'A certain shadowy totality': In search of the material constitution of the United States*

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Abstract

Constitutional law features prominently in the political culture of the United States, but there exists no sustained and robust tradition of theorising the material constitution of the polity. Most contemporary constitutional theorists remain committed to what Du Bois referred to as 'constitutional metaphysics' in his *Black Reconstruction*. Instead of attending to historically specific and determinate social relations, such theorists emphasise putative 'original public meanings' or an accretive 'living constitution'. Alternative possibilities for constitutional theory may be identified by reappraising the insights and limitations of older analyses of American constitutionalism by Beard, Llewellyn, and Hartz. These possibilities are not premised on the fetishisation of constitutional meaning, on fidelity to the framers' white supremacist and antidemocratic project, or on a commitment to the notion that the constitution is perpetually perfectible.

Keywords: Beard, Charles A.; fetishism; Du Bois, W. E. B.; Llewellyn, Karl N.; originalism

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[I]t is precisely the immersion in the concretions that allows us to move beyond the merely factual.[1]

Introduction

The study of the constitution of the United States has made little progress since the publication of W. E. B. Du Bois' *Black Reconstruction* in 1935.[2] Analysing the legislative debates leading up to the drafting of the Fourteenth

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[1] Theodor W. Adorno, *Philosophical Elements of a Theory of Society* (Cambridge: Polity Press, 2019), 11.

[2] *Black Reconstruction: An Essay toward a History of the Part Which Black Folk Played in the Attempt to Reconstruct Democracy in America, 1860–1880* (New York: Harcourt, Brace, 1935).

Amendment in the aftermath of the Civil War, Du Bois explicitly critiqued the fetishised 'constitutional metaphysics' that inhibited most participants' capacities for apprehending constitutional reality[3]: 'with incantation and abracadabra, the leaders of a nation tried to peer back into the magic crystal, and out of a bit of paper called the Constitution, find eternal and immutable law laid down for their guidance forever and ever, Amen!'[4] The constitution—manifestly antidemocratic, transparently racist, and designed and intended to accommodate slavery and to protect private property—had plainly disintegrated. Four years of industrialised warfare and the collective rebellion of Black slaves had seen to that. And yet virtually all of those who drafted, debated, or voted on the Reconstruction Amendments persisted in claiming that the constitutional order had been neither suspended nor disrupted. Du Bois understood, of course, that such performances had a purpose. They ensured that the democratisation of American society was limited, tentative, and vulnerable. The constitutional renovation that took place after Appomattox was quickly effaced and smoothed over. The Fourteenth Amendment was even de-fanged by judicial fiat in 1873.[5] What Du Bois dubbed 'abolition-democracy'[6] was suppressed not just through the institutional and social demolition of the fledgling democracies in the southern states, but also through the concerted restoration of many aspects of antebellum constitutionality. The rapid destruction of the first genuine attempt at institutionalising democracy in the US was carried out under the banner of constitutional continuity—the banner, that is, of the priority of constitutional abstractions over historical social reality. For neither the first nor the last time, white supremacy draped itself in the garlands of constitutional fidelity.[7]

The slippery divergences among constitutional rhetoric, constitutional myth, and constitutional politics during and after Reconstruction suggest that neither constitutional text nor constitutional doctrine can serve as reliable guides to apprehending constitutionalism as a set of historically specific practices. Du Bois evinced a subtle understanding of this problem in his critique of the revivification of antebellum constitutionality. This cannot be said of many of those who came after him, however. Constitutional metaphysics continues to pervade constitutional culture in the US today. It is a signal example of the 'reified authority'[8] that is constitutive of the domination and unfreedom characteristic of contemporary society. It naturalises the racialised hierarchies,[9] omnipresent violence,[10] and structural (that is, abstract and impersonal)

[3] Allison Powers, 'Tragedy Made Flesh: Constitutional Lawlessness in Du Bois's *Black Reconstruction*', *Comparative Studies of South Asia, Africa and the Middle East* 34, no. 1 (2014): 106–25.

[4] Du Bois, *Black Reconstruction*, 267.

[5] *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1873).

[6] Du Bois, *Black Reconstruction*, 83ff.

[7] Cf Powers, 'Tragedy Made Flesh'.

[8] Chris O'Kane, 'Reification and the Critical Theory of Contemporary Society', *Critical Historical Studies* 8, no. 1 (2021): 57–86.

[9] Rogers M. Smith, 'Beyond Tocqueville, Myrdal, and Hartz: The Multiple Traditions in America', *The American Political Science Review* 87, no. 3 (1993): 549–66.

[10] See generally Robert M. Cover, 'Violence and the Word', *Yale Law Journal* 95, no. 8

domination[11] that have been, and still are, constitutive of contemporary society. American constitutional theory is marked by a continued indulgence in constitutional metaphysics, not the self-reflexive critique of the social relations that make it possible. Many contemporary theorists treat constitutional norms and meanings as self-subsistent and socially autonomous. They would deny such a characterisation, of course; in Hartian terms, the rules of recognition[12] that they propose are not merely formal but incorporate normative or practical considerations as well. And yet such rules occlude and inhibit the apprehension of constitutionality as an ensemble of practices, concepts, and categories that are mutually constitutive with society as a whole.[13]

US constitutional theory, in other words, is distinguished by a widely-shared commitment to understanding constitutionalism as a 'legal technology for structuring state power',[14] not as a complex of thought and practice that both posits and is manifested in definite social relations. This can be seen in most theorists' inattention to the mutually-constitutive character of the seemingly-distinct spheres of politics and economics; to the violence and domination through which constitutional law is made and reproduced; and to the imbrication of the American constitutional order with the totality of world market relations. If constitutionalism is to be apprehended in its historical specificity—rather than in normative prescriptions for how it should be ordered—then most American constitutional theory will be of little help. Apprehending the constitution as an ensemble of determinate social relations that are the actual content of the forms of historically definite structures and processes is a task best accomplished through an approach to critical theory (understood as a critique of contemporary society's essential determinations or 'social forms'[15])—a task that does not simply presuppose the adequacy of liberal legality or the anteriority of legal norms.[16] An adequate critique along such lines would have the potential to destabilise the constitutional metaphysics derided by Du Bois and to open up the possibility of achieving fuller and deeper explanations of the US as a polity.

(1986): 1601–29.

[11]Tony Smith, *Beyond Liberal Egalitarianism: Marx and Normative Social Theory in the Twenty-First Century* (Leiden: Brill, 2017), 110–30.

[12]H. L. A. Hart, *The Concept of Law*, 2nd ed. (Oxford: Oxford University Press, 1997), 94–110 and passim.

[13]Rob Hunter, 'Marx's Critique and the Constitution of the Capitalist State', in *Research Handbook on Law and Marxism*, ed. Paul O'Connell and Umut Özsu (Cheltenham: Edward Elgar, 2021), 190–208.

[14]Aslı Bâli and Aziz Rana, 'Constitutionalism and the American Imperial Imagination', *University of Chicago Law Review* 85, no. 2 (2018): 257.

[15]Smith, *Beyond Liberal Egalitarianism*, 73.

[16]Moishe Postone, 'Critique, State, and Economy', in *The Cambridge Companion to Critical Theory*, ed. Fred Rush (Cambridge: Cambridge University Press, 2004), 165–93. Critical theory is concerned with the inverted and antagonistic social world of modernity, an adequate understanding of which is possible only through the apprehension of its historically specific social forms through the critique of political economy. For the latter, see Michael Heinrich, *An Introduction to the Three Volumes of Karl Marx's* Capital (New York: Monthly Review Press, 2012); Werner Bonefeld, *Critical Theory and the Critique of Political Economy: On Subversion and Negative Reason* (London: Bloomsbury, 2014); Smith, *Beyond Liberal Egalitarianism.*

This chapter examines several strands of American constitutional theory. Several early attempts—by Charles Beard, Karl Llewellyn, and Louis Hartz—provide instructive examples; any attempt to theorise the constitution's historical specificity must begin by examining them. However, the main contenders in contemporary theory—originalism and living constitutionalism—do not illuminate many of the historically specific features of constitutionality in the US. Moreover, most forms of US constitutional theory succumb to constitutional fetishism[17] and treat constitutional forms, meanings, or ideals as self-subsistent, natural, or timeless. Those constitutional theories that do acknowledge the irreducibly social character of constitutionalism—specifically, recent contributions to originalism and to living constitutionalism—nevertheless rest on contradictory foundations. The former hypostatises constitutional meanings as trans-historically valid abstractions; the latter is predicated on a claim for the ever-possible perfectibility of the constitution. Neither can fully affirm that constitutional meanings are always mediated by context and theory; both are ill-equipped to confront the determinate facts of American constitutionalism without imposing anterior normative frameworks upon them. Despite originalism's emphasis on the purported facts of fixed constitutional meanings, and despite living constitutionalism's emphasis on the dynamics of political struggle and public opinion, both accounts remain ensnared by constitutional fetishism.

The social constitution of the material constitution

I propose that the concept of the 'material constitution'[18] is best developed as part of a form-analytic approach to theorising the state. The 'materiality' in question is that of determinate and historically specific relations among social individuals (I do not have in mind a reductive or economistic materialism that treats purported and unmediated 'interests' as brute facts.) The recognition of the constitution as an historically specific ensemble of practices, concepts, and categories is contrasted with the notion of a constitution consisting of self-subsistent abstractions. Understanding the constitution as it obtains in history requires that we refrain from begging questions with respect to its particular content and social appearance.

A polity's actual constitution—consisting of an ensemble of practices, concepts, and categories—is an appearance of the form of the state. The state itself is the historically specific politico-juridical form of definite social relations.[19] The constitution is the appearance—that is, the specific historical existence—of that

[17] Franz L. Neumann, *The Democratic and the Authoritarian State: Essays in Political and Legal Theory* (Glencoe, Illinois: Free Press, 1957), 199.

[18] Marco Goldoni and Michael A. Wilkinson, 'The Material Constitution', *Modern Law Review* 81, no. 4 (2018): 567–97.

[19] Alexander Neupert-Doppler, 'Society and Political Form', in *The SAGE Handbook of Frankfurt School Critical Theory*, ed. Beverly Best, Werner Bonefeld, and Chris O'Kane, vol. 3 (London: SAGE, 2018), 816–33; Werner Bonefeld, 'On the State as Political Form of Society', *Science & Society* 85, no. 2 (2021): 177–84.

form in particular practices, in actual institutions, and in conceptually-mediated modes of acting, thinking, and knowing. To understand the constitution of a polity is to understand definite social activity, both as it obtains in history and as it is mutually constitutive with the particular concepts and categories that mediate it. To understand the constitution is to apprehend real social individuals' thought and action. It is a matter of the critique of contemporary society as it exists, not the normative prescription of society as it might be. In the case of the United States, such a critique must necessarily account for and proceed from the structuration of society through capitalist production and exchange relations, racism and settler-colonialism, and integration with the world market.[20] Indeed, it must proceed from the recognition of the observations that Du Bois stated plainly and that most subsequent students of the constitution have ignored.

Constitutions obtain in history through the continuous and contingent activity of social constitution—that is, the contradictory and antagonistic process through which society is reproduced. By 'social constitution' I refer to the contradictory and antagonistic processes whereby the reproduction of society 'manifests itself in the form of' fetishised (that is, seemingly natural) social forms and categories that mediate subjects' thought and action; such forms 'assert themselves behind the backs of the acting subjects' who themselves give those forms determinate reality in their own thought and action.[21] (I do not refer to approaches to constitutional theory that treat constituent power as an ongoing and immanent feature of established constitutional orders.[22]) It is with reference to the concept of social constitution that a polity may be understood as an appearance of a social form, the determination of which is found in the activity of real social individuals. To describe a constitution as socially constituted is to refer to the determinate reality of concepts that both mediate and are reproduced by definite and historically specific social relations. Constitutional documents do not themselves cause the historical specificity of determinate social relations. Instead, constitutionality *qua* categories, concepts, and practices is constituted through a continuous and contradictory 'process of becoming'.[23] It is reproduced through the activity of political subjects along with the simultaneous (and typically depoliticising) mediation of social relations by constitutionality.[24]

In contrast, most American constitutional theory is distinguished by the special attention given to constitutional review of legislation—a judicial prerogative with a central role in the political development of the US.[25] As such, US constitutional theories tend to be either formalist, textualist, or 'normativist'[26]

[20] An adequate understanding of constitutionalism is possible only through attending to the critique of capitalism as abstract social domination. See Hunter, 'Marx's Critique'.

[21] Bonefeld, *Critical Theory*, 21.

[22] Paul Blokker and Chris Thornhill, eds., *Sociological Constitutionalism* (Cambridge: Cambridge University Press, 2017).

[23] Goldoni and Wilkinson, 'The Material Constitution', 581.

[24] On depoliticisation and the reproduction of constitutionality, see Hunter, 'Marx's Critique'.

[25] Keith E. Whittington, *Repugnant Laws: Judicial Review of Acts of Congress from the Founding to the Present* (Lawrence, Kansas: University Press of Kansas, 2019).

[26] Martin Loughlin, 'The Concept of Constituent Power', *European Journal of Political*

in character. This is in no small part due to the construction of constitutionality as a fundamentally jurisprudential domain. The entrenchment of judicial supremacy—pursued in the defence of the agendas of particular political coalitions, and generally supported by successful national coalitions, especially as they are expressed through presidential politics[27]—is accompanied by the continued gravitational pull of the 'counter-majoritarian difficulty'.[28] An obsession with paradox attends much of the activity of US constitutional theorists who seek to reconcile majoritarian legitimation with the acutely antidemocratic features of the formal constitution.[29]

US constitutional theory does little to investigate or unsettle the reification and hypostatisation that subtend constitutionalism as a cultural practice. It is still as fetishistic as it was in Du Bois's day. It lacks an adequately developed vocabulary for the apprehension of constitutionalism as the activity of real social individuals. To hear the practices and concepts of constitutionalism described in terms of the real appearances of definite social relations may come as a shock to 'those for whom the concepts of the bourgeois social sciences ("society", "norms", "equilibrium", "legitimacy" etc.) are so familiar that their reality is almost tangible'.[30] But the concepts that populate constitutional thought are not autonomous ontological constituents of our world. They are not simply illusory, but they are certainly neither natural nor self-subsistent—as so many constitutional theorists suppose them to be. They may be explained, understood, and critiqued only with reference to the broader array of social relations of which they a part. I now turn to the consideration of some early attempts to contribute to such a critical project.

Beard, Llewellyn, and Hartz

This section surveys three thinkers from the first half of the twentieth century—Charles Beard,[31] Karl Llewellyn,[32] and Louis Hartz[33]—who departed from conventional accounts of American constitutionalism. The objects of their inquiries were neither constitutional provisions nor doctrines. Beard

Theory 13, no. 2 (2014): 218–37.

[27] Keith E. Whittington, *Political Foundations of Judicial Supremacy: The Presidency, the Supreme Court, and Constitutional Leadership in U.S. History* (Princeton, New Jersey: Princeton University Press, 2007).

[28] Alexander M. Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (Indianapolis, Indiana: Bobbs-Merrill, 1962), 16–17.

[29] Nimer Sultany, 'The State of Progressive Constitutional Theory: The Paradox of Constitutional Democracy and the Project of Political Justification', *Harvard Civil Rights–Civil Liberties Law Review* 47 (2012): 371.

[30] Simon Clarke, 'Marxism, Sociology, and Poulantzas's Theory of the State', in *The State Debate*, ed. Simon Clarke (Houndmills: Macmillan, 1991), 85.

[31] *An Economic Interpretation of the Constitution of the United States* (New York: Free Press, 1986 [1913]).

[32] 'The Constitution as an Institution', *Columbia Law Review* 34 (1934): 1–40.

[33] *The Liberal Tradition in America: An Interpretation of American Political Thought since the Revolution* (New York: Houghton Mifflin Harcourt, 1955).

pursued a relatively rare approach to understanding the constitution, viewing it as the product of social conflict rather than deliberation over principles and institutional design. But his analysis was 'materialist' only in the most limited and reductionist sense of the term, as I argue below. Llewellyn, in turn, gave a rough-hewn but perceptive articulation to the notion of the 'living constitution'. He remained focused on the pragmatics of judicial review, but he emphasised that the constitution is identical neither with the constitutional text nor the extant body of doctrine. Finally, Hartz placed a greater emphasis on political thought than either Beard or Llewellyn, who were preoccupied with economic interests and judicial decision-making, respectively. Hartz's explanation of American political culture—in terms of an historically invariant liberalism—attended to the articulation of politics through categories and modes of thought, but it did not offer explanations in terms of definite social relations.

'Beard's method was unrefined in details'[34]; he focused on the economic and sectional interests of the framers themselves.[35] His account, as well as Hartz's monochromatic portrait of a liberal polity, are inadequate causal accounts of constitutional practice (the creation and the reproduction of constitutionality); Llewellyn's rather more modest argument did not even attempt to provide such an account. Precisely because they sought to offer critical explanations of the constitution, however, all three warrant more attention than is customarily given to them in contemporary constitutional theory.

Beard described the constitution as 'an economic document'[36] rather than as a politico-philosophical document. The interests of the framers determined the drafting and ratification of the constitutional document. For Beard, the political content of that document—and the procedural chicanery through which it was created and ratified[37]—represented a victory for financial and commercial élites. Far from being a principled compromise, the creation and ratification of the constitution amounted to 'a genteel scam'[38]—an anti-democratic measure taken by the holders of specific kinds of wealth in order to secure their property and profits against policies that might threaten them. The framers' fear of democracy was best understood through the lens of 'economic determinism', which Beard considered 'as nearly axiomatic as any proposition in social science can be'.[39] He held that such an analytic frame is a necessary corrective against 'the juristic view' that imagines that the constitution is 'the work of the whole people' and

[34]Richard Hofstadter. 'Beard and the Constitution: The History of an Idea', *American Quarterly* 2, no. 3 (1950): 195–213.

[35]'Beard occasionally seemed to be charging the Framers with lining their own pockets... At other times, however, he suggested only that the Framers advanced the economic interests of the class to which they belonged...' Michael J. Klarman, *The Framers' Coup: The Making of the United States Constitution* (New York: Oxford University Press, 2016), 377.

[36]Beard, *Economic Interpretation*, 152 ff.

[37]Beard, 239–52.

[38]William Hogeland, *Founding Finance: How Debt, Speculation, Foreclosures, Protests, and Crackdowns Made Us a Nation* (Austin, Texas: University of Texas Press, 2012), 6.

[39]Beard, *Economic Interpretation*, 15; 15, n. 1.

'bears in it no traces of the party conflict from which it emerged.'[40]

The term 'party conflict' reveals the limits of Beard's argument, which was constrained by his methodological individualism. He averred that 'no movement by a mass of people can be correctly comprehended until that mass is resolved into its component parts'.[41] Moreover, by restricting his focus to the conflict between élite 'parties', Beard's analysis occluded the broader social conflict of which that particular party conflict was only one particular instance. He indefensibly effaced slavery in his account; by failing to analyse slavery with precision and sustained emphasis, he also failed to provide an adequate account of the creation of the constitution as a victory for the possessors of wealth rather than for the members of sectional parties.[42] Moreover, his critique was limited to the constitutional text, its drafting, and its ratification; he was not concerned with actual historical constitutional practice. But Beard's argument remains valuable as an early example of critical (rather than celebratory) constitutional analysis. It is limited and incomplete; but these limits must be surpassed, rather than used as an excuse for dismissing critical constitutional scholarship.[43] Who will deny that the US constitution is 'based upon the concept that the fundamental private rights of property are anterior to government and morally beyond the reach of popular majorities'?[44] But this is not enough to ground a critique of the constitution, not least because it misses so much of what distinguishes constitutional practice in the United States.

Llewellyn counted Beard among those students of politics and law who were more attentive to their actual practice than their formal specifications.[45] Llewellyn attempted to manifest this attentiveness by distinguishing between constitutionalism in an institutional sense and 'mere working government'; he held that the former is a 'penumbra' of beliefs, understandings, and conventions that accumulates (and may, perhaps, dissipate) over time and through practice.[46] The metaphor of an institution contrasts sharply with the conventional American conception of a constitution as a textually-specified framework or body of rules. Llewellyn advanced a distinct criterion for recognising constitutional content: continuous practice, not textual fidelity or normative prescription, is the modality through which constitutional content is determined. For Llewellyn, the constitution as an institution does not obtain

[40] Beard, 11.

[41] Beard, 253.

[42] Cf Staughton Lynd, 'On Turner, Beard and Slavery', *Journal of Negro History* 48 (1963): 235–50.

[43] Beard has been the target of 'an aggressive, largely successful effort... to discredit and dismiss him'. Hogeland, *Founding Finance*, 6.

[44] Beard, *Economic Interpretation*, 324.

[45] Llewellyn, 'The Constitution as an Institution', 2.

[46] Llewellyn, 26ff. It is interesting to note that Llewellyn used the term 'penumbra' to denote a relatively determinate ensemble of practices and understanding, while Hart later used the term to describe a region of legal *indeterminacy* outside the perimeter of 'a core of certainty'. Hart, *The Concept of Law*, 123. The term has also had a chequered history in judicial decision-making; see Louis J. Sirico Jr., 'Failed Constitutional Metaphors: The Wall of Separation and the Penumbra', *University of Richmond Law Review* 45, no. 2 (2011): 459–90.

historically in the form of a fixed body of rules or a mesh of power relations, but rather in 'a certain shadowy totality'[47]—a dynamic yet path-dependent pattern of continually developing constitutional meaning. This totality may not be identified with any text. It is nevertheless socially determinate, and its development exerts a tendential influence on judicial outcomes. In Llewellyn's sketch, such development falls within the penumbra of the living and unwritten constitution that is non-identical with the textual constitution. Our recognition of the actuality of such relations does not necessarily give us interpretive guidance in hard cases, but it does give us good reason to believe that judges do not rely solely on textual materials when making decisions.

Llewellyn may be glossed as saying that a polity is constituted socially, not textually. The social constitution of reality is necessarily antagonistic and contradictory. Institutions may persist, but that persistence is reproduced through conflict and contradiction; the ramifications for the determinacy of constitutional meaning are obvious. But contingency and conflict do not efface determinacy altogether. Llewellyn's penumbra is no less real for having been constituted through conflict. Llewellyn argued that the United States 'have [an unwritten] Constitution, and that nobody can stop their having such a Constitution, and that whether anyone likes that or not, the fact has been there for decades. . . '[48] Llewellyn's narrow focus on the juridical—and *a fortiori* his conception of social constitution as a mere process of institutionalisation—renders his account inadequate as a material theory of constitutionalism. Even so, his insight that constitutionality is made and re-made through contestation and conflict is generative and compelling.

Hartz emphasised the politically constitutive role of concepts, but he did not understand them to be historically specific and determinate categories mediating thought and social behaviour. That is, he did not understand them to be constituted through definite historical processes of conflict and antagonism. Instead, he offered a ' "single factor" analysis'[49] of the American polity, characterised by an absent feudal past and a pervasively liberal political culture (among its élite, at least, to which his 'single factor' analysis was largely restricted). His argument hypostatises liberalism and effaces political subjects other than normative citizens of the settler-colonial polity: propertied white men. Lacking an account of how liberalism was and is socially constituted, Hartz could not offer an adequate explanation of how and why it came to dominate and define American politics. Unlike Beard, Hartz recognised the centrality of racism and slavery to the American political tradition, but even these are treated primarily as concepts standing to one side of historical conflict. Violence rarely intrudes in Hartz's account, and even when it does it is quickly brushed aside—as, for example, when he describes the antebellum United States as 'a land where liberalism had destroyed nothing, unless it was the society of the Indians'.[50] He

[47] Llewellyn, 'The Constitution as an Institution', 8.
[48] Llewellyn, 2.
[49] Hartz, *The Liberal Tradition*, 20.
[50] Hartz, 152.

even describes the Civil War not in terms of violence and destruction but in terms of 'the strange agonies the Southerners endured trying to break out of the grip of Locke and the way the nation greeted their effort'[51]—a telling contrast with Du Bois's own account of the struggle for abolition.

Originalism and its discontents

Despite their attentiveness to certain aspects of constitutional practice, both strands of contemporary American constitutional theory—originalism and living constitutionalism—have moved further away from Beard's, Llewellyn's, or Hartz's attentiveness to constitutionalism as a form taken by definite social relations. Originalism rests on a (paradoxically) ahistorical conception of constitutional meaning. Meanwhile, living constitutionalism emphasises constitutional practice—but it imposes exogenous normative standards in order to distinguish valid constitutional changes from invalid departures from what Llewellyn called the 'certain shadowy totality' of established practice.

Originalism

Originalism is grounded in the contention that constitutional meanings are trans-historically stable and interpretively recoverable. It is intimately linked to conservative efforts to re-shape the contours of the American state (particularly its administrative apparatus) during and beyond the second half of the twentieth century.[52] It is a 'political practice' whose 'ascendancy', according to two prominent critics, 'does not reflect the analytic force of its jurisprudence, but instead depends upon its capacity to fuse aroused citizens, government officials, and judges into a dynamic and broad-based political movement.'[53]

A contemporary cohort of 'new originalists' emphasises public constitutional meaning over the original intentions of constitutional framers or the putative plain meaning of the constitutional text.[54] They focus on the publicity of provisions' original meanings at the moment of their 'fixation' through writing and ratification.[55] The particular intentions of individual framers do not disclose constitutional meanings. Such a task requires investigating historical facts

[51] Hartz, 177.

[52] Steven M. Teles, *The Rise of the Conservative Legal Movement: The Battle for Control of the Law* (Princeton, New Jersey: Princeton University Press, 2012); Amanda Hollis-Brusky, *Ideas with Consequences: The Federalist Society and the Conservative Counterrevolution* (New York: Oxford University Press, 2015); Paul Baumgardner, 'Originalism and the Academy in Exile', *Law and History Review* 37, no. 3 (2019): 787–807.

[53] Robert Post and Reva Siegel, 'Originalism as a Political Practice: The Right's Living Constitution', *Fordham Law Review* 75 (2006): 549; cf Calvin TerBeek, ' "Clocks Must Always Be Turned Back": *Brown v. Board of Education* and the Racial Origins of Constitutional Originalism', *American Political Science Review* 115, no. 3 (2021): 821–834.

[54] Keith E. Whittington, 'The New Originalism', *Georgetown Journal of Law & Public Policy* 2, no. 2 (2004): 599–613.

[55] Lawrence B. Solum, 'The Interpretation-Construction Distinction', *Constitutional Commentary* 27 (2010): 116.

about speakers, utterances, and their political contexts. Many contemporary originalists also acknowledge that ''[u]ncertainty and indeterminacy are inherent in the originalist approach to constitutional interpretation'.[56] Accordingly, they distinguish between constitutional interpretation[57]—the discernment of original public meanings—and constitutional construction[58]—the elaboration of constitutional meaning (and its translation into constitutional provisions and institutions) in instances of vagueness or ambiguity. Judicial review should be guided by the canons of interpretation, not the vagaries of construction. Interpretation is neither mechanical nor purely procedural; it is a hermeneutic encounter, the outcome of which must not be imagined to be foreseeable or foreordained. Nevertheless, judicial review takes as its object—so new originalists argue—the relatively fixed, public meaning of the constitutional text. The normatively defensible role of judicial review involves the interpretive determination of meaning in order to enforce institutional boundaries and protect individual rights.

Originalism does not apprehend constitutional practice as a moment of a social totality that is suffused by violence, domination, and subordination. Moreover, originalists have been largely untroubled by historiographical objections to the narrowness of originalism's historical vision.[59] It is true that new originalist theories could only be the products of a post-Realist legal academy in which 'the interpenetration of law and politics' is an accepted fact.[60] Few new originalists would deny 'the truism that judges make law'.[61] Nevertheless, contemporary originalists' acknowledgement of the mutual constitution of law and politics is a thin one; they still abstract institutional conflict from social conflict. Moreover, originalism casts constitutional meanings as autonomous abstractions. As such, it cannot apprehend the constitution as both mediating and socially constituted through antagonism and contradiction.

Living constitutionalism

Originalism's opponents insist on recognising 'a living Constitution which completes, alters, aye, and overrides the Document'.[62] Since the advent of

[56]Keith E. Whittington, 'Originalism: A Critical Introduction', *Fordham Law Review* 82 (2013): 403.

[57]Keith E. Whittington, *Constitutional Interpretation: Textual Meaning, Original Intent, and Judicial Review* (Lawrence, Kansas: University Press of Kansas, 1999).

[58]Keith E. Whittington, *Constitutional Construction: Divided Powers and Constitutional Meaning* (Cambridge, Massachusetts: Harvard University Press, 1999).

[59]Calvin TerBeek, 'The Search for an Anchor: Living Constitutionalism from the Progressives to Trump', *Law & Social Inquiry* 46, no. 3 (2021): 860–889. A forceful statement of the historiographical objection may be found in Jack N. Rakove, *Original Meanings: Politics and Ideas in the Making of the Constitution* (New York: Vintage Books, 1996).

[60]Stephen M. Griffin, *American Constitutionalism: From Theory to Politics* (Princeton, New Jersey: Princeton University Press, 1998), 18.

[61]Neil Duxbury, 'Faith in Reason: The Process Tradition in American Jurisprudence', *Cardozo Law Review* 15 (1993): 636.

[62]Llewellyn, 'The Constitution as an Institution', 2.

the Warren Court,[63] 'living constitutionalists have engaged in the defensive[64] justification of left-liberal judicial interventionism.[65] They attempt to show that the unwritten constitution supersedes the written constitution but is nevertheless compatible with or presupposed by the values implicit in the written constitution (the enforcement of which is often understood in terms of moral perfectibility or 'redemption', not textual fidelity).[66] It is reasonable to characterise this project as 'a mood and an anxiety', not a theory or a method.[67] It is not Whiggish, in other words; after all, to describe the constitutional order as living is to acknowledge that it may die.[68]

Living constitutionalism elevates Llewellyn's 'certain shadowy totality' above the documentary constitution. The former must guide interpretive practice, while the latter can neither adequately describe the salient features of contemporary constitutional practice nor explain the histories of struggle and contestation though which it was made. But living constitutionalists lack a fixed interpretive anchor; they can only point to departures from consensuses that are controverted and contested—essentially and necessarily so. They cannot propound consistent methods for distinguishing between those constitutional innovations that are popularly authorised and those that are not. Recourse to contractarian theories of political consent only deepens the problem of fetishism.[69] Living constitutionalists must either make recourse to fetishistic patterns of political thought, such as natural law or hypothetical consent, or else abandon the *teloi* of living constitutionalism—in exchange, perhaps, for the commitments of 'popular constitutionalism'[70] or the contemporary 'law and political economy' movement.[71] Originalists simply deny the actuality of any shadowy totality; but living constitutionalists can only gesture at it, rather than isolate its determinate content.

[63] Cf L.A. Scot Powe, *The Warren Court and American Politics* (Cambridge, Massachusetts: Belknap Press, 2000).

[64] Jack M. Balkin, *Living Originalism* (Cambridge, Massachusetts: Harvard University Press, 2011), 125.

[65] Notable contributions to this literature include Bruce Ackerman, *We the People: Foundations* (Cambridge, Massachusetts: Belknap Press, 1991); Bruce Ackerman, *We the People: Transformations* (Cambridge, Massachusetts: Belknap Press, 1998); Barry Friedman, *The Will of the People: How Public Opinion Has Influenced the Supreme Court and Shaped the Meaning of the Constitution* (New York: Farrar, Straus and Giroux, 2009); David A. Strauss, *The Living Constitution* (New York: Oxford University Press, 2010).

[66] Jack M. Balkin, *Constitutional Redemption: Political Faith in an Unjust World* (Cambridge, Massachusetts: Harvard University Press, 2011).

[67] Ethan J. Leib, 'The Perpetual Anxiety of Living Constitutionalism', *Constitutional Commentary* 24, no. 2 (2007): 370.

[68] Cf Jack M. Balkin, *The Cycles of Constitutional Time* (New York: Oxford University Press, 2020).

[69] Geoffrey Kay, 'Right and Force: A Marxist Critique of Contract and the State', in *Value, Social Form and the State*, ed. Michael Williams (Houndmills: Macmillan, 1988), 115–33.

[70] Mark Tushnet, *Taking the Constitution Away from the Courts* (Princeton, New Jersey: Princeton University Press, 2000); Larry D. Kramer, *The People Themselves: Popular Constitutionalism and Judicial Review* (New York: Oxford University Press, 2004).

[71] Jedediah Britton-Purdy et al., 'Building a Law-and-Political-Economy Framework: Beyond the Twentieth-Century Synthesis', *Yale Law Journal* 129, no. 6 (2020): 1784–1835.

Originalism and living constitutionalism as constitutional fetishisms

Du Bois would have had little patience with today's dominant theories, which also cannot be said to have built upon the contributions of Beard, Llewellyn, or Hartz. Both originalism and living constitutionalism, even in their most sophisticated forms, remain theories of constitutional metaphysics. Neither furnishes sufficient theoretical materials for the apprehension of the constitution as a socially constituted ensemble of practices, concepts, and categories. Despite its notable gains in sophistication—and tendencies toward convergence or at least complementarity with certain accounts of living constitutionalism[72]—originalism cannot ground an adequate account of the US constitution. The chief objects of originalist theory are not political struggles or settlements themselves, but 'fixed' meanings that are specified—with lesser or greater degrees of determinacy—in the constitutional text and are held to codify the content of political settlements. As such, originalism is necessarily counterposed to the apprehension of constitutionality as the specific form of appearance of definite social relations. It is predicated on the trans-historical recoverability of meanings (either subjective or public); it is ultimately defensible only on the basis of insisting on the adequacy of conceptions of meaning and reference that largely predate the twentieth century[73] (although that would at least be consistent with a constitutional theory that presumes that early modern political theory is adequate for the inverted and contradiction-laden contemporary social world).

We are now far from the paths trodden by Beard or Llewellyn—let alone by Du Bois. Originalism is defensible only on the basis of disavowing 'the contribution of society and the contribution of the real world' to 'the determination of reference'.[74] To the extent that it is predicated on the adequacy of the fixation thesis, originalism is a curiously ahistorical—even antihistoricist—theory of the historical translation of meaning.[75] What sincere originalist could affirm Wittgenstein's statement that 'words only have meaning in the stream of life'?[76] Originalists adhere to the claim that at least some meanings—constitutional meanings among them—are essentially untransformed by discursive encounters. As such, they claim the persistence of specific abstractions even in the absence of their reproduction through socially constitutive processes of antagonism and contestation. Moreover, unlike the 'real abstraction' of capital, which mediates contemporary society, the abstractions that originalism concerns itself with—constitutional meanings—are essentially contested concepts, not socially

[72] Balkin, *Living Originalism*; Whittington, 'Originalism: A Critical Introduction'.

[73] Whittington, *Constitutional Interpretation*, 88–109.

[74] Hilary Putnam, 'Meaning and Reference', *The Journal of Philosophy* 70, no. 19 (1973): 711.

[75] Jonathan Gienapp, 'Historicism and Holism: Failures of Originalist Translation', *Fordham Law Review* 84, no. 3 (2015): 935–56.

[76] Ludwig Wittgenstein, *Last Writings on the Philosophy of Psychology*, ed. G. H. von Wright and Heikki Nyman, trans. C. G. Luckhardt, vol. 1 (Chicago: University of Chicago Press, 1996), §913.

objective categories.[77] They are not, in other words, historically specific forms of appearance of determinate social relations. Instead, they are normative statements about how social relations ought to be ordered. Any conceivable new originalist synthesis—combining the fixation thesis, on the one hand, and the insistence on the diachronic interpretability of synchronic public meanings, on the other—is unstable and ultimately untenable. Even if it is granted that the indeterminacy of the meaning of legal texts is bounded,[78] the meaning of any particular text cannot serve as an adequate explanation of the struggles that preceded its inscription, nor as a guide to its application to future cases. The originalist conception of the constitutional order abstracts constitutional meanings from their dynamic historical contexts and presents them as anterior to, rather than constituted through, social relations. This is fetishism of the first order.

Living constitutionalism fares no better. New originalists at least attempt to grapple with the social character of meaning. Such an attempt does not ultimately succeed, inhibited as it is by the commitment of originalists (old and new) to the fixity and (relative) determinacy of meaning—such that originalists trade in hypostatised meanings shorn of specific social contexts. Living constitutionalism, by contrast, is always already fetishistic. The notion of the living constitution requires the imposition of particular normative standards—even if they are exogenous to political practice as it actually obtains in history—in order to determine which constitutional changes are democratically authorised and which are ephemeral (and hence non-authoritative or, indeed, invalid). Originalists are more able than living constitutionalists to tell stories about democratic justification for judicial review—within the US context, that is, in which popular sovereignty is the default normative anchor for democratic legitimacy. One need not grant the truth of originalists' premises (particularly regarding meaning and translation, but also regarding the adequacy of popular sovereignty as a theory of political justification) in order to acknowledge that they have presented a coherent (if not convincing) story of how democratic publics authorise constitutional creation and change—that is, by writing things down. Living constitutionalists cannot offer such a parsimonious protocol for institutionalising constituent power. Even so, new originalists are unable to adequately apprehend constitutional reality as a result of their commitment to the absolute anteriority of constitutional norms with respect to social practice. Living constitutionalists are at least motivated by an awareness of 'the entanglement of facts and value'.[79]

[77] On real abstraction see Chris O'Kane, 'The Critique of Real Abstraction: From the Critical Theory of Society to the Critique of Political Economy and Back Again', in *Marx and Contemporary Critical Theory: The Philosophy of Real Abstraction*, ed. Antonio Oliva, Ángel Oliva, and Iván Novara (London: Palgrave Macmillan, 2020), 265–87. On social objectivity, see Bonefeld, *Critical Theory*, 54–60 and passim; Paul Mattick, *Theory as Critique: Essays on Capital* (Leiden: Brill, 2018), 79–85 and passim.

[78] Lawrence B. Solum, 'On the Indeterminacy Crisis: Critiquing Critical Dogma', *University of Chicago Law Review* 54, no. 2 (1987): 462–503.

[79] Hilary Putnam, *The Collapse of the Fact/Value Dichotomy and Other Essays* (Harvard University Press, 2002), 28–45.

Originalists and living constitutionalists both draw pictures of American society that Du Bois would recognise as caricatures. They ask questions that Beard would dismiss as trivial and Llewellyn would regard as distractions. The originalist conception of constitutional meaning cannot serve as an adequate picture of what settlements have been achieved, or even what has been struggled over.[80] Living constitutionalists imagine that settlements are self-justifying and self-enforcing, or that their having been achieved is a dispositive reason against contesting them. In neither instance, however, do we have an adequate account of the US constitution. Originalist fixation and constraint are inevitably poor guides to understanding how, or through what processes and antagonisms, a polity is actually constituted. Living constitutionalism, meanwhile, is actively at odds with the actual US constitution. It holds some struggles up as discharging authoritative settlements and others as illegitimately threatening constitutional democracy. Originalists trade on a crabbed and exclusionary conception of democracy that posits a singular 'people' (one that is throttled by the dead hand of the past, no less). But living constitutionalists must simply resort to question-begging, contractarian theories of political justification. And both approaches trade on fetishistic understandings of institutions. That is, they tend to treat institutions (formal and non-formal) as self-subsistent or natural, rather than as particular forms of appearance of social reality—the constitutive processes of which cannot be identified with either the formal constitution or the normative constitution.

Conclusion

Critiquing the formal constitution of a polity does not necessarily get us any closer to a critique of the polity itself. What does the formal constitution reveal, and what does it efface, about the make-up of the American polity as an ensemble of material social relations? What were the social relations that made possible, and both mediated and were presupposed by, the constitutional categories and concepts of American constitutionalism? How did they change and develop through the antagonism—the brutality and barbarism—at the heart of the American state-building project? Du Bois's rejection of constitutional metaphysics prompts such questions, but few American constitutional theorists seem interested in answering them. American constitutional theorists have been unable to give definite and coherent shape to Llewellyn's 'certain shadowy totality' of practices, beliefs, and understandings. They will remain unable to do so as long as they fail to take seriously, and learn from, the tentative steps taken by earlier scholars towards an adequate understanding of constitutional reality.

More fundamentally, after almost a century, we are no closer to answering Du Bois's challenge. We can gesture at what an adequate response would look like. The constitution of the United States, considered as an historically specific

[80] Bruce Ackerman, 'The Living Constitution', *Harvard Law Review* 120, no. 7 (2007): 1737–1812.

appearance of the form of the state, is distinguished by, *inter alia,* capitalist relations of production and exchange; anti-indigeneity and settler-coloniality; ascription to racialised and gendered hierarchies of domination, exclusion, and extermination; and the articulation of domestic governance with global relations of circulation and accumulation. But these cannot be explained on the basis of the hegemonic modes of constitutional thought in the contemporary United States. Doing so requires the further development of the critical concept of the material constitution.