authority to any other institution. Other constitutional bodies are not of the power-conferring kind. For example, Article III of the US Constitution vests judicial power in the Supreme Court. However, that institution does not delegate power to the courts that sit below it within America’s federal structure. The crucial point for our analysis is that neither Parliament nor the Supreme Court is vested with authority by a superior institution. It is this fact which marks them out as constitutional authorities.

Fundamental authority, in the sense described above, is an attribute of legal power, not of the law made through exercise of such power. Congress has constitutional authority, but the statutes it passes are ordinary law. Consequently, some institution may exercise fundamental authority even if the law it creates is inferior to other law. For example, in the UK both Parliament and executive, through exercise of the prerogative, exercise constitutional powers. However, it is a cardinal rule of UK law that statute is superior to prerogative. In the case of conflict, the latter gives way to the former.³⁵ Fundamental authority is, thus, also distinct from unlimited authority. The executive may exercise constitutional powers when seizing property during wartime, but it is limited in its capacity to do so by any statute that attaches conditions to such seizures.³⁶ Equally, Congress may have constitutional authority, but it is limited in the exercise of that power by the regulative rules of the Constitution. Its power is not an attribute of some higher institution, even though its legislation is limited by higher law.³⁷

A first response to this is to suggest that it misunderstands the role of codified constitutions in the creation of legal authority. For while it is true that no super-legislature stands behind the constitution, the constitution itself sits above the distinctive branches of government. No doubt in one sense this is true, for the constitution regulates the exercise of power by such institutions. But in another it is false, for these institutions may well draw their authority from the codified constitution. Consider how Articles I, II, and III of the US Constitution specify some, albeit not all, of the fundamental rules for legal authority

³⁵ *Attorney General v De Keyser's Royal Hotel* (1920) AC 508

³⁶ See *ibid*

³⁷ John Austin unhelpfully identified the foundations of legal authority with the confluence of all of the above properties. The sovereign owed its authority to no superior. It was incapable of legal limitation. In turn, all other forms of legal authority were ultimately derivations of the commands of the sovereign. See John Austin, *The Province of Jurisprudence Determined* (Cambridge University Press, 1832 (1995)) lecture VI

in the US legal order.³⁸ Should we think of the constitution as delegating that authority to them? On this view, Articles I, II, and III function in much the same way as the conferral of power by Parliament on a minister. The legislature grants authority to the minister, and the constitution grants authority to the legislature. No doubt we may talk loosely about, say, the constitution granting authority to the legislature as we do the statute conferring powers on the minister. But this talk is indeed loose. A grant or transfer of power is the act of an agent. Parliament confers authority on the minister. The statute, in turn, is the mechanism through which such an act occurs. We need to distinguish between the creator of some power and means through which that power is created. The US Constitution establishes the legislative, executive and judicial powers. It does not confer such powers on anyone.

That said, constitutions, like any other source of law, are the datable, traceable consequence of human agency. In the case of codified constitutions, they are the consequence of some definite political process. If the Constitution of 1787 did not delegate the very powers that it constitutes, perhaps those who drew up and ratified that document did. To understand the force of this argument we need to consider two features of the logic of delegated power. First, such powers are created within a system of power and authorisation. The general delegates to their officer because they have the authority to do so, the head chef to the sous chef because they sit above them within the hierarchy of the kitchen. By way of contrast, were I to instruct you to organise my calendar for the week, I would not be delegating any decision. I would just be being offensive. Second, as already mentioned, such processes involve a hierarchical distribution of power within that system of authority. The head chef may delegate to the sous chef, but not the sous chef to the head chef. How, then, are constitutions created? There are two clear cases, and a spectrum of possibilities in between. In the first, the new constitution is created according to a procedure laid down by the old constitution. In this case we are faced not with a novel constitutional order, but the amendment of an existing one. Alternately, there may be a foundational break or rupture between orders. This was true, for example, of the 1787 Constitution, whose ratification rules were clearly inconsistent with

³⁸ Crucially, the federal Constitution recognises and regulates but does not constitute the authority of state institutions. That task is an attribute of state constitutional law.

those laid down in the prior Articles of Confederation. In this case, the new constitution is not authorised by the old order. Moreover, whatever authority the creators of the new constitution exercise, they do not exercise this power as a part of the legal order for which their constitution will become "The Constitution". Their act of free creation is not an assignment of responsibility within an existing power structure, but a blueprint for a new one. Such an act is neither an amendment of the system it aims to replace, nor part of that it aims to create. It is not an exercise of legal authority.

Constitutional amendment may be thought to create greater difficulty for the idea of constitutional authority as fundamental authority. Most codified constitutions lay down processes for their own amendment. In many cases such procedures are used to change substantive constitutional rules, for example by introducing new constitutional rights. However, the process of constitutional amendment may also extend to the institutions of government. This is true, for example, of the Swiss Constitution, which explicitly permits its own "total revision".³⁹ Provided the process for amendment and ratification is met, existing forms of government may be altered or replaced. For example, a unicameral legislature could be created to replace the existing bicameral Swiss Federal Assembly, by implication altering the procedure for the creation of valid legislation. Should we think of such a process as delegation of power from the superior authority of the amending institution to the inferior authority of the newly constituted assembly? This would, I think, be a mistake. It is a crucial feature of the amendment power that it is not superior to any other provision of the constitution. Such power may be limited by other aspects of the constitution, as is true, for example, in the case of the German Basic Law. Equally, for some decision to constitute an amendment it must meet the formal conditions laid down for that process. In the same way that a statute may provide reflexively for its own amendment or abolition, so the constitution may too. The self-amending part of the statute or constitution, however, is not superior to any other part and the rules created through its use of no greater authority than the rest of the statute or constitution. An institution created through constitutional amendment is thus one that exercises fundamental authority, because the source of its power can be no higher than the constitution itself.

³⁹ Art 193 Swiss Federal Constitution

A more dizzying suggestion is that the grounds of constitutional authority be reconstituted not from outside—through revolutionary means—or horizontally—through constitutional amendment—but from below. There is, for example, an ongoing debate within UK constitutional law about whether Parliament could, through ordinary legislative process, alter its own basic structure, and, as a result, the procedure for the creation of valid legislation. Say Parliament were to pass a statute attempting to abolish its second chamber, the House of Lords, and replace it with a democratically representative body, would such a statute be effective?⁴⁰ The question is complicated by the fact that such a statute would be attempting to amend the very rule that provides for its authority. It would, no doubt, take an unwise judge to balk at such a constitutional moment and so it may be that this hard question of constitutional theory never receives—in the hands of the courts at least—any definitive answer. What Parliament can do today, legally speaking, may lose ground to what Parliament in fact does tomorrow. The continuing authority of the newly reconstituted Parliament could not, on pain of circularity, owe its authority to create legislation to legislation. However, by accepting this new constitutional settlement the courts would provide the grounding necessary to free the system of its logical problem. By treating the acts of this new Parliament as Acts of Parliament they would imbue it with fundamental authority within the legal order.

The idea of constitutional change underscores a final point about the analysis of fundamental institutions. The concept is meant to explain the logic of legal authority as it exists at a particular point in time, not the historical development of institutions.⁴¹ It is thus perfectly possible for some institution whose authority was once derivative of a superior institution to come to exercise constitutional power within the legal order. For example, both the English and Scottish Parliaments—themselves precursors to the UK Parliament—evolved from legislative councils that were delegates of the English and Scottish monarchs, respectively. What explains this transition?⁴² Delegation

⁴⁰ See Peter Mirfield, 'Can the House of Lords Lawfully be Abolished?' (1979) 95 *Law Quarterly Review* 36

⁴¹ See Gardner, *Law as a Leap of Faith* 101

⁴² Here I follow in part, and diverge in part from, Gardner's account. See *ibid* 101-103, 109-116

becomes a dead letter when it no longer plays a role in grounding authority. If asked to explain the powers of the UK Parliament today one should not, on fear of being outcast from the academic community, invoke the authority of the Crown. While the power of the monarch was, historically, reason for the validity of the Acts of the Legislative Council, it is not reason for the validity of Acts of Parliament. It is this fact that renders Parliament a constitutional institution today. An institution's powers, at one time a creature of superior legal authority, cease to be so when that prior authority is no longer reason for the validity of the newly constitutional institution.⁴³ In such circumstances the fundamental rules for legal authority have changed, and by implication the forms of constitutional power within that legal order.

If constitutional authority is authority without higher authorisation, the question becomes how this is possible. Indeed, the very idea of such authority—power without prior authorisation—is thought by many to pose one of the central problems, if not the central problem, for jurisprudence.⁴⁴ As law's unexplained explainer, it gives rise to a puzzle structurally similar to that of the first cause: if all events have a cause, what caused the first event? Similarly: if all authority depends on authorising rules, what authorises the highest authority? We earlier encountered Kelsen's ingenious, if ultimately unsatisfactory, solution to this problem: that the authority of the historically first constitution, incapable of being legislated for, must be presupposed. I will aim not to say too much about this problem here, except to straighten out the interpretation of the account that I, along with Gardner, otherwise adopt.⁴⁵

⁴³ This fact explains why in later passages I depart from Farrah Ahmed's suggestion that we should think of the prerogative powers of the executive as delegated by the Crown. The authority of the King no more explains the executive's power to go to war today than it does the power of Parliament to legislate. See Farrah Ahmed, 'The Delegation Theory of Judicial Review' 84 *The Modern Law Review* 772, 790-796

⁴⁴ See, in particular, Scott Shapiro, *Legality* (Belknap Press of Harvard University Press 2011) 35-46

⁴⁵ See, for Gardner's treatment of the issue, Gardner, *Law as a Leap of Faith* 101-109

H. L. A. Hart famously rejected Kelsen's transcendental argument for legal authority. Law is a social institution and the basis of its authority consequently a matter of social practice. While the authority of all but the most foundational legal institutions depended on their being authorised by law, this could not be true of the legal system's most basic authorities. Parliament empowers the minister, but no higher authority empowers Parliament. Instead, the authority of such institutions depended on the "acceptance of... rule[s] conferring authority."⁴⁶ Hart's deceptively simple solution to the problem of the origins of legal authority was just that: some have power because others accept that they do. Hence, while the authority of the minister to make the order depends on statute, the capacity of Parliament to make legislation depends on a practice according to which its decisions are held to be binding. If the acceptance of such a rule is what accords Parliament its authority, we must ask whose acceptance is to count. Hart's answer to this question was the system's officials, in particular its "courts, which are charged with the responsibility of determining what the law is."⁴⁷ Hence, the legislature has authority,

⁴⁶ H. L. A. Hart, *The Concept of Law* (3rd edn, Oxford University Press 1961 (2012)) 60 and see for elaboration 101-102, 115-116

⁴⁷ Ibid 60. This may be thought to solve one problem only by giving rise to another. For courts are themselves authoritative institutions whose power derives from the legal system. Hart never explicitly engaged this worry, but his work contained the outline of a response. In addition to rules determining the fundamental conditions for law-making – Hart called these rules of recognition – the legal system also contained fundamental rules of adjudication, rules determining the conditions for authoritative determinations about the content of the law. In the same way that rules identifying ultimate law-making acts existed because actually accepted, so too those determining ultimate adjudicative authority depended on acceptance by other institutions within the legal order. Indeed, such rules exist in complex interplay: with the authority of the legislature dependent on acceptance by the courts and the decisions of adjudicative institutions treated as binding by other institutions within the legal order. A more colloquial way of putting the point is that it takes the coordinate actions of many different agents to get the legal system up and running. See, for the worry, Neil MacCormick, *H.L.A. Hart* (2nd edn, Stanford University Press 2008) ch 10 and Stephen Perry, 'Hart on Social Rules and the Foundations of Law: Liberating the Internal Point of View' (2006) 75 *Fordham Law Review* 1171

because law-applying officials accept a rule according to that authority.⁴⁸ In recognising that authority may arise from acceptance, Hart explained how there may be legal institutions for which there is no higher legal authority: the order's fundamental institutions.

Or did he? For some, Hart's argument about the practice-based grounds of legal authority may be thought to put his theory on collision course with the codified constitution.⁴⁹ In holding that legal authority bottomed out in social practice, Hart is commonly read as implying that such rules must have a distinctive form: as practice-based or customary norms. Consider, in this regard, the relationship between the rules of the French language and the pronouncements of the Académie Française. Although the latter is, according to its founding documents, the practical authority on the French language, it has had only partial success in implementing such authority. For every "ordinateur" there is a "diffusion pour baladeur". What explains this? As rules of natural language, the rules of French are those actually practised by the relevant linguistic community. Such rules gain standing, not by having been ordained, but by having been embraced. In this context, accepted custom edges out enacted authority. On the strongest version of the argument, it obliterates it. There can, on such a view, no more be legislative authority for natural language than there can be a musical performance of Pythagoras' first theorem. It is the wrong kind of thing for that. This creates a dilemma. For it seems to force us to hold either that Hart's account is explanatory, in which case the written constitution is overtaken by custom, or that codified constitutional authority is possible, in which case Hart's practice-based account of law cannot explain that authority. Consider that Art I, § 7 of the US Constitution specifies the procedure for the creation of valid legislation: "Every Bill which shall have passed the House of Representatives and the Senate, shall, before it become a Law, be presented to the President of the United States." This is not a customary rule. And yet, it is one of the fundamental rules for law creation within the US system. It is the functional equivalent of the rule of UK law that Hart holds up as a stock example of a

⁴⁸ To be clear Hart did not consider such practices sufficient for the existence of the legal order of which such institutions formed a part. In addition to the embrace by officials of the rules constituting legal authority, the outputs of such authority must be "generally efficacious". See Hart, *The Concept of Law* 116-117.

⁴⁹ See Gardner, *Law as a Leap of Faith* 101-103 for the argument.

recognition rule: that “what the [King] in Parliament enacts is law.”⁵⁰ Must we conclude that one of these is, whereas one of these is not, a fundamental rule of recognition within its respective legal order?

For his own part Gardner accepted this dilemma. “...ultimate rules of recognition”, he suggested, “cannot be enacted, or otherwise canonically formulated. They cannot exist in legislation. They can exist only in the practices of officials...”⁵¹

Why? To simplify greatly: any attempt to create an ultimate rule of recognition by legislation requires that there be a superior legislator with the power to confer an original or inherent power. But that is a contradiction. If there is a superior legislator conferring the power, it follows that the power conferred is not original or inherent but delegated. The rule of recognition created is not, in other words, an ultimate rule of recognition. It follows that an ultimate rule of recognition cannot be a legislated rule.⁵²

Such rules were consequently “customary laws *in foro*”, customs of the courts.⁵³ Recognising that this analysis nudges out the written constitution as an ultimate source of legal authority, Gardner proposed the following solution: that lying behind any written constitution was a customary norm in accordance with which the constitution was law.⁵⁴ This deprives the codified constitution of status among the legal order’s most fundamental rules, while saving space for it within a customary legal order.

I want to pursue an alternate argument in defence of Hart’s solution to the problem of legal authority. Rather than accept the above dilemma, I will reject it. There is no opposition between the idea that

⁵⁰ Hart, *The Concept of Law* 107-108

⁵¹ Gardner, *Law as a Leap of Faith* 101-102

⁵² Ibid 102

⁵³ Ibid 102

⁵⁴ Hence, Gardner claimed, one ultimate, albeit unstated, rule of US law was that “Whatever is laid down in the constitution produced by the 1787 Philadelphia Convention, as amended, is law.” See *ibid* 116

fundamental legal authority depends on acceptance, and the codified nature of the rules declaring such authority. Consider first that Hart never used the language of custom to describe his doctrine of recognition in *The Concept of Law*. He stressed, instead, that the existence of such a rule as a foundational rule, “unlike that of a statute, must consist in an actual practice.”⁵⁵ In what way must such rules depend on practice? Core to Hart’s theory is the idea that ultimate rules of recognition could not derive their authority from within the legal order. Were they to do so, they would not be ultimate rules. To hold otherwise is, as Gardner suggests, “a contradiction.” However, this argument about the essential function of such rules is not at the same time a thesis about their necessary form: i.e. whether they are customary or codified. Indeed, it seems obvious that some rule may have both codified status and customary authority. A religious text, for example, is, well, a text. And yet it may be the authoritative text for some group only because accepted by that group. Indeed, this is precisely what a canonical text is: a text that is, as a matter of custom, accepted as authoritative. Gardner is thus right to hold that an ultimate rule of recognition cannot be created “by legislation” where this is taken to mean a standard that is legally authorised. As ultimate standards for the creation of law, they cannot. But he is wrong to infer from this that such rules cannot have legislative form. Thus, where a legal order has a codified constitution, the authority of that constitution depends on its acceptance.⁵⁶ In turn, the codified constitution will likely specify some, if not all, of the rules constitutive of fundamental authority within the legal order. To the extent that it does, the institutions so identified are constitutional institutions. Constitutional authority may depend on practice, without the constitution being a practice-based set of rules.

⁵⁵ Hart, *The Concept of Law* 111 and see more generally 100-112. Although note that he did many years later, in the posthumously published postscript to that book, come to describe the rule of recognition as “a form of judicial customary rule” See *ibid* 256

⁵⁶ As Larry Alexander notes, even if some constitution were not ratified according to its terms, it would still be the constitution of a legal order if accepted within it. See Alexander, ‘What are Constitutions, and What Should and Can they Do?’ 3. See further Frederick Schauer, ‘Amending the Presuppositions of a Constitution’ in Sanford Levinson (ed), *Responding to Imperfection* (Princeton University Press 1995) 152-157

The idea that the authority of the constitution within the legal order rests on its acceptance by legal officials is, of course, compatible with the idea that the very same document may be endowed with formal authority for some other purpose. Consider that the 1787 Convention, although not exercising authority as a part of the legal order, nonetheless claimed authority to create rules *for* that order. In specifying the conditions for its own success, it laid down the process for constitution creation and ratification that its design was required to meet. That constitution became the authoritative constitution of an actual legal order on being accepted and applied by the very officials that it ordained.

Or consider the process of constitution creation in colonial contexts. The Constitution Act of 1867 was both the first constitution for Canada and, at the same time, a statute of the Imperial Parliament in Westminster. Such a dual reality is possible when the enacted authority of one order is the accepted authority of another. While UK law embraced the authority of the Westminster Parliament, Canadian law embraced the authority of the Constitution.⁵⁷ The Westminster Parliament was not an institution internal to Canadian law, although certain of its statutes were sources of law within that jurisdiction.

Fundamental authority within a legal order is thus authority that depends on acceptance. This may be acceptance of a codified constitution that specifies the basic institutions of the state, or of unwritten rules for constitutional authority. In many legal systems it is an admixture of both.⁵⁸ The institutions that have authority as a result of such acceptance are the legal order's constitutional institutions. Constitutional law regulates such institutions. What it means for it to do this is the subject of the next section.

⁵⁷ Consider, in this regard, *Hodge v the Queen*, which held that, as a matter of Canadian law the provinces, and by implication the Canadian federal institutions, were not delegates of the Imperial Parliament but "within [the limits set by [the Constitution Act had] the same authority as the Imperial Parliament...would have had under like circumstances." See *Hodge v The Queen* [1883] UKPC 59

⁵⁸ Consider that the power of US courts to set precedent is not laid down in the US Constitution.

CONSTITUTIONAL LAW

It is sometimes suggested that we distinguish contract from tort based on the source of obligations in each area of law. Whereas contractual duties are the product of will – promise or agreement – tortious duties are non-voluntary. However, the law of contract may imply terms into our agreements that were never voluntarily undertaken. Nor can we loosen the constraint to say that contractual duties depend upon acts of will even if not necessarily arising from them, for the same is true of certain torts. Voluntary undertaking, by way of assumption of responsibility, may form the background to the law's imposition of duties in negligence. How, then, to square the circle? Rather than saying that contractual duties arise from agreement we can think of contract as the law regulating agreement. This means giving legal force to certain classes of voluntary undertaking. It may also involve the imposition of additional duties concerning their fulfilment. Finally, it means providing remedies in response to their breach. In turn, tort regulates acts of interpersonal significance other than agreements, including acts that only accrue liability because they take place against a backdrop of voluntary undertaking.

Gardner's suggestion is that we think of constitutional law like this. Rather than think of it as the law deriving from "The Constitution", we should think of it as the law regulating a certain kind of institution. Because public law has to do with political authority and because a society's constitutional institutions are its most fundamental institutions, so constitutional law is the law that regulates such authorities. Consider in this regard the archetype of constitutional law – the Bill of Rights – and the archetypical constitutional remedy – the decision striking down a statute because contrary to rights. Through applicative decisions of the courts the requirements of the constitution are brought to bear on the exercise of legislative power. Constitutional law *regulates* the authority of this institution.

What does it mean for the law to play such a role? In a broad sense we can say that the law regulates power by determining the conditions for its use and limits on its exercise. Hence, as the previous section made clear, the logically first task for constitutional law is to establish the authority of the fundamental organs of the legal order. Such rules determine, for example, conditions for valid legislation, the existence of any independent executive authority, and the legal order's basic

adjudicative institutions.⁵⁹ The constitution may distribute such powers to distinctive bodies or, in the extreme case, deliver them all into the hands of a singular ruler. Either way, these rules specify the form of constitutional government and are a necessary first part of any system of constitutional law.⁶⁰

As important as the above class of rules is to the legal order, they are hardly the locus classicus of constitutional law. In their day-to-day work, constitutional lawyers are concerned less with the rules constitutive of legal authority, and more with the standards by which the exercise of that authority is held to account. Such constraints bite on the rules and decisions of constitutional institutions. They concern not whether there has been a decision but whether that decision should be disavowed, overridden or remade because unconstitutional. These are the regulative rules of the constitution in the narrow sense. Regulative, because they presuppose the authority of the institutions on which they operate. They are the power-constraining counterparts to the formal power-conferring rules of the constitution.

In a standard case such rules impose substantive limits on the exercise of legal power, for example through rights or structural constraints. Say the right to free speech is invoked by some individual as a defence

⁵⁹ As Gardner notes, Hart was uncertain about whether to describe rules of this kind—in particular fundamental recognition rules—as legal rules. In one sense they obviously are, as they are rules of the legal system. In another, they are distinct in kind from other legal rules in providing the ultimate grounds for legally valid acts and decisions. See Hart, *The Concept of Law* 112-113 and Gardner, *Law as a Leap of Faith* 107-109

⁶⁰ Although cf Yowell, 'A Proposal for Defining and Classifying Systems of Constitutional Government' 329-333 for the view that systems of accumulated power—hereditary monarchies, one party states, etc—are not really systems of constitutional government at all. In treating something like the modern conception of the separation of powers as essential to constitutions, Yowell denies what Aristotle affirms, which is that monarchy is one of a variety of constitutional forms, albeit one that may devolve into its corrupted counterpart, tyranny.

to the charge of burning the flag.⁶¹ The right regulates the content of the statute because it requires the court to deny effect to that legislation based on its constitutionally offensive provisions. In controlling the effect of this law, the norm regulates the constitutional powers of the legislature. Or say a scheme for environmental regulation is held unconstitutional because insufficiently tailored to the limits of federal authority.⁶² Here, federalism limits the law-making authority of the legislature by requiring the courts to strike down such legislation.⁶³ Or consider that some exercise of prerogative power may be held unlawful because contrary to the requirements of legislation.⁶⁴ This structural rule regulates executive power.

In the above examples the constraints imposed by the constitution are negative. They are violated through some act on the part of the state. However, regulative constitutional rules may be as much positive as they are negative. For example, under the South African Constitution, all individuals have rights to basic education and health. This has been interpreted by the Constitutional Court to require state authorities to, for example, secure premises for the sake of providing education, and to make available certain classes of drugs.⁶⁵ These decisions regulate the powers of government by requiring that they be exercised.

Although each of the above cases involves the regulatory authority of the courts, the constitution may also place such authority in the hands

⁶¹ *Texas v. Johnson* 491 US 397 (1989)

⁶² *Reference re Impact Assessment Act* 2023 SCC 23

⁶³ Although a decision invalidating some law is the archetype of the constitutional remedy, the law may regulate the exercise of legal authority in ways that fall short of this. For discussion of remedial alternatives to strike down see Stephen Gardbaum, *The New Commonwealth Model of Constitutionalism: Theory and Practice* (Cambridge University Press 2013), esp. chs 6 and 7 and Rosalind Dixon, 'The Forms, Functions, and Varieties of Weak(ened) Judicial Review' (2019) 17 *International Journal of Constitutional Law* 904, 911-914

⁶⁴ *Attorney General v De Keyser's Royal Hotel*

⁶⁵ *Governing Body of the Juma Musjid Primary School v Essay NO* [2011] ZACC 13, *Minister of Health v Treatment Action Campaign (No 2)* [2002] ZACC 15

of other institutions. For example, the UK Human Rights Act in the first place requires courts to interpret legislation in so far as is possible in a manner consistent with rights.⁶⁶ Failing that the court may issue a non-binding declaration of incompatibility as between rights and rights offensive legislation.⁶⁷ The latter does not affect the validity of the law, although its use is itself a condition of the exercise of a further constitutional power: for government to amend the rights offensive statute.⁶⁸ This power, like its legal interpretive counterpart, regulates the law-making authority of Parliament.

On the institutional account the defining feature of constitutional law is not the source or status of that law, but the institutions that form its object. Hence, it is capable of accommodating both codified constitutions and their uncoded counterparts, for each expresses rules that are regulative of constitutional authority. Moreover, it allows us to make sense of both statutes and precedents as sources of constitutional law. Just in case these acts and decisions bear on the fundamental powers of state, they form part of the law of the constitution. It is this fact that unites the Act of Union, post-*Griswold* privacy rights and the *rechtsstaatsprinzip* into a coherent category alongside the codified constitution.

While the institutional account rivals and aims to replace the fundamental law analysis, it also accommodates a number of the intuitions that lie behind that idea. For example, whenever a codified constitution is accepted within some legal order, its provisions will form part of constitutional law by regulating the fundamental powers of state. Given that the codified constitution is of a higher status than ordinary legislation, its rules will necessarily constrain such institutions. The codified constitution is not constitutional law because it is fundamental law. However, by dint of being fundamental law, it is necessarily constitutional law. Equally, we can explain why many attach special importance to entrenchment in their understanding of constitutions. Whenever some standard is entrenched against, say, legislative repeal, that standard circumscribes the authority of the legislature. It regulates legislative power.

⁶⁶ Human Rights Act 1998 s 3

⁶⁷ *Ibid* s 4

⁶⁸ *Ibid* s 10

Constitutional law, then, is the law that regulates fundamental authority. In part it does this by bestowing on institutions powers that bear on the exercise of that authority: for example, through judicial review. Notice that while the bodies who exercise these regulatory powers may themselves be constitutional institutions, in the sense of possessing fundamental authority, they need not. For example, although the UK Supreme Court undoubtedly exercises constitutional functions, it does so as a creature of statute.⁶⁹ While constitutional law takes as its object a confined set of institutions, its reach spreads much more widely within the legal order. Any body that exercises power to regulate the authority of constitutional institutions has that power as a matter of constitutional law.

This fact helps to put in place what might otherwise seem an important objection to the institutional account. Because the analysis treats as its anchor point institutions that are, by their nature, a distinctive and narrow part of the legal order, it may be thought under-inclusive. For example, in the UK under devolution the modern Scottish and Welsh Parliaments, and Northern Irish Assembly are creatures of statute. Their power and authority is a direct consequence of Westminster legislation. And yet the authority of such institutions is standardly recognised to be constitutional in character. The nature of devolved institutions' legal power explains this. It is a crucial facet of the devolved authorities that, within their spheres of competence, such institutions may override or amend Westminster legislation. This authority to alter or replace statutes is, in turn, compatible with the sovereignty of the Westminster Parliament because created through statute. The devolved power may override the devolver, but only on the authority of the devolver. It is the fact that they may do so that such authorities have constitutional powers in the first place.

Consider more generally how delegated authority – the authority of the regulatory agency, or of the minister – is commonly thought to be the province of administrative law. However, one important exception to this is when such bodies are given powers that enable them to alter the effect of law made by superior institutions. In the UK these are called Henry VIII powers: powers in legislation that allow the bearer of this authority to modify primary legislation. We encountered one such power earlier, in the form of s 10 of the Human Rights Act. This enables the executive to amend statute to bring it into

⁶⁹ Constitutional Reform Act 2005

line with Convention Rights consequent on a declaration of incompatibility. The institutional account explains both parts of the picture. While administrative law has as its object delegated authority, delegated authority may arise to constitutional significance where it can be used to regulate the powers of constitutional institutions.

A final important objection to this approach takes as its point of departure the fact that the boundaries of constitutional law are not as neat as the distinction between fundamental and delegated authority might be taken to suggest. For example, it is commonplace in many legal systems that constitutional rights apply as much to institutions that are the delegates of higher authority as to those higher authorities: to cities as well as provinces, to the administrative state as much as the state. The account may seem to have the counterintuitive implication that constitutional law becomes administrative law when it regulates institutions at lower levels within the hierarchy of the legal order.

In fact, this objection is much less pressing than it might seem. For although it is essential to the argument that constitutional law regulates institutions that exercise fundamental authority, it is no part of the argument that it only regulates such institutions. Hence, for example, the German Basic Law applies as much to administrative bodies as it does the fundamental institutions of state. More controversially, that same law has been held to apply not only vertically – to relations between subject and state, but horizontally – in relations between subjects.⁷⁰ These extensions of constitutional law's necessary jurisdiction – the first an obvious rationalising move itself required by the Basic Law,⁷¹ the second more obviously a constitutionally transformative moment – do nothing to challenge or upset our understanding of constitutional law as the law that regulates ultimate authority. The Basic Law *is* constitutional law because

⁷⁰ In the famous *Lüth* case Constitutional Court of the Federal Republic held that the rights-based provisions of the Basic Law applied not only against political institutions but also, indirectly, in relations between private persons "The Constitution", the Court held, "erects an objective system of values... no rule of private law may conflict with it, and all such rules must be construed in accordance with its spirit." See *Lüth* 7 BVerfGE 198 (1958) (FRG)

⁷¹ Article 1 (3) of the Basic Law explicitly provides that its right "shall bind the legislature, the executive and the judiciary as directly applicable law."

binding on the most fundamental institutions of state.⁷² That constitutional rights may apply as much to administrative bodies as they do to constitutional institutions thus turns out to be no more perplexing than the idea that tortious liability may, in certain cases, arise based upon prior agreement. We need to separate the necessary features of some area of law from its contingent properties. I have argued that it is essential to constitutional law that it regulate institutions whose authority is fundamental within the legal order.

CONCLUSION

The account of constitutional law given here is formal. It aims to accommodate without sanctioning the various doctrines that form the centrepiece of modern constitutionalism: rights, the separation of powers, and constitutional supremacy. It also makes space for their rejection. Indeed, it may be objected that this understanding is so thin as to accommodate all forms of legal authority.⁷³ Alternately, this may be seen less as an objection and more as a reason to endorse such an account. Given the institutional nature of law, constitutional law is the one form of law that legal systems cannot be without.

⁷² Equally, it may be the case that administrative law doctrines are invoked to police constitutional authorities. Thus, in the celebrated *GCHQ* case Lord Diplock held that review on the basis of illegality, irrationality and procedural impropriety lay as much against the executive in its use of prerogative power as it did in its use of statutory power. Indeed, the prerogative is often seen to sit at an awkward juncture: as a feature of both constitutional and administrative law. We can explain this. The prerogative forms part of constitutional law because of the nature of that authority – as an independent source of legal authority – and because of its interaction with the powers of Parliament. Equally, in reviewing the exercise of prerogative powers for their irrationality the courts have helped themselves to a doctrine, the genesis of which lies in the control of statutory power. See *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374. For an alternate analysis on which prerogative powers are properly a part of administrative law as a form of delegated authority see Ahmed, 'The Delegation Theory of Judicial Review' 790-796

⁷³ See Raz, *Between Authority and Interpretation* 324-325 for the distinction between thin and thick senses of constitution.