THE METHODOLOGY OF CONSTITUTIONAL THEORY WORKSHOP
Foxhill House, University of Reading – April 6–7, 2017
INTRODUCTION

UK constitutional law currently faces a host of challenges relating to, for instance, devolution, its relationship with processes of European integration, and the impact of the Human Rights Act. These challenges defy its traditionally pragmatic character and call for a systematic re-examination of its methodology. In particular, they bring into sharp relief the need to devise a robust interdisciplinary approach to constitutional issues.

The workshop brings together 13 experts in the field to discuss how such a methodology can be designed. Its aim is to apply insights from history, sociology, political theory and philosophy to the study of the UK Constitution in a way that can inform legal doctrine. In particular, it will focus on the following overarching questions:

1. What do we mean when we say that a proposition of constitutional law is true?
2. Can constitutional doctrine be autonomous?
3. How do past and current legal practice constrain constitutional argument, if at all?
4. To what extent is constitutional theory a normative or a descriptive enterprise? How can its normative and descriptive elements be best reconciled? What is the connection between constitutional law and moral legitimacy?
5. How can empirical and socio-legal analysis inform constitutional doctrine and theory?

The workshop is organized under the auspices of the Rights, Justice and Legal Theory research theme and is generously funded by the Modern Law Review and Reading School of Law.

The School of Law is part of the world-ranked University of Reading, rated among the UK’s most research-intensive institutions and one of the UK’s largest, best-known and most successful campus universities. With attractive views of Whiteknights Lake and surrounded by parkland, the School of Law is situated in Foxhill House, an architecturally significant grade 2 listed building on the University’s main campus.

Founded in 2015, the Rights, Justice and Legal Theory research theme has as its mission to explore the connection between law and legal and political philosophy. Recent events include:

1. Symposium on Alon Harel’s ‘Why Law Matters’ with reply by the author
2. Thomas Bustamante, ‘Democracy and the Rule of Law when Dialogue is no Longer Possible: The Supreme Court and the Houses of Parliament in Brazil’s 2016 Impeachment Process’
LIST OF SPEAKERS

Professor Trevor Allan: Professor of Jurisprudence and Public Law, Pembroke College, Cambridge

Dr Nick Barber: Associate Professor of Constitutional Law and Wyatt Rushton Fellow and Tutor in Law, Trinity College, Oxford

Professor Peter Cane: Yorke Distinguished Visiting Fellow, Christ’s College, Cambridge

Professor David Dyzenhaus: Professor of Law and Philosophy, Albert Abel Chair, and University Professor, University of Toronto

Professor Graham Gee: Professor of Public Law, University of Sheffield

Professor Jeffrey Goldsworthy: Emeritus Professor, Monash University

Dr Michael Gordon: Senior Lecturer in Constitutional Law, University of Liverpool

Professor David Howarth: Professor of Law and Public Policy, University of Cambridge

Dr Dimitrios Kyritsis: Associate Professor in Law, University of Reading

Dr Aileen Kavanagh: Associate Professor of Law and Fellow, St Edmund Hall, Oxford

Dr Stuart Lakin: Lecturer in Law, University of Reading

Dr Sarah Nason: Lecturer in Law, Bangor University

‘No answer is what the wrong question begets’

## WORKSHOP PROGRAMME

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|      | 1.30 - 2.50pm   | Panel 1                      | Trevor Allan, What makes a proposition of (British) constitutional law true?  
|      |                 |                              | Jeffrey Goldsworthy, Theoretical Disagreement in Law                   |
|      | 2.50 - 3.00pm   | Coffee                       |                                                                        |
|      | 3.00 - 4.20pm   | Panel 2                      | Peter Cane, Constitutional Law, Theory and History                      
|      |                 |                              | Aileen Kavanagh, Keeping it real in Constitutional Theory              |
|      | 4.20 - 4.30pm   | Coffee                       |                                                                        |
|      | 4.30 - 5.50pm   | Panel 3                      | Graham Gee, Is Public Law Ideological?                                 
|      | 7.15pm          | Dinner                       | Cote Brasserie, Reading                                                 |
| Two  | 9.15 - 9.30pm   | Coffee                       |                                                                        |
|      | 9.30 - 10.50pm  | Panel 1                      | Guest Chair: Professor Dawn Oliver, UCL                                
|      |                 |                              | Sarah Nason, Reconstructing Administrative Justice as a Constitutional Foundation   
|      |                 |                              | Jeff King, The Role of Facts in Constitutional Theory                   |
|      | 10:50 - 11.00pm | Coffee                       |                                                                        |
|      | 11.00 - 1.00pm  | Panel 2                      | Mike Gordon, The Nature of Positivist and Political Public Law         
|      |                 |                              | Nick Barber, The Significance of the Common Understanding in Legal Theory |
|      |                 |                              | Stuart Lakin, Interpreting the British Constitution                    |
|      | 1.00 - 2.15pm   | Lunch                        |                                                                        |
|      | 2.15 - 4.15pm   | Panel 3                      | Dimitrios Kyritsis, Constitutional Law as Legitimacy Enhancer          
|      |                 |                              | David Dyzenhaus, The Constitution of Authority and the Authority of Constitutions |
|      | 4.15 - 4.30pm   | Coffee                       |                                                                        |
|      | 4.30 - 4.45pm   | Round up and close           | Dimitrios Kyritsis and Stuart Lakin                                   |

Improvisation is the creativity of those who use what other people make, not the creativity of those who design from scratch.

*Professor David Howarth*
ABSTRACTS

Nick Barber, The Significance of the Common Understanding in Legal Theory
This paper focuses on an aspect of the methodology of legal scholarship: the role that the common understanding of an institution or principle should play in formulating a successful account of that entity. The paper begins by surveying the claims for the common understanding in contemporary scholarship. There are at least three reasons why a theorist should pay regard to the common understanding. First, the account produced needs to be intelligible to the community it addresses. Second, as social institutions are constituted by social rules, and shaped by people’s beliefs and dispositions, the common understanding of social institutions will at least partly determine their nature and operation. Finally, the common understanding may provide a pointer towards important features of the institution or principle: an argument based on the ‘wisdom of crowds’ may require us to pay attention to what people think is significant and valuable, even if we struggle to see this ourselves. The paper then considers the limitations of these arguments. Though they all show a role for the common understanding in accounts of institutions and principles, none are decisive: there is latitude for theorists to depart from the common understanding and, indeed, to produce successful interpretations of these phenomena such departure is often essential.

Mike Gordon, The Nature of Positivist and Political Public Law
This paper aims to reflect further on claims developed in an earlier article, A Basis for Positivist and Political Public Law: Reconciling Loughlin’s Public Law with (Normative) Legal Positivism (2016) Jurisprudence 449-477. This article sought to establish a conceptual basis for an approach to public law which is both positivist and political, using the work of Martin Loughlin and Jeremy Waldron. In particular, the earlier paper attempted to achieve this through the reconciliation of Loughlin’s ostensibly anti-positivist theory of ‘public law as political jurisprudence’ with the normative legal positivism articulated by Waldron.

The present paper will develop these claims further, and confront more directly three key issues concerning the nature of positivist and political public law. First, the paper will consider the availability and coherence of the model of positivist and political public law outlined in the earlier article. Second, it will reflect on the purpose and implications of such an approach to public law. And third, the paper will examine the place and value of a normative approach to public law of this kind on the spectrum of constitutional theories.

David Dyzenhaus, The Constitution of Authority and the Authority of Constitutions
My paper will discuss HLA Hart’s and Hans Kelsen’s theories of constitutionalism. On the surface, Hart had little to say about this topic, perhaps because he was writing in the context of a legal order in which Parliament is held to be supreme, so that it can make any law it pleases. In addition, one might think that the fact that he was writing well before the surge in constitutionalism of the late twentieth century explains his lack of attention. Finally, there is, of course, his theoretical position that a constitution in the sense of an entrenched bill of rights is not necessarily a component of legal order, and so there is no need for general legal theory to pay attention to this topic. But he was very much concerned with the topic of how legal authority gets constituted – indeed, the whole argument of The Concept of Law is devoted to it. Kelsen, in contrast, had a lot to say about constitutionalism, which could be explained by the context in which he wrote in the 1920s and 1930s, which he had himself helped to create by being one of the designers of the Austrian Constitutional Court as well as a judge on its first bench. But, in my view, Kelsen’s attention to the topic has more to do with his quite different theory of the constitution of legal authority. A comparison of the two will, I hope, help to bring to the surface Hart’s more implicit theory of constitutionalism and to illuminate the connection between constitutional law and moral legitimacy.

Graham Gee, Is Public Law Ideological?
Ideology is one of the most ubiquitous and persistent concepts in political thought. In recent years, ideology has re-emerged as an important and respectable topic of study within political theory. This is due in large part to the work of Michael Freeden, who has argued that ideologies are distinct intellectual phenomena that warrant academic investigation, and in this he has challenged the negative connotations so often ascribed to ideologies. For Freeden and a burgeoning number of political theorists, the study of ideology is the source of important insights into the nature and working of the political world. In public law thought, however, ideology remains little more than a derogatory label applied (normally without much reflexivity) to propositions dismissed as partial, limited, distorted and doctrinaire. There is scant evidence that public lawyers view the study of ideology as a way to enrich our understanding of the political world – and, of course, the role of law and legal actors within it. In this paper, I begin by reflecting on some possible reasons why public lawyers neglect the study of ideology. I then outline the main lessons that public lawyers can draw from writings on ideologies by political theorists. These lessons are important, I argue, because public law thought in the UK has taken ‘an ideological turn’ in recent years. My argument is not that all public law thought is ideological, but that to varying degrees most such thought has ideological dimensions, with these dimensions both more visible and more influential as a result of rapid and far-reaching constitutional change. This ideological turn demands careful examination, and not least to recognize its potential as well as its pitfalls. I conclude with some suggestions on what this ideological turn – and, by extension the study of ideologies that it invites– might suggest about future directions in public law thought.
Peter Cane, Constitutional Law, Theory and History
This paper will explain the theoretical foundations of a planned Cambridge Constitutional History of the United Kingdom. Matters covered will include the temporal dimension of (constitutional) law and its relationship to the history of (constitutional) law; the relationship between constitutions and constitutional law; and the relevance of law’s normativity to the telling of its history. The paper will contribute to themes 4 and 5 of those proposed by the organisers and also, perhaps, glance sideways at theme 3.

Aileen Kavanagh, Keeping it real in Constitutional Theory
In UK public law scholarship, a distinction is often drawn between descriptive and normative claims. According to this distinction, descriptive scholarship merely describes what the law is, whereas normative scholarship contains arguments about what law ought to be. Embedded in this distinction is the suggestion that the former task is easy, pedestrian and unexciting. Description is the lowly domain of the ‘black letter lawyer’. In contrast, the intellectual high road is paved with normative claims about what ought to be. This road takes us to the exciting and heady atmosphere of constitutional theory. In my paper, I will argue that constitutional theory cuts across this distinction between descriptive and normative, between what is and what ought to be. My argument is that constitutional theory should be constrained by and grounded in constitutional practice. There should be an adequate degree of ‘fit’ between the theory and practice. On this view, constitutional theory is an analytical enterprise, which combines an understanding of constitutional practice as it is, with an appreciation of the ideals to which those practices aspire.

Jeff King, The Role of Facts in Constitutional Theory
The central contention of this paper is that empirical studies and political science have vastly more insight to offer than most constitutional theorists are ready to admit. Constitutional theory is centrally concerned with politics. Politics is the art of the possible. And possibilities are real world phenomena. Such phenomena concern questions of causation, of social facts, and predictions or assumptions about the feasibility of various arrangements. The best constitutional theory will recognise the significance of these issues and should accord a significant role to empirical and historical analysis. However, we see a different temptation, especially among lawyers, namely, either to retreat to pure or ideal theory on the one hand, or to consider patterns of caselaw to be an empirical dataset on the other. But neither approach can be defended in the long run. I will illustrate these ideas with examples that compare the work of noted theorists such as Rawls, Dworkin and Waldron with lesser read but often more insightful studies by writers like Bellamy, Tierney, Lijphart and Habermas.

Trevor Allan, What makes a proposition of (British) constitutional law true?
A proposition of British constitutional law is true when it is affirmed by a theory of justice implicit in, or extrapolated from, the general corpus of public law, regarded as a unified and coherent whole. Judicial precedent plays a critical role, providing a series of relatively stable points of convergence between lawyers’ competing interpretative theories. An analogy with Rawlsian reflective equilibrium is (contra Waldron, Alexander et al.) appropriate and illuminating. We seek harmony between the precedents (cases widely taken to be correctly decided) and the general principles that taken together justify those decisions, critically examining each in the light of the other. This is the most important sense in which we have a common law constitution: the law is determined by the discourse of reason exemplified by common law adjudication at its best. A legal proposition is true, not only because it is affirmed by the theory of justice implicit in the general corpus of rules and principles, but also because that theory of justice is morally correct—correct, at least, in the sense that it underpins the legitimacy of state coercion in the name of law. Legal principles have no power to bind us unless they are (contra Dworkin) genuine moral principles, consonant with our convictions about the nature and limits of legitimate government. If we think that respect for basic human rights is a condition of legitimate government, worthy of our allegiance, it follows that such respect must also be part of any interpretative justification of the body of current law. And while such rights may be usefully encoded in a bill of rights (or Human Rights Act), they are fundamentally common law rights—implicit elements of the theory of constitutional law. In a common law legal order moral disagreement is resolved (or attenuated) by reasoned deliberation, converting a clash of competing ideologies into argument over the appropriate way to understand an inherited tradition. Legal interpretation is necessarily a collective endeavour, depending on genuine debate between participants in a common practice. A common practice can be sustained only if each interpreter seeks convergence, offering arguments addressed to other participants, respectful of their differing experience and understanding of the shape and history of the practice. But truth or correctness is nonetheless finally a matter of individual conscience: every legal judgment carries an affirmation that the enforcement of the law, thus conceived, is morally justified. (Personal integrity and Dworkinian political integrity are closely aligned.) So legal judgment replicates the dialogic and ‘protestant’ dimensions of moral judgment, underlining the character of legal judgment as (sharply focused, contextual) moral judgment.

Dimitrios Kyritsis, Constitutional Law as Legitimacy Enhancer
This paper sets out the methodological tenets of moralised constitutional theory. According to moralised constitutional theory the purpose of constitutional law is to buttress the legitimacy of a political regime by furnishing standing assurances that government power will be used properly. Although moralised constitutional theory maintains that contentious constitutional law issues are ultimately determined...
by principles of political morality, it is compatible with both legal positivism and anti-positivism. Moreover, it does not ignore either the history of different legal systems or considerations of political exigency to which constitutions are also sensitive. But it insists that the overarching reason history and political exigency matter is a moral one. Nor does moralised constitutional theory block reform. It is only meant to answer the pressing moral question under what conditions state coercion is warranted here and now.

Sarah Nason, Constitutional Methodology: Normative Reconstruction and Empirical Disenchantment

The divide between what is and what ought to be, between description and evaluation, and between facts and values, has preoccupied Western thought. These distinctions bear on whether descriptive and normative theory, and empirical legal studies, are equally viable and valuable methods of constitutional research. I defend a constructivist method bringing together traditional tools of legal theory with those of quantitative and qualitative empirical research. The method is constructive in that the relation between theory and empirical data is not one of pure deduction or pure induction, but of laying principles over practices and acknowledging the organic inter-action between these knowledge bases.

Legal theorists and empirical scholars are concerned with the basic data of law; the beliefs attitudes and opinions of those subject to it. Whilst legal theorists tend to rely on their common sense intuitions about this data, empirical scholars interrogate it more deeply and systematically, both groups then have to make sense of what the data really means. I propose a three-stage methodology; the first is to outline manifest interpretations – these are interpretations based on informed intuition; the second stage uses these manifest interpretations as a starting point for developing empirical studies that result in the production of operative interpretations; the third stage is to develop a target or aspirational interpretation that fits with the operative interpretations and provides the best justification of them.

To date I have used this method to develop an interpretation of judicial review for the advancement of justice and good governance; this interpretation accepts the truth and importance of many aspects of legal and political constitutionalism (as they relate to judicial review) but also better fits with and justifies current Administrative Court practice. The next piece of the puzzle I aim to collect is broader administrative justice. Such remains the Cinderella of UK legal systems, and is beset by ongoing major changes to our constitutional architecture, including to the balance of power between state institutions and how this impacts on the daily lives of citizens. It is ‘where the rubber meets the road for constitutionalism’, and hence where most of the data of legal practice (on which philosophers and empiricists alike depend) originates. Before outlining these specific projects, I go back to first principles of methodology in relation to jurisprudence and empirical legal research to mount a sustained defence of my constructive interpretative strategy.


The distinction between spontaneous order and planned order has long influenced thinking in both political economy and constitutional theory. But the work of Richard Sennett and others suggests that a third option exists: improvisation. In an improvised order, unlike in a spontaneous one, actors consciously try to co-ordinate their actions with those of others, but unlike in a planned order, they use only the material and tools immediately to hand. Improvisation is the creativity of those who use what other people make, not the creativity of those who design from scratch. The parallel between improvisation and common law processes is very strong, but also that between improvisation and the process of UK constitutional reform over the past 20 years. Interpreting the British constitution as an improvised order thus has immediate attractions, but one should be careful not to leap into interpreting everything as improvisation. Methodological issues arise from asking how observers can distinguish improvisation from non-improvisation and how to go about investigating the processes of improvisation. On the first issue important variables include the degree of conscious co-ordination and the degree to which actors engage in processes similar to those characteristic of design in other fields. On the second issue, thick ethnographic methods might be appropriate but a case exists for ‘thinner’ case study methods reminiscent of Llewellyn and Hoebel’s Cheyenne Way.

Stuart Lakin, The Character of Constitutional Disagreement

(1) What makes any claim about the British constitution correct or incorrect? (2) Can people disagree about the answer to (1)? (3) If so, what is the character of such disagreements, and how can we resolve them? (4) Given our answers to the three preceding questions, which claims are true of the constitution?

My aim in this paper is to address these four questions. I do so with particular reference to three well known sets of claims about the British constitution: Goldsworthy’s Hartian defence of parliamentary sovereignty, common law constitutionalism, and political constitutionalism. My core thesis responds to the second and third of my questions. I contend that disagreement about (1) is (2) inescapable and (3) interpretative in character. If these responses are correct, then the three sets of claims compete in a way that few people acknowledge. They compete in terms of the capacity of their underlying moral theories to explain the salient features of the constitution. In defending constitutional interpretivism, I reject several other constitutional methods based, respectively, on logic, history, conceptual analysis and descriptive sociology. Each method, I argue, is stung by the same misunderstanding of the relationship between facts and values.
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